

it has complied with this order.

IN THE MATTER OF
THE PULSE, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

*Docket C-291. Complaint, Dec. 28, 1962—Decision, Dec. 28, 1962**

Consent order requiring a New York City company engaged in the measurement of radio and television audiences and the publication and sale to broadcasters and advertisers of data and reports based thereon, to cease representing falsely that the radio and television station and program "ratings" and audience "shares" compiled by it were accurate and reliable measurements arrived at through the use of techniques that were free from error other than sampling error.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

*Published as modified by order of Oct. 23, 1963.

Trade Commission, having reason to believe that The Pulse, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Pulse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 730 Fifth Avenue, New York, N.Y.

PAR 2. Respondent is now and for more than one year last past has been engaged in the measurement of radio and television audiences and in the compilation, analysis and publication of data and reports containing radio and television audience size and composition information and in the sale of such data and reports to broadcasters, advertisers and advertising agencies.

PAR 3. Respondent causes said reports, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said reports in commerce as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in said reports in such commerce is and has been substantial.

PAR 4. In the course and conduct of its business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of reports containing radio and television audience size and composition data.

PAR 5. In the course and conduct of its business, as aforesaid, respondent publishes and sells reports containing data compiled by it which include radio and television station and program "ratings" expressed in mathematical terms to the exactness of one-tenth of one per cent and audience "shares" expressed in mathematical terms to the exactness of one per cent. By so doing respondent represents directly or by implication that such "ratings" and audience "shares" are accurate and are reliable measurements of radio and television station and program audiences, arrived at through the use of techniques and procedures that are free from error other than sampling error.

PAR 6. In truth and in fact, respondent uses techniques and procedures that result in bias or error other than sampling error, and

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which adversely affect the accuracy and reliability of its "ratings" and audience "shares". Among and typical of respondent's techniques and procedures are the following:

1. It includes all "Not-At-Homes" in its sample base.
2. It credits listening or viewing to "Not-At-Homes" according to a formula that has not been validated by adequate research.
3. It adjusts "Sets-In-Use" figures upward by 20% for morning programs and 40% for afternoon and evening programs without research to justify such adjustments.
4. Its sample is clustered which has the effect of reducing the sample size.
5. It uses data from reports containing interviewees' general preferences as opposed to what they actually listened to or viewed during the period covered by the survey.
6. It uses hearsay data given by those interviewed.
7. It uses data obtained from individuals or households not a part of the preselected sample.
8. It conducts special surveys wherein the area surveyed is defined by one of the stations being measured and in which the resulting audience levels or ratings of said station and of competing stations are controlled by the signal pattern or area of popularity of the station defining the area to be surveyed.
9. It uses data obtained by interviewers over whom respondent exercises a degree of supervision and control insufficient to assure the accuracy or reliability of such data.
10. In some reports, it has combined the ratings and audience shares of two or more stations into a single rating and share, while other stations, not serving the entire area served by the combined stations, are listed therein with their individual ratings and audience shares as though they were competing with such combination of stations for the audience in the entire area covered by said reports.

The techniques and procedures above set forth result in bias or error and adversely affect the accuracy or reliability of respondent's "ratings" and "shares". Therefore, the representation that respondent's "ratings" and audience "shares" are accurate to the degree indicated by the precise mathematical terms in which they are expressed, and that they are reliable are false, misleading and deceptive.

PAR. 7. In the future course and conduct of its business, as aforesaid, respondent has represented, directly or by implication:

1. That the sample size for each survey is the number of quarter hour reports upon which such survey is purportedly based.

2. That all of its measurement data are obtained by the use of rosters.

3. That the measurement data contained in its reports are all based exclusively upon actual listening or viewing.

4. That its employment of a "Time-Line" technique eliminates the inflation of its measurements.

5. That its interviewers are provided with a preassigned plan as to where to conduct interviews and that such interviewers do not deviate from such plan.

