Order denying motions to reconsider the Commission's order of December 20, 1961, denying motions to disqualify.

MEMORANDUM OF CHAIRMAN DIXON IN REGARD TO RESPONDENTS' MOTIONS THAT HE BE DISQUALIFIED

By separate motions supported by affidavits the respondents herein have requested that I be disqualified from participating in this pro-

ceeding. All of the motions were filed pursuant to Section 7(a) of the Administrative Procedure Act and allege in substance that my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary of the United States Senate disqualify me from further participation in this matter.

As the motions disclose, the Subcommittee for which I acted as Counsel and Staff Director did, during 1959 and 1960, conduct an investigation, including public hearings, into certain pricing and other practices of the ethical drug industry. As leading members of that industry, the respondents herein were requested to, and did, furnish documents and other information to the Subcommittee. As counsel, I played an active role in the accumulation and presentation of this factual data to the members of the Subcommittee.

While the motions inaccurately describe the role I played in the aforesaid investigation as "advocacy," it should be unnecessary for me to point out that hearings before Congressional committees are *ex parte* and in no sense adversary in nature. Further, they cannot be said to be adjudicative, since they have as their sole purpose the amassing of facts in order that the Congress may be adequately informed concerning the desirability or need for legislation. The entire extent of my participation in the Subcommittee's investigation of the ethical drug industry is a matter of public record. I stand on that record but, of course, do not consider myself bound by the writings or statements of others who participated in that investigation, including Subcommittee members or employees.

My duties with the Subcommittee staff definitely did not involve the making of decisions or judgments on the facts accumulated. It was my duty to assist in adducing all of the facts with respect to the subject being investigated and to refrain from presenting only one side of controversial subjects.

Respondents' motions refer to the phrasing of questions which I directed to witnesses during public hearings before the Subcommittee as indicating my advocacy of positions opposed to those of the respondents herein. It is elementary that the questions of a lawyer engaged in eliciting facts from a witness do not necessarily indicate his state of mind but are couched in terms best calculated to adduce the truth.

The points raised by the respondents against my participation in this proceeding are not unlike the charge of bias raised against the complete membership of the Commission in the case of *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683 (1948). In that case, after the taking of testimony had been concluded and while the proceeding was still pending before the Commission, one

of the respondents asked the Commission to disqualify itself from passing upon the issues involved, alleging that the Commission had previously prejudged the issues and was prejudiced and biased against the Portland cement industry generally. The Commission refused to disqualify itself, and the contention was subsequently presented to and rejected by both the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court. Because the situation there dealt with is so analogous to the situation in which I now find myself and because the Supreme Court's consideration of this point is so clear and so complete, I quote from that opinion (pp. 700–702, *supra*):

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by §6 of the Trade Commission Act. 15 U.S.C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extend [*sic*] defeat the congressional purposes which promoted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against the respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade pro-

ceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey* v. *Ohio*, 273 U.S. 510, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* at 523.

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

Should I accede to the respondents' motions here, I might also find myself barred from consideration of cases in other industries investigated while I served as Counsel and Staff Director to the Senate Antitrust and Monopoly Subcommittee of the Committee on the Judiciary. These industries include, among others, the steel, automobile, milk, bread and roofing industries. I would thus find myself in the position where my experience acquired from working as a legislative counsel would be a handicap instead of an advantage. This, in my opinion, would defeat the very intendment of Congress in creating a Commission to be manned by commissioners with some degree of expertise.

Following the respondents' contentions to their ultimate conclusion, the Commission itself might be alleged to be disqualified from ultimately judging a proceeding because of the fact that, under its basic responsibilities, it reviews, prior to the issuance of a complaint, investigational records. Such investigational records are not unlike

investigative records of legislative bodies. They are both *ex parte*. However, after the issuance of a complaint by the Commission and the joinder of issues, it is clear that the proceedings then become adversary and the record must be finally judged in this climate. I find myself in a position not greatly different from that of my fellow Commissioners.

The respondents' motions are founded upon the assumption that I have prejudged the issues here involved, and I am incapable of rendering an impartial decision. Thus, what is here involved is the present state of my mind with respect to these issues. The state of a man's mind is by the nature of things known only to him and to his Maker. I have carefully and conscientiously considered the question here presented and have concluded, and hereby state, that I have not formed a definite opinion with respect to any of the material issues involved in this proceeding and honestly believe that I have a free and open mind with respect thereto, and I am fully capable of rendering a completely impartial decision based solely upon the facts contained in the record. Accordingly, I shall not withdraw from participation in this proceeding.

In view of the nature of these motions, I am not participating in the Commission's deliberations and decision upon them.

ORDER

On December 13, 1961, all of the respondents in this proceeding filed seperate motions requesting the Commission to disqualify Commissioner Dixon from participating in the appeal from the initial decision of the hearing examiner. These motions were based on an alleged prejudgment of the issues of fact and law to be presented in the appeal. On December 20, 1961, the Commission issued an order denying these motions. Assuming that it had the power to disqualify one of its members from participating in an appeal from an initial decision, the Commission found that the showing made by respondents was insufficient to warrant exercise of such power in the particular circumstances presented here. The order stated, *inter alia:*

"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."

