and rescind its determination that issuance of complaints here is in the public interest and is consistent with the Commission's expressed concern to prevent future unlawful acquisitions in this industry through exercise of its powers of industrywide inquiry and correction. Accordingly,

It is ordered, That the motions of respondents in the above-captioned proceedings to suspend further adjudicative proceedings be, and they hereby are, denied.

HOFFMANN AIRCRAFT COMPANY ET AL.

Docket 8136. Order, Apr. 29, 1965

Order denying respondent's petition that Commission's order of May 13, 1961, 58 F.T.C. 730, be reopened and modified.

Order Denying Petition To Reopen Proceedings

This matter is before the Commission upon respondents' petition, filed April 5, 1965, requesting that this proceeding be reopened for the purpose of modifying the Commission's order to cease and desist issued on May 13, 1961 [58 F.T.C. 730], based on an agreement containing a consent order.

As grounds for their request, respondents allege that there was a misunderstanding as to the meaning of certain paragraphs of the order to cease and desist as the result of representations made by counsel supporting the complaint during the negotiations leading to the consent order. Respondents have made no showing in verification of the allegations in their petition.

The Acting Director, Bureau of Deceptive Practices, has filed an answer in opposition to respondents' petition. Attached to the answer is the affidavit of counsel supporting the complaint wherein he denies making the alleged representations concerning the phraseology or interpretation of the order to cease and desist. Complaint counsel has attached to his affidavit a copy of a draft of a proposed order which he discussed with respondents' counsel, and handwritten notations thereon tend to refute respondents' allegations.

The Commission, upon consideration of respondents' unverified petition and the answer thereto, has determined that respondents' request must be denied.

Respondents do not contend that there have been any changed conditions of fact since the order to cease and desist became final. The Commission's action in denying the present motion is not intended to pre-

TEXAS INDUSTRIES, INC., Docket 8656
MISSISSIPPI RIVER FUEL CORPORATION, Docket 8657

Order, April 14, 1965

Order denying requests of two respondents to suspend proceedings pending completion of an industrywide investigation.

Order Denying Motions To Suspend Complaints

On March 31, 1965, the hearing examiner certified to the Commission motions by counsel for respondent in each of the above-captioned proceedings to suspend the proceeding pending completion of an industrywide investigation, inquiry, or other action by the Commission.

On December 7, 1964, the Commission announced the commencement of an investigation designed to aid the Commission in enforcing Section 7 of the Clayton Act, as amended, in the cement industry. Respondents in the motions before us argue that in light of the Commission's announced intention of proceeding on a broad industrywide basis to prevent unlawful mergers in this industry, the Commission should, as a matter of fair enforcement policy, not prosecute adjudicative proceedings against these respondents in regard to past acquisitions by them in this industry.

This argument misconceives the purpose of the Commission's investigation and of any industrywide proceeding that might arise out of it. Such a proceeding would be concerned with preventing future unlawful mergers, by providing business men with guidance as to the probable legality of proposed mergers; it would not adjudicate the legality of specific past mergers. The Commission issued complaints in the present cases because it had reason to believe that the challenged acquisitions endangered competition in the markets affected; and the ill-effects of such specific acquisitions, if found illegal, could not be dissipated merely by a nonadjudicatory, industrywide inquiry of the kind projected by the Commission. That is why, as the Commission stated in *Permanente Cement Co.*, Docket 7939, decided April 24, 1964, p. 9 [65 F.T.C. 410, 494], commencement of a general industrywide inquiry "is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions [previously] consummated." Here, too, the challenged past acquisitions could be found to "have profound and even irreversible adverse effects upon competition in substantial markets" which no industrywide action looking to the prevention of future unlawful actions by cement producers would, in itself, be effective in correcting.

trative action aimed at dealing promptly and effectively with the basic merger problems out of which the cases arise.

I reiterate my view that the Commission, without further delay, should decide these cases, and also that it should not continue to delay in acting immediately on a broad administrative basis to prevent further unlawful mergers in the retail food industry. The initial decision of the hearing examiner in Docket 7453 was rendered more than two years ago—on April 5, 1963 [69 F.T.C. 226]. Oral argument on the appeal from the initial decision was heard by the Commission on November 6, 1963—a year and half ago. The initial decision in Docket 8458 was rendered on October 4, 1963 [67 F.T.C. 999], and oral argument was heard on May 7, 1964—almost a year ago. If "remedies and solutions" for the serious, industrywide problems in the food industry are to be found, as I hope they will, we should delay no longer in deciding these particular cases and moving along into a broad industrywide administrative approach.

