Section 5(c) of the Administrative Procedure Act; and

The Commission having determined that respondents have failed to justify the action requested:

*It is ordered*, That respondents' motion requesting that Commissioner MacIntyre be disqualified from participating in this proceeding be, and it hereby is, denied.

Commissioner MacIntyre not participating.

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## PHILADELPHIA CARPET COMPANY ET AL.

*Docket 7635. Order, May 14, 1965*

Order extending the closing date for the respondent to file a report of compliance.

### Superseding Order as to Time Within Which Respondents Shall File Report of Compliance

Respondents have filed a petition with the Commission requesting that the period of time within which they are required to comply with the Commission's cease and desist order be extended for a period of time coextensive with that accorded their competitors in companion cases. The Commission, on April 2, 1964, extended the time in which eight of respondents' competitors [1] were required to file reports of compliance to sixty (60) days after the latest date of any final judicial determination on appellate review in *Callaway Mills Co.*, Docket No. 7634, *Cabin Crafts, Inc.*, Docket No. 7639, and the instant case. Appeals from the Commission's decision in *Callaway Mills Co.*, *supra*, and *Cabin Crafts, Inc.*, *supra*, are currently pending before the United States Court of Appeals for the Fifth Circuit. On April 1, 1965, the Commission's order in the instant case was affirmed by the United States Court of Appeals for the Third Circuit. *Philadelphia Carpet Co.* v. *Federal Trade Commission*, 342 F. 2d 994 (3d Cir. 1965). The final decree of that court ordering compliance with the Commission's order to cease and desist was issued on April 26, 1965.

In the circumstances, the Commission has determined that the period of time within which the respondents in this case should be required

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*In re *Doubleday and Company, Inc.*, 52 F.T.C. 169 (1955).

[1] Bigelow-Sanford Carpet Company, Inc., Docket No. 7420; Mohasco Industries, Inc., Docket No. 7421; The Magee Carpet Company, Docket No. 7631; C. H. Masland & Sons, Docket No. 7632; The Beattie Manufacturing Company, Docket No. 7633; A. & M. Karagheusian, Inc., Docket No. 7636; Roxbury Carpet Company, Docket No. 7637; The Firth Carpet Company, Docket No. 7638.

obvious that the proceeding brought against CBS can in no way be considered an outgrowth of the *Doubleday* proceeding. Assuming for the moment that both cases involve the same legal theory as to similar facts,[2] in my view that does not constitute a factual nexus so as to warrant my disqualification in this proceeding under section 5(c) of the Administrative Procedure Act. The mere circumstance that *Doubleday*, which was dismissed, may have rested on the same or a similar legal theory as the instant proceeding is insufficient to bring my participation in this case within the area forbidden by Section 5(c). Needless to say, I intend to judge this matter on the facts in this record and in the context of this industry.

If respondent's construction of the term "factually related case" were to be upheld, obviously no staff member could ever sit on any Commission or administrative board having a quasi-judicial function. There would be too many instances where he would have to disqualify himself. Furthermore, by way of analogy, if the phrase were to be given the broad sweep for which respondents contend, few United States Attorneys could become elevated to a Federal judgeship and probably no Attorney General could ever sit on the Supreme Court. For example, if a United States Attorney had once participated in a murder proceeding involving a particular set of facts, under respondents' interpretation of the doctrine there would be a commingling of the prosecutorial and judicial function in another homicide involving similar circumstances because he had, in the course of prosecution, once taken the position that murder under analogous facts was illegal. This is clearly an absurd result. The doctrine to be applied here obviously is that the prior expression of legal views as to the lawfulness of certain practices does not disqualify the adjudicative officer if it does not involve the particular party being proceeded against. As a noted authority has stated, "Bias in the sense of [a] crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [3] I might add that my views on this proceeding have, in fact, not yet crystallized.

## Order Denying Motion To Disqualify

Respondents, by motion filed May 12, 1965, having requested that Commissioner MacIntyre be disqualified from any further participation in this proceeding; and

Commissioner MacIntyre having filed with the Commission a statement that he has determined not to withdraw; and

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[2] At this time I have reached no final conclusion on that point.