6. That its measurements are based upon a probability sample.

7. That respondent's sampling method is statistically accurate.

PAR. 8. In truth and in fact:

1. Respondent's sample size for each survey is smaller than the number of quarter hour reports upon which each such survey is purportedly based.

2. Rosters are not always employed by respondent in obtaining measurement data.

3. Some of the measurement data contained in respondent's reports are based upon general listening or viewing preferences as opposed to actual listening or viewing as of a specific time.

4. Respondent does not always use a "Time-Line" technique.

5. In conducting interviews respondent's interviewers sometimes deviate from the preassigned plan and conduct interviews elsewhere.

6. Respondent's measurements are not based upon a probability sample.

7. Respondent's sampling method is not completely accurate either statistically or otherwise.

Therefore, the representations contained in paragraph 7 above are false, misleading and deceptive.

PAR. 9. In the course and conduct of its business respondent, by publishing and selling the aforesaid reports and data, places instruments of deception in the hands of some radio and television stations thereby enabling them to compete unfairly with other radio and television stations.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead the purchasers and the sellers of radio and/or television time into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's data and reports by reason of said erroneous and mistaken belief. Said practices of respondent also have had, and now have, the ca-

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capacity and tendency to mislead purchasers of radio and/or television time into the purchase thereof because of the aforesaid erroneous and mistaken belief that the aforesaid statements and representations were and are true. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent from its competitors, and to sellers of radio and/or television time from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public, of respondent's competitors and of sellers competing in the sale of radio and television advertising time, and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER*

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, The Pulse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 730 Fifth Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

*As modified Oct. 23, 1963.

ORDER

It is ordered, That the Pulse, Inc., a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, offering for sale, sale or distribution of radio or television audience measurements, whether in the form of data, reports or otherwise, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That such measurements, data or reports are accurate to any precise mathematical value or definition.
 - (b) That the number of quarter hour reports upon which a survey is based is the sample size for any report of survey.
 - (c) That all of its measurement data are obtained by the use of rosters.
 - (d) That it eliminates inflation of measurements, by the use of a "Time-Line" technique or otherwise.
 - (e) That its interviewers do not deviate from a preassigned plan in conducting interviews.
 - (f) That it uses any form of probability sample.
 - (g) That its sampling method is accurate statistically or otherwise.
2. Using data based upon general listening or viewing preferences as opposed to actual listening or viewing without clearly disclosing in each report that such data may have been based upon general listening or viewing preferences as opposed to actual listening or viewing.*
3. Including "Not-At-Homes" in a sample base by any formula not validated by research.
4. Crediting listening or viewing to "Not-At-Homes" by any formula that has not been validated by research.
5. Adjusting "Sets-In-Use" or other figures unless justification therefor has been validated by adequate research.
6. Using clustered samples unless such fact and the extent thereof is clearly and conspicuously disclosed in each report.
7. Using data based upon hearsay reports, estimates or guesses without clearly disclosing in each report that such data may have been based upon hearsay reports, estimates or guesses.*
8. Using data obtained from individuals or households not a part of a preselected sample.

*As modified Oct. 23, 1963.

9. Publishing or selling reports containing the results of special or other surveys wherein the area surveyed is defined by one of the stations being measured or surveyed and in which the resulting audience levels or ratings of this station and of competing stations are determined by the signal pattern or area of popularity of the station defining the area to be surveyed, unless such reports are distinguished by format and title from all regular metro and county reports and the identity of the station or stations defining the area covered by such special reports is prominently disclosed.

10. Using data obtained by interviewers over whom respondent does not maintain supervision and control sufficient to assure the accuracy or reliability of such data.

11. Misrepresenting in any manner the size of the effective sample used in any measurement.

12. Misrepresenting in any manner the accuracy or reliability of its measurements, data or reports.

13. Publishing or selling reports in which the ratings and audience shares of two or more stations are combined into a single rating and audience share and in which other stations, not serving the entire area served by the combined stations, are listed with their individual ratings and audience shares as though they were competing with such combination of stations for the audience in the entire area covered by said reports.