One such approach might be for the Commission to extend an opportunity to all of the large retail food chains to cooperate with the Commission in the prevention in this industry of mergers proscribed by Section 7. The companies that have been active in making acquisitions could be directed to file with the Commission periodically such reports as might be necessary to keep the Commission informed, well in advance, as to all prospective mergers and acquisitions involving such companies. See Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b); *United States* v. *Morton Salt Co.*, 338 U.S. 632. On the basis of the information obtained through such reports concerning the terms, conditions, business reasons, etc., of proposed acquisitions, as well as on the basis of the Commission's extensive accumulated knowledge and experience concerning the competitive conditions and problems of the retail food industry, the Commission could, where practicable, advise companies as to the probable legality of such proposed acquisitions, as well as take such other action as might be required to prevent unlawful mergers. In addition, the Commission could utilize such information to aid in keeping itself abreast of current merger trends in the industry.

The merger movement in the retail food industry warrants the Commission's closest scrutiny; and unlawful mergers in the industry should be prevented. But we must choose wisely the "remedies and solutions" that are likely to achieve our enforcement goals in an effective and fair manner. To protract the present cases still further while ignoring the larger question of how the Commission is to deal effectively with a merger movement that is continuing and that is industrywide in scope seems to me the least efficient, the least expeditious, the least economical, and the least equitable approach for an administrative agency to take.

clude respondents from filing a new motion if and when supported by a factual showing that would warrant modification of the order to cease and desist.

On the basis of the foregoing:

It is ordered, That respondents' petition, filed April 5, 1965, be, and it hereby is, denied.

NATIONAL TEA CO., Docket 7453
THE GRAND UNION COMPANY, Docket 8458

Order and Statements, May 3, 1965

Order providing for reargument of two cases before the full Commission involving the merger movement in the retail food industry.

Separate Statement

By Elman, *Commissioner:*

I agree that the merger movement in the retail food industry is industrywide in scope; that it raises serious problems; and that all the members of the Commission as now constituted should participate in formulating "remedies and solutions." I do not agree, however, that the way to remedy and solve these problems effectively is by setting these cases down for reargument, as the full Commission has now decided to do.

In both cases there is a quorum for deciding the appeals on the merits. The cases can be decided now, without reargument, and I think they should be. By deciding *not* to decide these cases now and to set them down for reargument, the Commission has delayed the process of seeking and finding "remedies and solutions." In these cases, and in others, the central goal of merger enforcement in this industry should be the same: the preservation of a competitive market structure. In this industry particularly, the Commission should be primarily concerned with arresting further concentration through acquisitions, whether by these respondents or by other major chains, that could result in the industry's becoming substantially less competitive than it is today.

A quorum of the Commission is now available, without reargument, to dispose of the present cases in harmony with what should be the Commission's primary enforcement objectives in this industry. It is true that the members of the Commission who did not hear oral argument in these cases may properly decline to participate in adjudicating the merits of the appeals. But those members, who have now voted to set the cases down for reargument, could with equal propriety refrain from entering into the adjudication of these cases, permitting them to be decided now, and at the same time join in appropriate adminis-

Such a situation can readily arise when there are four Commissioners sitting. And while hearing oral argument is not necessary to participation, those Commissioners not having had the benefit of earlier oral argument feel the need for the enlightenment and clarification which oral argument might provide. Neither Commissioner Jones nor I heard National Tea, nor has Commissioner Jones heard Grand Union. Our judgment that the public interest requires our full participation in these cases must outweigh a call, however insistent, that these matters must now be pressed to conclusion.

This rather uncomplicated state of affairs, which would defer these matters at most a few weeks, should not, it seems to me, give rise to a public debate as to the methods and objectives of Commission merger enforcement policy.