[3] 2, Davis, *Administrative Law Treatise*, § 12.01 at 131 (1958); Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 218 (1964); see also *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

amended, respondent Nash-Finch's answer in opposition thereto, and respondent's motion to terminate the proceeding. In addition, respondent Nash-Finch concurrently filed a motion that I be disqualified from further participation in this proceeding. In support of its motion for my disqualification, respondent cites my participation as staff counsel in the negotiation and settlement leading up to the entry of the cease and desist order against Nash-Finch in 1947 and asserts, further, that I participated in discussions relating to respondent's proposed compliance with that order. Respondent argues that under the circumstances my disqualification is mandatory under the rule announced in *Amos Treat & Co.* v. *S.E.C.*, 306 F.2d 200 (D.C. Cir. 1962). Finally, respondent contends that I should not participate since this proceeding is adjudicative and the Commission herein purports to act as a master in making findings of fact for the court of appeals.

Every adjudicator is under a positive duty to fulfill his adjudicative functions unless actually disqualified, and it is almost as great a fault to employ self-disqualification too readily as too sparingly.[1] The same considerations are, of course, equally applicable to agency members' participation in the administrative functions entrusted to them when faced with a request for withdrawal. Careful consideration of the issues raised by respondent's motion is therefore required in the context of this proceeding and the manner in which it developed.

The cease and desist order under consideration here issued in 1947 and the provisions of the so-called Finality Act, enacted July 23, 1959, do not apply. Accordingly, it is the purpose of this proceeding to determine whether the facts warrant a petition to one of the courts of appeals for affirmance and enforcement of the order to make it final. The determination as to whether an order of enforcement should issue rests with the courts and not with the Commission. Respondent nonetheless claims that in proceeding the Commission is acting as a master for the court of appeals and therefore it is entitled to all of the procedures applicable to an adjudicative trial. In short, respondent asserts that if I continue to sit in this proceeding there will result a commingling of the adjudicative and prosecutorial and investigative functions prohibited by the Administrative Procedure Act. The crux of the situation, therefore, is whether this is an investigative, an adjudicative or a hybrid proceeding. That question can best be resolved after an examination of how this proceeding was instituted and how it has developed over the last two years.

On February 1, 1963, the Commission issued its order directing an investigation as to whether respondents had complied with the order

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[1] Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 233–34 (1964).

to file a report of compliance should be extended for a period coextensive with that of their aforementioned eight competitors. Accordingly,

*It is ordered*, That the paragraph in the Commission's order to cease and desist, issued February 10, 1964 [64 F.T.C. 762], referring to the time within which respondents are required to file a report of compliance with said order be, and it hereby is, stricken.

*It is further ordered*, That the respondents shall, within sixty (60) days after the date of the final judicial determination in *Callaway Mills Co.*, Docket No. 7634, or *Cabin Crafts, Inc.*, Docket No. 7639 [362 F. 2d 435 (1966)], whichever is later, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the Commission's order to cease and desist.

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## C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

*Docket 4589. Memorandum, May 17, 1965*

To avoid further delay Commissioner MacIntyre withdraws from the case in which respondents allege that his participation would result in a commingling of adjudicative, prosecutorial, and investigative functions prohibited by the Administrative Procedure Act.

### Memorandum of Commissioner MacIntyre With Respect to Respondent's Motion That He Be Disqualified

Approximately nineteen years ago, while serving as a member of the staff of the Federal Trade Commission, in my capacity as Chief of the Division of Investigation and Litigation, I participated in conferences with Federal Trade Commission counsel and counsel for the C. H. Robinson Company and the Nash-Finch Company, held for the purpose of negotiating a consent settlement of alleged violations of law taking place approximately twenty years ago or more. Such conferences did result in the negotiation of a consent settlement and a cease and desist order was issued in F.T.C. Docket No. 4589 [43 F.T.C. 297]. The current investigation, initiated on February 1, 1963, is for the purpose of collecting information regarding the present practices of the C. H. Robinson Company and the Nash-Finch Company. If it should appear that the present practices of the respondents violate the terms of the aforesaid cease and desist order, then the Commission may refer the information to the appropriate court for a determination of whether violation of the cease and desist order has occurred and whether the order should be enforced.

