Order reopening the record and modifying the consent agreement and initial decision by inclusion therein of the "stipulation" below set forth.

Counsel for respondent by motion filed July 25, 1961, having requested that certain material included in said motion and referred to as a "Stipulation" be made a part of the record in this proceeding, and counsel supporting the complaint having, in effect, joined in said motion by urging that it receive prompt and considerate attention; and

The Commission having heard and considered said request and hav-

ing determined that the public interest requires alteration of the record in the manner requested:

It is ordered, That this proceeding be, and it hereby is, reopened and that the record be, and it hereby is, altered and modified by the inclusion therein of the following "Stipulation" as a part of the consent agreement and initial decision.

PARAGRAPH 1. Respondent has expressed its willingness to enter into a consent agreement directed toward the entry by the Commission of a cease and desist order herein, provided: (a) that the present stipulation is incorporated in and made a part of said consent agreement; (b) that it is agreed that the intent of the parties hereto is that said cease and desist order shall be limited in its application to the specific act and practices set forth in paragraph two, below, and construed to cover only said acts and practices.

PAR. 2. The specific acts and practices complained of by the Commission in its complaint issued herein on June 3, 1960, are as follows:

First: Sales of fresh citrus fruit by respondent to direct buyers, other than brokers, and the allowance or payment of a brokerage or commission, or a discount in lieu thereof, on such sales.

Second: Sales of fresh citrus fruit by respondent to brokers and the allowance or payment of a brokerage or commission, or a discount in lieu thereof, on such sales. These practices include:

(a) Instances where such allowances or payments are separately made by check, or otherwise; or

(b) Instances where the broker deducts said brokerage, commission, or allowance from the invoice price before remitting payment therefor; or

(c) Instances where such allowances or payments are deducted from the sale price and the broker is given a net billing reflecting such brokerage or commission.

PAR. 3. Nothing herein contained shall be construed as prohibiting the industry trade practice custom and usage of respondent giving or allowing other bona fide Florida fresh citrus fruit packers and shippers inter-packing house discounts or making inter-changes of fruit with such packers and shippers. This paragraph is intended to be applicable only to those packers and shippers who are regularly engaged in the business of packing fresh citrus fruit.

PAR. 4. The present stipulation shall (a) become a part of the consent agreement herein, and shall be and remain a part thereof and (b) shall be conclusive and binding upon the parties hereto for all purposes to the same extent and effect as the consent agreement entered into herein.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

BERNARD LOWE ENTERPRISES, INC., ET AL.

Docket 7673

ATLANTIC RECORDING CORPORATION, ET AL.

Docket 7711

VEE-JAY RECORDS, INC., ET AL.

Docket 7767

AM-PAR RECORD CORP., ET AL.

Docket 7778

CARLTON RECORD CORPORATION, ET AL.

Docket 7825

Order, December 5, 1961

Order denying request by trade association for leave to intervene as *amicus curiae* in payola cases.

American Record Manufacturers and Distributors Association, by petition filed November 13, 1961, having requested leave to intervene as *amicus curiae* in the above proceedings and to file a brief and participate in oral argument in the petitions to reopen the proceedings and set aside the decisions and orders filed therein; and

The Commission having determined that in all the circumstances the request for leave to intervene as *amicus curiae* in this matter has not been justified:

It is ordered, That the petition of American Record Manufacturers and Distributors Association for leave to intervene in these proceedings as *amicus curiae* be, and it hereby is, denied.

By the Commission, Commissioner Elman dissenting.

Orders, with opinions, denying respondents' petitions to reopen and set aside desist orders of June 1, 1960, in payola cases, 56 F.T.C. 1115, 1341, 1523; 57 F.T.C. 316, 458.

Counsel for respondents by petitions filed [on dates given in footnote] . . . having requested the Commission to reopen these proceed-

ings and set aside the orders to cease and desist issued March 24, 1960, and the opportunity to orally argue said requests,* and

The Commission having duly considered said requests and the opposition thereto filed by counsel supporting the complaint, and having determined that there has been no showing made from which the Commission might conclude that changed conditions of fact or law or the public interest require reopening these matters for the purpose of setting aside the orders to cease and desist:

It is ordered, That respondents' petitions and requests for oral argument be, and they hereby are, denied.

By the Commission, Commissioner Elman dissenting.

Commissioner ELMAN, dissenting:

I find myself unable to concur in the disposition of these five "payola" cases.