14. Using any technique or procedure in making measurements or compiling data or reports that impairs the accuracy or reliability of such measurements, data or reports unless the deficiencies or limitations of such technique or procedure are clearly and conspicuously disclosed.

It is further ordered, That the 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 this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

SWIFT & COMPANY

Docket 8304. Order and Opinion, July 11, 1962

Interlocutory order denying motion to disqualify Commissioner MacIntyre from participating in proceeding.

MEMORANDUM OF COMMISSIONER MACINTYRE IN REGARDS TO RESPONDENT'S MOTION THAT HE WITHDRAW FROM THIS PROCEEDING

Respondent, by Motion filed herein July 3, 1962, has requested that I withdraw from this proceeding and that I not participate or advise the Commission regarding its decision herein.

Respondent's Motion refers to the fact that I was Chief of the Commission's Division of Investigation and Litigation during the period from 1951-1954 and that before the end of that period an investigation had been made of respondent's practices, the results of which were transferred to the Department of Agriculture for a proceeding there. Apparently respondent considers that the investigation made of Swift & Company in the period of 1951-1954 served as a basis for and out of which developed the present proceeding in Federal Trade Commission Docket 8304. Moreover, respondent takes the position that it would be improper for me to have been responsible for the conduct of an investigation of Swift & Company at that time and to now participate in a decision by the Commission in a formal case which the respondent believes developed out of that investigation.

There are pertinent facts not publicized heretofore regarding my connection or lack of connection with the present proceeding in Federal Trade Commission Docket 8304. I am informed that an investigation of Swift & Company was undertaken by the Commission under its informal investigational File No. 1-24619 prior to 1952. In 1954 the file number of that particular investigation became File No. 541 0207. Also, I am informed that the Commission's investigation of that matter and the files in connection therewith were discontinued and marked "Closed" November 15, 1955. Considerably in advance of that date, February 15, 1955, I resigned from the staff of the Federal Trade Commission and had no connection with the activi-

ties of the Commission, either at staff level or at the Commission level, until I took the oath of office as a Member of the Federal Trade Commission on September 26, 1961. I am informed that in the meantime, in 1959, the Commission docketed for investigation under File No. 591 0158 a new investigation of Swift & Company, and that out of the ensuing investigation has developed the proceedings involved in Federal Trade Commission Docket No. 8304. With that investigation and the present formal proceedings I have had no connection nor responsibility. I was not a Member of the Commission in 1961 at the time it issued its complaint in this matter. Therefore, I was not informed, as were the other Commissioners, regarding the results of the investigation conducted commencing in 1959 into the activities of Swift & Company. Consequently, I was not in a position to conclude, as were the other Commissioners, that there was reason to believe that Swift & Company was engaging in unfair acts and practices in violation of the laws administered by the Commission. In view of these circumstances, to the extent that I should participate in any decision by the Commission in Docket No. 8304, I would do so without as much information regarding the underlying background of the proceeding as evidently is possessed by each of the other Commissioners who participated in the decision to issue the complaint in Docket No. 8304.

In view of the foregoing and other facts and circumstances known to me, I am aware of no reason why I should withdraw from the proceeding and refrain from participating with the Commission in any decision in this proceeding. One thing is clear: I am determined that whatever I do in this proceeding shall be without bias or prejudice, but on the contrary, be expressive of sound and fair judgment.

ORDER DENYING MOTION TO DISQUALIFY

Respondent, by motion filed July 3, 1962, having requested that Commissioner MacIntyre withdraw from this proceeding, or, in the alternative, that the Commission determine that Commissioner MacIntyre is disqualified with respect to any and all proceedings in this matter; and

The Commission being of the opinion for the reasons set forth in the accompanying memorandum that the grounds stated in respondent's motion are insufficient to support a determination that Commissioner MacIntyre be disqualified:

It is ordered, That the motion directed to the Commission requesting that it disqualify Commissioner MacIntyre from participating in this proceeding be, and it hereby is, denied.