This matter is now before the Commission on Commission counsel's request that the order directing the investigational hearings be

torney in seeking enforcement of a court order. Respondent's motion for clarification made it clear, to me at any rate, that it would have been desirable for the Commission to differentiate sharply between the adjudicative and investigative functions in this matter and I did not concur in the order of November 4. While this procedure may have been approved by the courts,[2] it seems clear that the interaction of the adjudicatory form given to this investigation and the procedural questions continually raised by respondents throughout this proceeding has created a procedural bog, out of which the Commission has yet to find its way. When respondent objected to the so-called undefined nature of this proceeding, the Commission should have amended its order directing the investigation, making it plain that this proceeding is solely investigative, to which only the Rules of Practice applicable to investigations will be applied. This the Commission has not chosen to do and the result has evidently been confusion compounded.

Respondent, not satisfied with the "clarification" contained in the order of November 4, 1963, petitioned the United States District Court for the District of Minnesota, Fourth Division, for a declaratory judgment and injunction. Nash-Finch requested that the Commission and its staff be enjoined from further proceeding in this matter until respondent had been informed as to whether the hearings are adjudicative or investigative, the purpose of the hearings clarified, the duties and functions of the presiding official defined, and the rules applicable to the proceeding affirmatively promulgated.

The district court, denying respondent's petition, adopted essentially the position set forth in the Commission brief filed with the court, to the effect that in an enforcement proceeding the Commission may, to expedite the proceedings, hold investigative hearings in advance of going to the court of appeals and to such hearings apply its adjudicative rules.[3] The court further held that under this procedure the Commission proceeds as if it had been appointed as a master and that this was the procedure adopted in this instance.[4]

As heretofore stated, it is my view that this proceeding is essentially an investigative proceeding and, although the courts have judicially approved what the Commission has done here in prior cases, it is obvious that the engrafting of adjudicatory procedures on the Commission's essentially investigative function in this instance led only to confusion and delay. This case and similar cases, I believe, could be

[2] See *F.T.C.* v. *Standard Brands* [1950–1951 TRADE CASES ¶ 62,797], 189 F. 2d 510 (2d Cir. 1951); and *F.T.C.* v. *Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (9th Cir. 1959).

[3] In this case the procedure utilized has, if anything, slowed down the proceeding.

[4] *F.T.C.* v. *Nash-Finch Co.*, 1964 Trade Cas. ¶ 71,204 [7 S.&D. 973].

to cease and desist in Docket No. 4589. The order specified that a public investigational hearing should be conducted for that purpose pursuant to § 1.34 and the related rules of the Commission's Rules of Practice which were then in effect. It was further ordered that the chief hearing examiner should appoint and designate a hearing examiner to preside at the hearing with all the powers and duties as provided by § 4.13 of the Commission's Rules of Practice then in effect. The order provided that respondents were to have the right of notice, cross-examination, production of evidence in rebuttal, and that the hearings should be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules were applicable.

The ensuing months were consumed by procedural maneuvering until on October 14, 1963, respondent Nash-Finch filed a motion requesting the Commission to clarify the order of February 1, 1963, directing an investigation of the respondent. It was the burden of respondent's motion that the order of February 1, 1963, was defective because it did not specify whether the proceeding initiated was adjudicatory or investigatory and that it failed to make clear whether the examiner was appointed to act as an impartial adjudicative officer subject to the provisions of Section 5(c) of the Administrative Procedure Act. Respondent, at that time, argued strenuously that it should be advised as to whether these hearings were supposed to be an "actual trial" and that it should not be left to speculate as to whether these hearings were the proper time to make its defense. In short, respondent claimed that it could not be sure of the procedural rights to which it was entitled under this proceeding. On November 4, 1963, the Commission issued its memorandum and order disposing of the petition for clarification of the prior order. The Commission did not change the format of the proceeding, merely holding, essentially, that the same procedure had been previously approved by the Ninth Circuit in *F.T.C.* v. *Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (1959) [6 S. & D. 666], where the court stated that any reasonable and fair method or procedure not forbidden by statute would be appropriate as a foundation for an enforcement proceeding.

I have always been of the opinion, and am of the opinion now, that investigational proceedings leading up to enforcement under Section 11 of the Clayton Act prior to its amendment by the so-called Finality Act are inherently investigational procedures, irrespective of whether the indicia of adjudicative proceedings are engrafted thereon. The Commission's function here is strictly an administrative one; it is in the same position as the Justice Department or a United States at-