On January 17, 1962, the respondents filed "Motions to Disqualify and to Reconsider". The full text of these motions is as follows:

"The undersigned respondents, being uncertain as to the procedural status resulting from the Commission's order of December 20, 1961 and as to the procedural steps which they may be required to take pursuant thereto, respectfully move the Honorable Chairman to disqualify himself because of the matters set forth in the affidavits attached to the respondents' motions filed on December 13, 1961; and, in the event that the Chairman should reach the decision that he is not disqualified, that the Commission reconsider its order of December 20, 1961 on the grounds that, irrespective of the applicability of the Administrative Procedure Act, the Commission has inherent power to regulate the course of proceedings before it and that the facts set forth in the said affidavits show that the Chairman is disqualified from acting in this cause, not only by virtue of said Administrative Procedure Act but also under principles of law applicable to the disqualification of judicial officers generally and to the right to a fair and impartial hearing guaranteed by the due process clause of the Constitution."

In accordance with the Commission's order of December 20, 1961, the instant motions filed by respondents are addressed primarily to Commissioner Dixon who, on this date, has filed a memorandum in regard thereto. For the reasons stated by him in that memorandum, Commissioner Dixon has determined not to withdraw from participation in this proceeding.

To the extent that respondents' motions are addressed to the Commission, they present no new grounds in support of the request to disqualify Commissioner Dixon. There is no basis or justification, therefore, for the Commission to reconsider its action of December 20, 1961.

Accordingly, it is ordered, That the motions to reconsider the Commission's order of December 20, 1961, be, and they hereby are, denied.

Commissioner Dixon not participating.

THE TEXAS COMPANY

Docket 6898. Order and Opinion, Mar. 9, 1962

Order denying respondent's application for disclosure of confidential documents.

OPINION OF THE COMMISSION

By the COMMISSION:

Respondent, pursuant to §§ 1.131 and 1.134 of the Commission's Rules of Practice, has applied for the disclosure of certain documents and materials, and pursuant to § 3.17 of the Commission's Rules, published May 6, 1955, as amended, has applied for issuance of a subpoena to the Secretary of the Commission directing him to appear and to testify and to bring with him the documents and materials requested in this application.

The documents sought are in two general categories: (a) those having to do with "the administrative construction of the meeting competition provisions" of the amended Clayton Act or any other statute barring price fixing and (b) alleged "ex parte communications . . . made outside the regular adjudicative process" with respect to this proceeding and other "communications" between the Commission or any member or employee in the decisional process in the proceeding and any agent or employee engaged in investigative or prosecutive functions with respect to (1) any investigation of respondent's pricing activities in 1957 and 1958 in Detroit, Michigan; (2) any enlargement of the scope of the hearings herein; (3) any amendment or supplementation of the complaint; and (4) the merits of this or a factually related proceeding.

In determining the action to take on a request for the release of documents, the Commission will consider not only the confidential and privileged nature of the material, but also the purpose for which the respondent intends to use it. *Postal Life and Casualty Insurance Company*, 52 F.T.C. 651 (1956).

Here respondent contends that the decision in *Sun Oil Co.* v. *Federal Trade Commission*, 294 F. 2d 465 [7 S. & D. 191] (5th Cir. 1961), indicates the importance of developing facts bearing upon the administrative construction of relevant statutes. A petition to review in this case was filed with the United States Supreme Court by the Solicitor General on behalf of the Federal Trade Commission, December 22, 1961.

Respondent also asserts, on the question of relevance and materiality, that the United States Supreme Court has been persuaded to reject a statutory construction urged by the Commission, by the fact, among

others, that it was inconsistent with the interpretation previously placed upon the critical language by that body. The cases cited to support this argument are: *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351–52 [3 S. & D. 337] (1941); and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 246 [5 S. & D. 221] (1951). In the *Bunte Bros.* case, the want of an assertion of power by the Commission was considered in determining whether such power was actually conferred. There the court referred to the Commission's unsuccessful attempt to secure the particular authority from Congress. In the *Standard Oil* decision, the court mentioned the "widespread understanding" as to the construction of the law and said that this understanding was reflected in "actions and statements of members and counsel" of the Commission. In documenting this observation in a footnote, the court referred only to public information and, in fact, seemed to emphasize the official action of the Commission itself in issuing cease and desist orders in which were inserted "savings" clauses bearing on the construction of the statute. Compare *United States* v. *E. I. duPont de Nemours & Company*, 353 U.S. 586 (1957). There the court stated that the failure of the Commission to act was not a binding administrative interpretation on the issue under consideration. (Id. 590.)

The information and documents considered by the Court in *Bunte Bros.* and *Standard Oil Co.* are on a different footing from the kind of materials here sought. The former were publicly known; the latter involved the inner workings of the agency. The implication of a thoroughness of consideration could not be drawn in the case of purely internal papers as it might be for documents or statements issued or made public by the Commission or one of its members. We conclude that the confidential documents here considered would not be relevant to any issue in this proceeding. Moreover, such documents might include, among other things, correspondence or other material relating to or identifying applicants or complaining parties. Such material is treated with strict confidentiality by the Commission. See § 1.15 of the Commission's Rules of Practice.

