nonconcurrence in *Clinton Watch Company, et al.* (Docket 7434, Order On Petition to Reopen Proceeding, February 17, 1964) [64 F.T.C. 1443], *The Regina Corporation* (Docket 8323, Order Reopening Proceeding and Modifying Cease and Desist Order, April 7, 1964) [65 F.T.C. 246] and his statement on the issuance of the *Revised Guides Against Deceptive Pricing* issued January 8, 1964, need no repetition here.

LLOYD A. FRY ROOFING CO. ET AL.

Docket 7908. Order and Memorandum, June 30, 1964

Order dismissing as moot the respondent's motion to disqualify the Chairman from participating in the adjudication of this case.

Memorandum of Chairman Dixon in Regard to Respondent's Motion That He Be Disqualified

By motion supported by an affidavit of respondent Lloyd A. Fry, Sr., respondents have requested that I be disqualified from participating in the agency's adjudication of this matter. It is alleged, in substance, that by reason of my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee, Committee on the Judiciary of the United States Senate, I have prejudged certain issues of fact involved in the instant case and am therefore barred by Sections 5(c) and 7(a) of the Administrative Procedure Act, 5 U.S.C. 1004(c) and 1006(a), and by the due process requirements of the Constitution, from participating in the Commission's decision herein.

During March 1958, the Subcommittee held hearings for the purpose of "examining the pricing practices and policies of the asphalt roofing industry." As Counsel and Staff Director of the Subcommittee, I participated in those hearings, personally questioning on the record various members of the industry, including respondent Lloyd A. Fry., Sr., and certain others who testified that they were being injured by the discriminatory low prices of the major roofing companies, including respondent Lloyd A. Fry Roofing Company. I also participated in the drafting of the Subcommittee's majority report on that inquiry.

These prior activities do not, *per se*, establish the kind of "personal" bias or prejudice that disqualifies. *Campbell Taggart Associated Bakeries, Inc.*, Dkt. 7938 (May 7, 1963) [62 F.T.C. 1494, 1498].[1] Hearings before Congressional committees are *ex parte* inquiries, not adversary proceedings; staff counsel is not an "advocate" engaged in the "prose-

[1] "Memorandum of Chairman Dixon in Regard to Respondent's Motion That He Be Disqualified."

cution" of a "case" against a specific party, but an agent of the legislature charged with the duty of developing all of the facts needed to determine whether additional legislation is called for, not with presenting only one side of the matter for the purpose of proving a violation of existing law. Further, legislative hearings of this sort are commonly industrywide inquiries, involving many or even all of the member firms, thereby diffusing the subcommittee's attention over an entire class of persons and producing, at most, an impersonal notion or suspicion of the activities of the class as a whole, not a "personal" animosity directed at some particular member of the group. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948), affirming *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589 (7th Cir. 1945); *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), removed from docket, 338 U.S. 189 (1949).

Further, mere "prejudgment," as such, does not appear to be sufficient basis for disqualification of an administrative adjudicator. *Marquette Cement, supra.* The administrative process, in providing that the same body of supposed "experts" shall cause an investigation to be made, examine the "extra-record" evidence gathered in that *ex parte* investigation to determine if there is "reason to believe" a violation of law has occurred, and then sit to determine the fact of whether those charges are sustained by the record, assumes that the administrator does not come to his adjudicative task with a mind that is wholly free from any factual information on the issues to be determined. As the Supreme Court held in *Cement Institute, supra,* the hearing has been a fair one if the charges are sustained on the adjudicative record and if the respondent is there given a chance to rebut those charges and thus to overcome any preconceived notions the administrators might have on the subject:

> 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. 333 U.S. at 701.

The issue in such cases, therefore, as the Supreme Court has thus framed it, is whether "the minds of its [Federal Trade Commission's] members [are] *irrevocably closed* on the subject" of the particular

respondent's alleged practices (emphasis added). The state of a man's mind, as I pointed out in another case involving a similar charge of prejudice,[2] "is by the nature of things known only to him and to his Maker." Whatever handicaps a man may labor under when he essays to search his own mind for prejudices,[3] I know to a moral certainty that my mind is not "irrevocably closed" on the issues involved in this proceeding.

However, as I pointed out in *Campbell Taggart, supra*, I am not insensitive to the "appearances" of the matter: "In common with most men, I desire not only to *be* fair, but to have my fairness made so obvious that the most superficial of critics will see and appreciate it. Hence, I am not indifferent to this respondent's suggestion that the 'appearance' of fairness, if not the law, requires me to disqualify myself." I am also mindful of the danger that too slavish a concern for appearances alone can cause the administrator to be "overly tempted to 'lean over backwards' to be fair and consequently to employ self-disqualification too readily." [4] Weighing these factors in the light of the facts in the instant case, I concluded several weeks ago, prior to the motions of these respondents, that I would disqualify myself here. Fry Roofing, by far the largest company in the asphalt roofing industry,[5] stood out rather clearly from the other and much smaller firms represented at the Subcommittee's hearings, and I do have some independent recollection of its business methods, as contrasted with those of its smaller competitors. While I do not think, as noted, that this amounts to bias, whether of a disqualifying, "personal" nature or otherwise, *Cement Institute, supra*, I am persuaded that, under the peculiar facts of this case, whatever public interest there may be in my participation in this proceeding [6] is outweighed by the principle that it is "of fundamental importance that justice should, not only be done, but manifestly and undoubtedly be seen to be done." [7]

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[2] *American Cyanamid Co.*, Dkt. 7211 ("Memorandum of Chairman Dixon in Regard to Respondents' Motions That He Be Disqualified") (1962) [60 F.T.C. 1881].

[3] Comment, "Prejudice and the Administrative Process," 59 *Northwestern University Law Review* 216, 232–235 (May–June 1964).

[4] *Id.*, at 234, n. 65.

[5] Fry "has almost twice as many plants as the next largest producer." "Administered Prices Asphalt Roofing," Report Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, S. Res. 231, 85th Cong., 2d Sess. (December 15, 1958), p. 38.

[6] "[E]very adjudicator has a positive duty to fulfill his adjudicative functions unless actually disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such an administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly." Comment, *supra*, note 3, at 233–234.

[7] *Rex* v. *Sussex Justices*, 93 L.J.K.B. 129, 131 (1924), quoted in comment, *supra*, note 3, at 225.

I shall not participate in the Commission's deliberations or decisions in this proceeding.

ORDER DISMISSING MOTION TO DISQUALIFY

Respondents having filed on June 18, 1964, a motion to disqualify Chairman Paul Rand Dixon from participation in the adjudication of this proceeding; and

Chairman Dixon having previously determined *sua sponte* to disqualify himself therefrom:

It is ordered, That respondents' motion be, and it hereby is, dismissed as moot.

Commissioner Dixon not participating.