In 1959 and 1960 the Commission issued over 100 "payola" complaints, the great majority of which—including these five—were disposed of by entry of consent orders. A small number, however, were contested. On September 13, 1960, Congress enacted Public Law 86–752 (74 Stat. 895, 47 U.S.C. 317) which amended the Communications Act of 1934 so as make failure to disclose the facts of such "payola" transactions a criminal offense. Since that amendment constituted an effective and sufficient deterrent against future violations, the Commission concluded that further prosecution of "payola" cases was unnecessary and not in the public interest. Accordingly, it dismissed the contested "payola" complaints that were still pending.

By their requests here the respondents are merely asking to be put on the same basis as their competitors, with respect to whom the Commission dismissed charges, without resolving their merits, solely because of the intervening enactment of Public Law 86–752. These respondents, also, have never been found to have violated the law as alleged in the complaints. The consent orders to which they agreed contain the standard recitals that they are "for settlement purposes only and do not constitute admissions that the law has been violated." These respondents have filed compliance reports and, so far as appears, are obeying the law. If, as to their competitors, the statute is a sufficient restraint against resumption of "payola" practices, as the Commission has already decided, it is also a sufficient restraint as to these respondents. Refusal to vacate the consent orders against the respondents penalizes them, in effect, for having cooperated with the

*Petitions were filed by the various respondents on the following dates: Bernard Lowe Enterprises, Inc., et al., D. 7673, on Oct. 31; Atlantic Recording Corp., et al., D. 7711, and Vee-Jay Records, Inc., et al., D. 7767, on Nov. 2, and Am-Par Record Corp., et al., D. 7778, on Sept. 27. Carlton Record Corp., et al., D. 7825, filed a letter on Sept. 27 which was treated as a motion.

Requests for oral argument were made by the first three respondents.

Commission. The denial of relief here brings about a disparate and inequitable treatment of competitors which, in my opinion, is neither required by law nor justifiable in the public interest.

THE QUAKER OATS COMPANY

Docket 8112 Order, December 11, 1961

Interlocutory order directing issuance of supplemental complaint

This matter having been heard upon an interlocutory appeal filed by counsel supporting the complaint, alleging error by the hearing examiner in refusing to certify to the Commission a request that the complaint be amended by the addition of an allegation that the respondent has violated Section 5 of the Federal Trade Commission Act, and upon the respondent's answer in opposition thereto; and

It appearing that the complaint now charges the respondent with having violated Section 2(a) of the amended Clayton Act and that the proposed amendment is thus not within the scope of the proceeding initiated by the original complaint; and

It further appearing that in the circumstances the request for amendment presented a matter wholly outside the authority of the hearing examiner to consider but peculiarly within the administrative discretion of the Commission to determine, and that the hearing examiner's refusal to certify it to the Commission for such determination was clearly erroneous; and

The Commission having treated the matter as though it had been properly certified and having found upon its consideration of all information available to it that it has "reason to believe" that the respondent has violated Section 5 of the Federal Trade Commission Act by selling oat flour at below cost or unreasonably low prices, and having determined that the issuance of an amended and supplemental complaint incorporating an appropriate charge in this respect is required in the public interest; and having given due consideration to the form of such complaint:

It is ordered, That the appeal of counsel supporting the complaint from the hearing examiner's ruling be, and it hereby is, granted.

It is further ordered, That the amended and supplemental complaint of the Commission issue herewith and be served upon the respondent, The Quaker Oats Company.

It is further ordered, That the evidence heretofore introduced in support of and in opposition to the original complaint shall have the same force and effect as though received at hearings under the complaint, as amended and supplemented, this action being without prejudice to the hearing examiner's authority and duty to rule upon the merits of any motion which may be filed requesting opportunity to further cross-examine witnesses heretofore appearing in the pro-

ceeding or to take such further action as may be appropriate to protect any of the respondent's rights.

By the Commission, Commissioner Elman dissenting to the promulgation of the order in its present form.

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, Dec. 20, 1961

Interlocutory order denying motions to disqualify Commissioner from participating in appeal from initial decision.

All of the respondents in this proceeding have individually presented motions requesting the Commission to disqualify Commissioner Dixon from participating in the appeal from the Initial Decision of the hearing examiner. These motions, filed under Section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a), are based on an alleged prejudgment of the issues of fact and law to be presented in the appeal.

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law. In the instant proceeding, no basis for departing from the normal practice has been shown.

It is ordered, therefore, that respondents' motions be, and they hereby are, denied.

By the Commission, Commissioner Dixon not participating.