quirements of Section 4.18 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

ARK-LA-TEX WAREHOUSE DISTRIBUTORS, INC., ET AL.

Docket 7592. Order, June 5, 1963

Order vacating initial decision and remanding case to hearing examiner for new initial decision.

This matter is before the Commission upon the appeal of respondents from the hearing examiner's initial decision filed October 13, 1961. The Commission, while satisfied of its jurisdiction in respect of the acts and practices alleged, has determined that the initial decision does not contain necessary findings of fact and conclusions of law set forth with the specificity required by Section 4.19(b) of the Commission's Rules of Practice. The Commission has also determined that this proceeding should be remanded to the examiner and be further considered by him in the light of the opinion of the Court of Appeals in *Alhambra Motor Parts, et al.* v. *FTC*, 309 F. 2d 213 (9th Cir. 1962)) [7 S.&D. 550], which was issued subsequent to the initial decision herein. Accordingly,

It is ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the entry of a new initial decision containing findings of fact and conclusions of law upon all of the issues of fact and law raised by the record, and for the reception of such further evidence as may be necessary. Upon issues of fact as to which respondents have the burden of proof, or of going forward with the evidence, such burden shall not be deemed by this order of remand to have been shifted to complaint counsel. Such new initial decision shall include specific findings, and reference to the evidence relied upon, with respect to all such issues, including but not limited to the following:

1. Whether respondents' suppliers discriminated between respondents and other customers in the sale of goods of like grade and quality, and if so, whether such discriminatory sales were sufficiently contemporaneous to be compared for purposes of determining whether the requisite discriminations and proscribed effects on competition existed.

2. Whether the respondents and non-favored jobber-customers of their suppliers competed in the sale of the products which were the subject of the alleged price discriminations.

3. Whether the alleged price discriminations had the requisite injurious effect upon competition in the distribution of automotive parts and, in particular, whether the non-favored jobbers were able to purchase the same products at the prices charged respondents, either from Ark-La-Tex or as a member of it or a similar group.

4. Whether respondent Ark-La-Tex was a legitimate wholesale distributor, entitled as such to a wholesale distributor discount, or whether it was merely a sham whose jobber-members should be viewed as the actual purchasers of the products involved, for purposes of Section 2(f) of the Robinson-Patman Act.

5. Whether respondents knew or should have known that the quantity and warehouse distributor discounts allegedly induced and received by them could not be cost justified.

Commissioners MacIntyre and Higginbotham not participating, Commissioner MacIntyre for the reason that he did not hear oral argument and Commissioner Higginbotham by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

THE TEXAS COMPANY

Docket 6898. Order, June 17, 1963

Order, with opinions, denying motion of respondent that Chairman and Commissioner MacIntyre withdraw from this proceeding.

Order Denying Motion to Disqualify

Respondent Texaco, Inc., by motion filed May 22, 1963, having requested that Chairman Dixon and Commissioner MacIntyre withdraw from participation in this proceeding, or, in the alternative, that the Commission determine that they be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of treating disqualification as a matter primarily for determination by the individuals concerned; and

Chairman Dixon and Commissioner MacIntyre each having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

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

Chairman Dixon and Commissioner MacIntyre not participating.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT TEXACO, INC., THAT HE WITHDRAW FROM THIS PROCEEDING

Texaco, Inc., respondent herein, has requested that I declare myself as ineligible to participate in this proceeding, including the hearing and determination of the pending review.

Respondent advances two grounds in support of its request. First, it contends that my address of July 21, 1961, before the National Congress of Petroleum Retailers, Inc., reflects a prejudgment of the issues herein as well as a personal bias. Respondent advanced this same argument in support of its request that I withdraw from participation in the Goodrich case [1] in which Texaco, Inc., was also named as a respondent. My views concerning that speech are recorded in my memorandum in response to that former request. Those views, which are equally applicable to the present request, are as follows:

As I read it and recall it, the only thought conveyed by the speech was that the Commission had challenged the legality of "overriding commissions" and certain other practices engaged in by the various oil and rubber companies, including respondent Texaco, Inc., and the B. F. Goodrich Company. By using the word "challenged," I indicated only that the Commission had determined there was reason to believe that the practices were in violation of law. This determination is an absolute, statutory prerequisite to any complaint, is in fact declared in the first paragraph of the instant complaint, and I fail to see how my repetition of it in a speech indicates bias or prejudgment of the ultimate issue.

As a second ground in support of its request, respondent contends that my participation in a "legislative investigation leading to the institution of proceedings by the Commission" represents adequate grounds for disqualification. Specifically, respondent refers to my service as Co-counsel and Staff Director to the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee in March 1957 when the Subcommittee took testimony regarding the price war in Norfolk, Virginia.