By the Commission, Commissioners Elman and MacIntyre not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order and Opinion, July 26, 1962

Interlocutory order vacating initial decision and remanding case to hearing examiner for additional testimony as to products and product lines purchased by respondents and their competitors and as to competition in the resale of such goods—in proceeding charging illegal inducing of discriminatory advertising allowances from suppliers.

OPINION OF THE COMMISSION

By Dixon, *Commissioner*:

Respondents herein are charged with violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities in connection with respondents' offering for sale or sale of goods not available to all of their competitors on proportionally equal terms. In short, the complaint charges in effect that respondents have knowingly induced their suppliers to make payments violative of Section 2(d) of the Robinson-Patman Act. The matter is now before us on the appeal of respondents from the initial decision wherein the hearing examiner sustained the allegations of the complaint.

Of the several issues presented by respondents in their brief, we are here concerned with their argument that the record does not support a finding that respondent Foster Type and Equipment Company, Inc.,¹ and other distributors of printing equipment and supplies, whose representatives testified in this proceeding, did in fact compete in the resale of goods with respect to which the payments in issue were made, as well as with respondents' contention that the evidence herein will not support a finding that such payments for services were not made available on proportionally equal terms to respondent Foster Type's competitors.

A review of the record convinces us that the evidence identifying the products of particular suppliers with respect to which Foster Type and other distributors allegedly competed is so uncertain that any determination based thereon could not rise above the level of conjecture.² For this reason alone it is impossible to make any find-

¹ Hereinafter referred to as Foster Type.

² The record is replete with the testimony of distributors allegedly competing with Foster Type who stated merely that they purchased "products" from various suppliers also selling to Foster Type. Even in the few instances where a more explicit response was elicited from representatives of such distributors the evidence is too vague for any informed conclusion on the crucial issue of competition in the resale of goods involved in the alleged inducement of payments violative of Section 2(d). For example, one witness testified his concern purchased "platemaking equipment" from The Nuarc Co., whereas the evidence with respect to Foster Type's purchases from that supplier indicates merely that this respondent purchased "photo mechanical equipment" from Nuarc; there is no additional evidence in this record permitting a determination as to whether the designations "platemaking" and "photo mechanical equipment" are in fact synonymous.

ing as to whether or not the requisite competition existed between Foster Type and other competitors in the resale of products involved in the alleged inducement of payments violative of Section 2(d). Furthermore, it would be mere speculation to infer that Foster Type and other distributors competed in the resale of products of the same supplier in the case of those distributor witnesses testifying merely in general terms that competition existed between them and Foster Type but whose testimony contains no reference to the supplier whose product was involved in such competition.

Another defect on the face of this record is the fact that representatives of certain distributors allegedly competing with Foster Type apparently did not have the knowledge to qualify them to testify with certainty as to whether Foster Type's suppliers involved in the alleged inducement of payments violative of Section 2(d) had made available to them payments for advertising or other promotional services.

Since we find that the evidence adduced thus far is inadequate for an informed determination as to whether competition existed between Foster Type and other distributors in the resale of the goods involved in the alleged inducement of payments violative of Section 2(d) and in view of our further finding that the testimony of certain distributors as to the nonavailability of payments for advertising or other promotional services is deficient because of inadequate knowledge on the part of certain of such witnesses, the initial decision is vacated and remanded to the hearing examiner for the purpose of receiving additional evidence on these points. Specifically, the examiner is directed to receive additional evidence identifying the products and lines of products purchased by Foster Type and its competitors from suppliers allegedly induced by respondents to make payments violative of Section 2(d), as well as evidence bearing on the issue of competition between Foster Type and other distributors in the resale of goods involved in the alleged violation of law. The examiner is further directed to receive additional testimony on the availability or nonavailability of payments for advertising or promotional services to distributors competing with Foster Type in the resale of such products.

