Order denying respondent's request for reconsideration of the Commission's order of July 28, 1966, page 79 herein, on the grounds that only two of the three participating Commissioners voted to issue the order. Respondent contends that an order of the Commission must be supported by three members.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent, by petition filed August 31, 1966, has requested the Commission to reconsider its decision issued herein on July 28, 1966, p. 79 herein. Counsel supporting the complaint has filed an answer in opposition.

Three of the five members of the Commission, constituting a quorum for the transaction of business under § 1.7 of the Commission's Rules of Practice, participated in the decision in this matter, with two of the participating Commissioners concurring in the decision, including the opinion, findings and final order.

In support of its petition, respondent relies on the ruling of the court in *Flotill Products, Inc.*,[1] that an order of the Commis-

[1] *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (9th Cir. 1966), *affirmance upheld on rehearing*, (August 15, 1966).

sion must be supported by three members in order to constitute an enforceable order. Additionally, respondent contends that since the Commission's decision is not concurred in by three of its members, the Commission has failed to make the findings of fact and give the statement of reasons in support of its decision required by Section 8(b) of the Administrative Procedure Act.

The decision of the court in the *Flotill* case issued several months prior to the Commission's decision in this matter. Notwithstanding that decision, it has been, and is, the position of the Commission that three members constitute a quorum and that a majority of a quorum is sufficient for the transaction of business, including the making of valid findings, the assignment of reasons therefor, and the issuance of a valid order. Moreover, this position was sustained by the court in *Atlantic Refining Co.* v. *Federal Trade Commission,* 344 F. 2d 599 (6th Cir. 1965), prior to the *Flotill* decision and has more recently been upheld by the court of appeals in another circuit in *Emile M. Lapeyre* v. *Federal Trade Commission,* 366 F. 2d 117 (5th Cir. 1966). As the decision of the court in *Flotill* does not stand as the ultimate determination on this issue, the Commission adheres to its position, and respondent's petition is denied.

Commissioner MacIntyre not participating.

TRI-VALLEY PACKING ASSOCIATION

Dockets 7225, 7496. Order, Sept. 23, 1966

Order denying respondent's petition for reconsideration of the decision issued herein on page 223, on the grounds that it was not on notice that it had the burden of proving that its lower prices were available to nonfavored customers.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent has filed a petition for reconsideration pursuant to § 3.25 of the Commission's Rules of Practice stating as ground therefor that the decision issued herein on July 28, 1966, page 223, raises new questions which it had no opportunity to argue before the Commission. Specifically, respondent contends that it was not apprised prior to the issuance of the Commission's opinion that it had the burden of proving that its lower prices were available to nonfavored customers. Respondent further argues that it was not proper for the Commission to con-

sider whether the proof offered by respondent in support of its meeting competition defense met the basic requirements of the *Staley* decision [1] because that issue had not been raised before it.

The Commission has carefully examined the record in this matter to determine whether respondent's petition relates to new questions raised by the decision or final order and has concluded that it does not. As to the first contention, the Commission did not hold that respondent had the burden of proving the availability of lower prices, but, to the contrary, sustained the hearing examiner's finding that ". . . irrespective of the question of who has the burden, counsel supporting the complaint has introduced clear and convincing evidence disclosing that the granted lower prices to the large chain purchasers located on 'California Street' were not available to the unfavored purchasers." (Initial Decision, p. 238.) Nor is there any basis for respondent's second contention. The hearing examiner interpreted the instructions of the 9th Circuit Court in its remand of this case as requiring a determination of the question whether respondent was engaged in meeting an equally low price of a competitor within the meaning of the proviso to Section 2(b) (Initial Decision, p. 225). In its appeal from the hearing examiner's rejection of its Section 2(b) defense on this issue respondent relied on *Staley* as a decision ". . . wherein the Supreme Court has established standards to test the sufficiency of evidence to establish the defense of meeting competition in good faith." [2]

Inasmuch as respondent's petition does not indicate that the Commission's decision or order raised new questions which respondent had no opportunity to argue,

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

Commissioner Elman dissenting.

THE CROWELL-COLLIER PUBLISHING COMPANY ET AL.

Docket 7751. Order and Opinion, Sept. 30, 1966

Order reopening proceedings and remanding case to hearing examiner for the taking of additional evidence and for him to certify record and findings.

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[1] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

[2] Opening Brief on Appeal of Respondent Tri-Valley Packing Association, a corporation, p. 48.