My duties with the Subcommittee staff have prompted requests that I withdraw from participation in several other proceedings.[2]

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[1] *In the Matter of The B. F. Goodrich Company and The Texas Company,* Docket No. 6485 [pp. 1513, 1514 herein].

[2] *In the Matter of Chas. Pfizer & Co., Inc.,* Docket No. 7780 [61 F.T.C. 1493, 1494]; *In the Matter of Campbell Taggart Associated Bakeries, Inc.,* Docket No. 7938 [pp. 1494, 1498 herein]: *In the Matter of American Cyanamid Company, et al.,* Docket No. 7211 [60 F.T.C. 1881].

I am on record in my memoranda in those cases as to my position with respect to those duties. For the record herein, I repeat the statement I made in the *Pfizer* case which expresses that position:

> 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.

An examination of the public record will disclose that I took no part in the questioning of any of the witnesses who appeared at the hearing referred to in respondent's motion. My advice to the Subcommittee, to which respondent also refers, was in response to a request for my views as to the adequacy of the Robinson-Patman Act amendment to the Clayton Act with respect to certain alleged practices in the oil and gasoline industry. This, in substance, was the purpose of the hearing and my remarks were made with that purpose in mind. I had not at that time, and I have not now, irrevocably closed my mind on the subject of this respondent's alleged practices as a result of *ex parte* testimony of dealers.[3]

As I have previously stated in response to requests that I not participate in a proceeding because of my service with the Subcommittee, "I do not believe that Congress, in expressly affirming the need for commissioners who have been informed by experience, [citing cases], intended that experience acquired from working as a legislative counsel should be a handicap."[4]

In direct response to charges in this motion, I state that I have not prejudged the issues in this matter nor do I harbor any personal bias. I am capable and will render an impartial decision based on all of the facts of record when the case is presented for decision.

It is my decision not to withdraw from participation in this proceeding.

Dated: June 11, 1963.

Memorandum of Commissioner MacIntyre in Regard to Respondent's Motion that he Withdraw from this Proceeding

Respondent, by Motion filed herein on May 22, 1963, has requested that I withdraw from this proceeding and that I neither participate in nor advise the Commission regarding its decision herein.

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[3] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948) [4 S.&D. 676].

[4] *In the Matter of Campbell Taggart Associated Bakeries, Inc.*, Docket No. 7938, Memorandum dated May 2, 1963 [pp. 1494, 1498 herein].

The reasons upon which respondent's Motion is based are stated in the following language in the Motion:

*** * * respondent deems it its duty to remind the Commissioner that, during the period that he was in charge of the Division of Investigation and Litigation within the Bureau of Antimonopoly of the Commission, numerous investigations were conducted of complaints regarding supplier aid to service station dealers during gasoline price wars of a kind similar to that involved in this proceeding. Thereafter, while Commissioner MacIntyre was Staff Director and General Counsel of the House Select Committee on Small Business and Staff Director to various of its subcommittees, hearings were held and reports were issued by these committees censuring supplier aid as illegal price discrimination and recommending that the hearings be forwarded to the antitrust enforcement agencies for appropriate action.**

In response to respondent's Motion, respondent should be informed that I resigned from the service of the Federal Trade Commission effective February 14, 1955 and had not served as Chief of its Division of Investigation and Litigation of the Bureau of Antimonopoly since June 1954. I am informed that the records of the Federal Trade Commission show that this matter was not even docketed for investigation until March 8, 1957. In other words, it was on that date that the Commission directed the commencement of an investigation for the accumulation of factual information about the matter.

It was not until September 26, 1961 that I returned to the Federal Trade Commission by taking the oath of office as a member of the body. This was under appointment by President Kennedy.

As a consequence of these and other relevant circumstances, I have less knowledge than other members of the Commission about this matter. Certainly those members of the Commission who voted for the issuance of the complaint in this matter and therein stated that they "had reason to believe" that the respondent was engaging in the acts and practices therein alleged, had some knowledge upon which they based that statement. I have not been sufficiently informed about this matter to say at this time that I would agree or disagree with the judgment thus expressed by my colleagues at that time. I am not aware of any participation by me in any determination that the respondent in this case has violated the law as alleged by the complaint herein.

Moreover, I recall no matter in which I had any responsibility as the General Counsel and Staff Director of the House Select Committee on Small Business during the period from February 15, 1955 to and including September 25, 1961, which leads me to conclude that I should not participate in the Commission's decision in this matter.

In addition to my conclusion that my participation as a member of the Commission in its decision in this matter would be appropriate, I have no reason to believe that any such participation would be tainted with any *appearance* of impropriety.

In view of the foregoing and other related facts and circumstances, I am aware of no reason why I should withdraw from the proceeeding or refrain from participating with the Commission in any decision in this proceeding. One thing is clear: I am deter-