Inasmuch as this case is being remanded for the purposes outlined above, no decision will be made at this time on the other issues presented in the appeal.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO
HEARING EXAMINER

This matter having come on to be heard upon the appeal of respondents from the hearing examiner's initial decision, filed July 17, 1961; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It is ordered, That the aforesaid initial decision be vacated and set aside.

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It is further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of § 4.19 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

By the Commission.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, Oct. 5, 1962

Interlocutory order remanding to hearing examiner for reasons for his recommended disposition, certification of motion for order permitting inspection and copy of documents in Commission's files.

OPINION AND ORDER REMANDING RESPONDENTS' MOTION TO INSPECT AND
COPY DOCUMENTS

The hearing examiner, by his order dated September 12, 1962, has certified to the Commission for its determination respondents' motion, filed August 27, 1962, for an order directing counsel supporting the complaint to permit respondents to inspect and copy certain documents in the possession of the Commission. The documents requested by respondents' motion include: (1) documents obtained by the Commission from respondents; (2) four specific documents; (3) documents prepared or received by respondents which were obtained by the Commission from sources other than respondents; and (4) correspondence between respondents and the Commission.

The examiner's order, citing the order of the Commission in *Union Bag-Camp Paper Corp.*, Docket 7946, certifies respondents' motion, together with his recommendation, to the Commission. The examiner recommends that the only part of respondents' motion which should be

granted is the request to examine certain documents submitted to the Commission by the respondents. He further recommends that the remaining documents "fall within the privileged category and should not be disclosed". The examiner gives no explanation for these recommendations.

This disposition by the examiner of the respondents' motion misconceives the purpose and purport of the Commission's order in *Union Bag-Camp Paper Corp.*, which provided, *inter alia*,

... that any future requests for confidential information in the possession of the Commission which may be filed by respondent in this proceeding shall be addressed initially to the hearing examiner who shall consider and initially determine whether good cause for the release and disclosure to respondent of such information has been shown; and if he shall make such an affirmative initial determination, the examiner shall thereupon certify the matter to the Commission, which retains exclusive authority under Rules 1.163 and 1.164 to release confidential information upon good cause shown.

This procedure was adopted because the determination of good cause for the release of documents in the Commission's files entails, primarily, consideration of issues of fact which require for their determination a detailed knowledge of the issues of the proceeding which, at this stage of the case, is possessed by the examiner.

In making his initial determination of such a matter, an examiner should in the first instance hear both sides relative to the merits of the demand. The material sought by the request (or representative samples thereof) should usually be submitted to him for his examination and study in the light of the contentions by the proponent and opponent.

Naturally, situations may arise where the papers in question relate to strictly internal affairs of the Commission, or where the documents are plainly confidential, such as minutes of Commission meetings. In those or similar circumstances, the examiner should decline to examine the material and should forthwith forward the request for release to the Commission, without any further consideration on his part.

In analyzing the relevance of the papers involved, the examiner should be governed by the charges made in the complaint. It is respondent's burden to show why, and how, the requested documents will aid in meeting these charges.

In considering the issues raised by applications for the release of documents, examiners should find it helpful, and frequently even necessary for guidance, to consult judicial decisions and precedents under the Federal Rules of Civil Procedure concerning the scope and justification of motions for discovery. It is emphasized, however, that the Federal Rules as such do not control Commission proceedings. Prob-

lems emerging from the assertion either of privilege or of the right to "work product" should be examined in the light of principles established by the federal courts, especially in those cases in the antitrust field dealing with the validity of the claim of privilege or the application of the "work product" rule.

