

----- ORDER, ETC. 1000

It is ordered, That the respondents' appeals from the hearing examiner's order filed May 12, 1971 be, and they hereby are, denied. Chairman Kirkpatrick not participating.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, June 24, 1971

Order denying respondent's motion for reconsideration of Commission's previous order denying the disqualification of the Chairman to hear this case.

ORDER DENYING MOTION TO RECONSIDER THE COMMISSION'S ORDER OF
APRIL 13, 1971

This matter is before the Commission upon respondent Standard Oil Company of California's (Standard) motion, and its memorandum in support thereof, for reconsideration of the Commission's order dated April 13, 1971 [p. 1580 herein], denying motions for reconsideration and disqualification. One portion of the original motion asks the Commission "to disqualify Chairman Kirkpatrick from further participation in any proceeding involving [respondents] and F-310, or in the alternative that Chairman Kirkpatrick disqualify himself."

In response to that motion, the Chairman, on April 8, 1971, filed for the record a memorandum stating that he declined to disqualify himself, setting forth the reasons why he felt he was not disqualified, and further stating that he shall not be present and shall not participate in any deliberation or decision by the Commission concerning the motions that he be disqualified.

On April 13, 1971, the Commission issued an order denying in their entirety the motions for reconsideration and disqualification. In that order the Commission recited the fact that the Chairman had filed the above memorandum and that the Commission thereafter met with-

out the presence of the Chairman and considered the above-referred-to motions. The Commission's order further stated that:

On the point of Chairman Kirkpatrick's participation herein, under the Commission's practice a disqualification is treated as a matter primarily for determination by the individual concerned, resting within the exercise of his sound and responsible discretion. This practice, the Commission believes, is proper and consistent with the law, and in the instant case no basis for departing therefrom has been shown. Accordingly, the requests on this point will be denied.

Standard challenges the procedure followed by the Commission in dealing with its motion. Specifically, respondent alleges that the Commission has abdicated its responsibility to determine the merits of the prior motion by permitting that motion to be "denied by the member of the Commission whose qualifications to participate in this matter were in consideration" prior to the time the Commission acted upon the motion itself.

The procedure that was followed here is that which the Commission has always followed where motions to disqualify individual members of the Commission have been filed. As reiterated many times by the Commission in previous cases:

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion.

American Cyanamid Company, 59 F.T.C. 1488 (Order of December 20, 1961); *id.*, 60 F.T.C. 1885 (Order of February 5, 1962 denying motion to reconsider); *Campbell Taggart Associated Bakeries, Inc.*, 62 F.T.C. 1510 (Order of May 7, 1963); *id.*, 62 F.T.C. 1511 (Order denying reconsideration). *Bakers of Washington, Inc.*, 66 F.T.C. 1569; *Sun Oil Co.*, 66 F.T.C. 1570. See also *Carvel Corporation*, 66 F.T.C. 1577. Furthermore, this policy is consistent with the practice followed by the Supreme Court and other Federal and State multimembered judicial tribunals when a motion to disqualify a member is filed, where there is no clear statutory authorization for the court to disqualify one of its members. Frank, "Disqualification of Judges," 56 Yale L.J. 605, 612. See also *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 897 (1945), (statement of Justice Jackson): "Because of this lack of authoritative standards it appears always to have been considered the