Respondent, as to the second category of documents requested, asserts that enough has been disclosed to make it clear that there are materials which have not been made a part of the public record bearing upon the possible commingling of the adjudicative and enforcing functions and the receipt of *ex parte* communications. In the principal instance referred to, it appears that a former chairman of the Commission and a member of the Commission's staff met with certain industry members. Respondent makes no assertion that the meeting

itself was in any way improper and states that it seeks only to ascertain the facts. We cannot open up confidential files on such vague and speculative grounds.

Moreover, respondent's contention appears to be mainly against alleged contacts involving certain third party organizations or persons. These organizations and individuals, however, are not parties to this proceeding. Information received from such sources on an *ex parte* basis does not come within § 4.27 of the Commission's Rules of Practice dealing with *ex parte* communications. The documents in the second category of the request also might involve the name of applicants or complaining persons, although we here make no reference to the individuals and organizations listed; and such information, as above indicated, is held in strict confidence.

For the above-stated reasons, we will not grant a release of the requested documents and materials. We need not discuss the application for the issuance of a subpoena directed to the Secretary of the Commission since, without the documents, the subpoena would serve no purpose.

Accordingly, respondent's application for access to documents and materials and for the issuance of a subpoena will be denied.

Commissioner Elman, being of the view that the opinion fails to deal adequately with the issues raised by respondent's application, does not concur in the Commission's disposition of the matter.

ORDER

Respondent having filed an application requesting disclosure of certain confidential documents and materials and the issuance of a subpoena directed to the Secretary of the Commission; and

The Commission having determined, for reasons stated in the accompanying opinion, that said application should be denied:

It is ordered, That the aforesaid application of the respondent for the disclosure of documents and materials and the issuance of a subpoena be, and it hereby is, denied.

Commissioner Elman not concurring.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, Apr. 5, 1962

Order reopening matter, vacating order, amending complaint, and remanding for further proceedings.

The Commission, by order of January 19, 1962, having given respondents opportunity to show cause, if any there be, why the public

interest does not require: (1) that this proceeding be reopened, (2) that the order to cease and desist and actions bearing on its interpretation be vacated and set aside, (3) that the complaint be amended in the manner set out in the show cause order, (4) that the amended complaint be accompanied by a proposed order in the form contained in the show cause order, and (5) that the matter be assigned for further appropriate proceedings under the complaint as so amended; and

Respondents, on March 26, 1962, having filed a paper designated Respondents' Memorandum Showing Cause; and

The Commission, after notice and opportunity for hearing as above described, having considered the matter, and having determined that the public interest requires that the proposed action as set forth in the aforementioned order to show cause be taken:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist, issued April 8, 1960,* and subsequent actions bearing on the interpretation of such order, be, and they hereby are, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, amended by modifying paragraphs 4, 5 and 6 to read, respectively, as follows:

PAR. 4. In the course and conduct of their businesses, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

"Chatham Emeralds"

"Chatham Created Emeralds"

"Chatham Cultured Emeralds"

"These stones are identical to natural emeralds in all their properties: chemically, physically, optically, with the same crystal faces, atomic arrangement, and even the same inclusions and 'gardens'."

PAR. 5. Through the use of the aforesaid statements, by positive assertion and by the failure to reveal the material fact that the products were synthetic and not natural stones, respondents variously represented that their said synthetic stones or synthetic emerald products had been cultured, were emeralds and were identical to emeralds.

PAR. 6. Said statements and representations, including the failure to disclose the material fact that the products were synthetic and not natural stones, were exaggerated, false, misleading, and deceptive. In truth and in fact, said synthetic stones or synthetic emerald products

*56 F.T.C. 1196.

had not been cultured, were not emeralds and were not identical to emeralds.

It is further ordered, That the amended complaint be accompanied by a proposed order reading as follows:

ORDER

It is ordered, That respondents, Carroll F. Chatham, an individual, trading as Chatham Research Laboratories, or under any other name; Anglomex, Inc., a corporation, and its officers, and Dan E. Mayers, individually and as an officer of said corporation; Ipekdjian, Inc., a corporation, and its officers, and Cultured Gem Stones, Inc., a corporation, and its officers, and Adom Ipekdjian and Georges Ipekdjian, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of stones now known as Chatham Emeralds, Chatham Created Emeralds or Chatham Cultured Emeralds, or any other manufactured stone having essentially the same optical, physical and chemical properties, or any other manufactured stone having essentially the same optical, physical and chemical properties as a natural stone, do forthwith cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones, unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic".

It is further ordered, That the matter be assigned to the hearing examiner for further appropriate proceedings under the complaint as so amended.

Commissioner Elman dissenting.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, May 29, 1962

Order denying motion to rescind order of April 5, 1962.

By motion filed April 23, 1962, the respondents have requested the Commission to reconsider and to rescind, set aside or vacate its order of April 5, 1962. The Commission in said order directed that