The examiner, after having received memoranda or briefs, and having heard oral argument (if he deems it necessary), should forward his certification accompanied by a written statement, in which he should set forth, in as much detail as appropriate, his reasons for the recommended disposition of the demand by the Commission. Thereafter, either side may submit to the Commission a further memorandum, expressing assent or dissent, under the applicable Rules of Practice.

The examiner's order herein fails to satisfy the requirements of this procedure, since it gives no explanation whatsoever for the recommendation that certain documents be released or for the conclusion that others are privileged and should not be released. Thus, the Commission is in no better position to determine whether the documents requested by respondents should be released pursuant to Section 1.164 of its Rules than it would have been had the request been initially addressed to the Commission. Accordingly,

It is ordered, That respondents' motion for the inspection and copying of documents in the possession of the Commission be, and it hereby is, remanded to the hearing examiner for further consideration and disposition in accordance with this opinion and order.

By the Commission, Chairman Dixon dissenting, and Commissioner MacIntyre concurring in the result, with the understanding that it does not provide for the release of documents which are confidential by operation of law or which otherwise the Commission is required by the public interest to keep confidential.

CHAS. PFIZER & CO., INC.

Docket 7780. Order and Opinion, Oct. 10, 1962

Denial of respondent's motion to disqualify the Chairman because of his association with the Senate Subcommittee on Antitrust and Monopoly.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO RESPONDENT'S MOTION
THAT HE WITHDRAW FROM THIS PROCEEDING

By motion filed September 14, 1962, this respondent has moved that I withdraw from this proceeding or, in the event that I should refuse to withdraw, that the Commission enter an order disqualifying me

from further participation. The motion is founded upon Sections 5(c) and 7(a) of the Administrative Procedure Act (5 U.S.C. §§ 1004(c) and 1006(a)), and "principles of law applicable to the disqualification of judicial officers generally; and the right of a respondent to a fair and impartial hearing guaranteed by the due process clause of the Constitution. . . ." The motion is supported by the affidavit of John E. F. Wood, of the law firm Dewey, Ballantine, Bushby, Palmer & Wood, of New York City, attorneys for respondent.

In substance, the affiant deposes that I am disqualified in this proceeding because, prior to becoming a member of the Commission, I served in an investigative capacity in a proceeding involving the facts now before the Commission. The affidavit correctly states that, shortly after the Commission entered its formal complaint herein, the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate held public hearings at which it received evidence relevant to the charges made in this complaint. It is also true that I participated in said hearings as Counsel and Staff Director of the Subcommittee. However, as indicated by the public record, my participation consisted solely of rendering some slight assistance to the Chairman of the Subcommittee in the numbering of exhibits. The record does not show, and I do not recall, taking any more of an active role in the presentation of this matter to the Subcommittee.

It seems to me that this motion is founded upon a misconception of the role played by a Congressional investigating committee. Proceedings before such a committee are not in any sense adversary in nature. As everyone knows, the hearings are conducted for the sole purpose of supplying Congress with information so that it may determine the need for and the form of legislation. To that end it is the clear duty of the committee staff, including its counsel, to present to the committee all information available and pertinent to any question under investigation including the opposing views of both sides in any controversial matter. The committee's staff counsel is definitely not an advocate of any side of any question but acts properly only as the conduit whereby relevant material is presented to the committee.

Thus, it is my view that the Administrative Procedure Act has no proper application in these premises and I reject respondent's argument that I am disqualified from further proceedings herein as a matter of law.

But more important to me than respondent's legal argument is the implication implicit in this motion that I have prejudged the issue in this matter and am incapable of rendering an impartial decision. This respondent is entitled to a fair and impartial hearing and a de-

cision based solely upon the evidence in the record. And certainly if I should, for any reason, be unable to approach this decision completely free of bias I would be morally and ethically disqualified to participate. But if such were the circumstances and I had formed any sort of definite opinion concerning the facts in this matter, a motion to disqualify would be unnecessary as I would have, before this time, *sua sponte* withdrawn from participation. However, I have not formed any opinion with respect to this matter and can honestly state that I have a free and open mind with respect thereto. Therefore, I shall not withdraw and shall cast my vote in accordance with a decision to be arrived at after a careful study of the entire record.