Order Directing Oral Reargument

These matters are before the Commission on appeals of counsel supporting the respective complaints. Oral argument *In the Matter of National Tea Co.*, Docket No. 7453 [69 F.T.C. 226], was heard on November 6, 1963, by the full Commission as then composed, which included three of the present Commissioners. Oral argument *In the Matter of The Grand Union Co.*, Docket No. 8458 [67 F.T.C. 999], was heard on May 7, 1964, by four members of the present Commission. Realizing the seriousness of the industrywide scope of the merger movement in the food retail industry, as shown by the records in these cases, and the problems associated with the remedies and solutions to be applied, and being of the opinion that all of the members of the Commission as now constituted should participate in the consideration of these cases and in the formulation of the remedies and solutions, the Commission has determined that the appeals of counsel supporting the complaints in both of these matters should be orally reargued. Although aware that reargument will lengthen somewhat the span of time between issuance of the complaints and ultimate disposition of the cases, the Commission is of the opinion that the advantages of a single aproach to the mutual problems presented by these cases more than outweigh the disadvantages inherent in lengthened proceedings. Accordingly,

It is ordered, That oral reargument on the appeals *In the Matter of National Tea Co.*, Docket No. 7453, and *In the Matter of The Grand Union Co.*, Docket No. 8458, be held before the members of the Commission on dates to be established by the Secretary of the Commission at times agreeable to counsel for respondents and counsel in support of the complaints.

SEPARATE STATEMENT

BY MACINTYRE, *Commissioner:*

Since I have always opposed procedures which tend to inject delay into the administrative process, I feel called upon to express my reasons for not opposing the Commission's decision to hear reargument in these cases.

The first and most important consideration is to afford all five Commissioners the opportunity to hear oral argument and to participate in the final decisions. Only three of the present Commissioners heard the first oral argument of the *National Tea* matter and only four Commissioners heard the *Grand Union* argument. I doubt that I would ever vote to deny a colleague who desires to participate in the decision of a case the right to hear oral argument thereon.

Another important reason for hearing reargument is to shed additional light on an important subject which the parties have not as yet adequately explored. It is my view that the briefs and arguments heretofore submitted did not give sufficient coverage to the question of remedy in the event violations are found. After these reargruments the Commission will be better equipped to decide whether to enter orders for outright divestitures, injunctions against future acquisitions, some combination of the two, or other orders with which respondents could comply without disruption to their businesses and would accept as appropriate. The reargruments we have provided for will enable all counsel in these matters to inform us more about the answers we should supply to these questions.

And, finally, the law in this field is developing at a very rapid rate and the interval since the last arguments has seen the issuance of many important court decisions. I am sure that all counsel will be benefited by this opportunity to bring their legal arguments up to date.

SEPARATE CONCURRING STATEMENT

BY REILLY, *Commissioner:*

The majority has ordered reargument in these aging cases because it finds itself unable to decide them without the participation of the full Commission. This is dictated in part by the majority's conviction that these cases are important in the Commission's larger concern with competition in the food industry and thus should be considered by the full Commission, and in part by the fact that the number of Commissioners participating in a matter may be large enough for a quorum but not large enough to provide a clear majority for satisfactory Commission action.

8512. Counsel for Columbia Broadcasting System, in a motion requesting that I withdraw from participation in the *Columbia Broadcasting* case, argue that the practices allegedly engaged in by the Columbia Broadcasting System are similar to the practices which Doubleday allegedly had pursued and with respect to which the Commission had dismissed the complaint many years ago.

Respondents request that I withdraw from participation in this case because during my tenure on the staff of the Commission as Assistant Director of the Bureau of Antimonopoly and Chief of the Division of Investigation and Litigation my name appeared on various briefs in *Doubleday*. Respondents claim, as a result, I must have had important administrative responsibilities with respect to the investigation or prosecution or appeal in *Doubleday*. In this connection, respondents contend that in view of my participation in *Doubleday* it must be inferred that I was an advocate of the specific positions advanced by complaint counsel in that case with respect to the alleged injurious effect on dealers of mail order clubs. Respondents contend that *Doubleday*, which was dismissed, is the decision controlling this case and in fact was relied upon by the hearing examiner below in dismissing the complaint.

Respondents, citing Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c), argue that *Doubleday* and the instant proceeding are "factually related" and contend that as a result my continued participation herein would entail a commingling of the adjudicative and prosecutorial or investigative functions. I have examined the authorities cited by respondents and certainly none of them support the proposition that under these circumstances the *Doubleday* case and the instant proceeding should be considered "factually related" within the meaning of that term as used in Section 5(c). Respondents straightforwardly admit that they have found no judicial authority construing the words "factually related" in the statute. Further, they are to be commended for candidly directing the Commission's attention to the definition of this phrase in the *Attorney General's Manual on the Administrative Procedure Act* (1947).[1] As I construe that definition, a factually related case within the meaning of the Act refers to two cases involving at least to some degree the same party out of the same or a connected set of facts. The Manual further states: "* * * [agency employees] would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted." In this case it is

[1] At p. 54, n. 6.