In view of the circumstances, I shall not participate in the Commission's deliberation and decision upon the respondent's motion that the Commission enter an order directing that I be disqualified from further participation in this proceeding.

ORDER DENYING MOTION TO DISQUALIFY

Respondent filed a motion on September 14, 1962, to disqualify Commissioner Dixon from participating in this proceeding. The motion was addressed primarily to Commissioner Dixon, and alternatively to the Commission in the event that he should determine not to disqualify himself.

In an accompanying memorandum, filed this date Commissioner Dixon has determined, for reasons stated in such memorandum, not to withdraw from participation in this proceeding. To the extent that respondent's motion is addressed to the Commission, it fails to make a sufficient showing to justify so extraordinary an action by the Commission as would be involved in requiring one of its members to withdraw from participation in a proceeding on the ground of personal disqualification. See Order Denying Motions to Disqualify in *American Cyanamid Company*, Docket No. 7211, dated December 20, 1961.

It is ordered, That the motion directed to the Commission requesting the disqualification of Commissioner Dixon from participation in this proceeding be, and it hereby is, denied.

By the Commission, Commissioner Dixon not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order, Nov. 13, 1962

Interlocutory order broadening scope of remand and directing hearing examiner to receive allegedly new evidence.

ON INTERLOCUTORY APPEAL

By the Commission:

This matter is before us on respondents' appeal from the hearing examiner's rulings excluding allegedly new evidence which respondents contend will demonstrate the following:

1. Changed circumstances relating to the sale of the business of respondent, Foster Type and Equipment Company, Inc., under an agreement containing a covenant not to compete for a period of ten years, demonstrating that the instant proceedings lack public interest.
2. That the two respondent corporations were operated as separate businesses and were so regarded by competitors of respondent, Foster Type and Equipment Company, Inc., advertising in "Printing Impressions."
3. That all competitors of respondent, Foster Type and Equipment Company, Inc., received and used costly direct mail advertising materials, photo-engravings, photographs and promotional displays made available free of charge to such competitors by suppliers of Foster Type and Equipment Company, Inc., advertising in "Printing Impressions," demonstrating that counsel in support of the complaint has failed to prove that any payments to respondent, Foster Publishing Company, Inc., for advertising in "Printing Impressions" resulted in a disproportionate payment for advertising to Foster Type and Equipment Company, Inc.

We have determined that, with the possible exception of the evidence outlined in paragraph 3, the proffered evidence is beyond the scope of our remand order of July 26, 1962, and that the hearing examiner properly excluded this evidence in the light of that directive. A review of the hearings on September 12 and 13, 1962, however, persuades us that as a practical matter the evidence proffered by respondents is already in the record though not officially received by the examiner. We could reject respondents' appeal, as counsel supporting the complaint suggests, on the ground that no prejudice to respondents will result since the evidence is available for the Commission's ultimate consideration. Nevertheless, we have determined that, on balance, the better course is to broaden the scope of the remand and direct the examiner to receive the proffered evidence. This will afford the parties the opportunity to consider this data in their proposed findings and we will have the advantage of the examiner's evaluation of the evidence when the initial decision comes before us for review. Accordingly, respondents' appeal is granted.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter having come before the Commission on respondents' interlocutory appeal, filed October 18, 1962, from the hearing examiner's ruling excluding certain offers of evidence, and the answer of counsel supporting the complaint in opposition thereto; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the scope of the remand should be broadened and that respondents' proffered evidence outlined on page 2 of their interlocutory appeal should be evaluated by the hearing examiner:

It is ordered, That the interlocutory appeal of respondents be, and it hereby is, granted.

It is further ordered, That the hearing examiner receive and consider the aforesaid evidence offered by respondents.

By the Commission.