

IN THE MATTER OF
LINDAL CEDAR HOMES, INC., ET AL.

Docket C-2774. Interlocutory Order, July 26, 1977

Denial of corporate respondent's petition for modification of order to cease and desist to provide a waiver of the requirement of furnishing prospective franchisees with extensive, specified information and a copy of the franchise agreement prior to the running of fifteen business days.

ORDER DENYING PETITION FOR MODIFICATION OF ORDER

Respondent, Lindal Cedar Homes, Inc., a firm engaged in the sale of franchises, has filed a petition to modify those portions of an order to cease and desist, issued on January 5, 1976, which requires it to furnish prospective franchisees extensive, specified information concerning its franchises and a copy of the franchise agreement "at least fifteen days prior to the execution by the prospective franchisee of any franchise agreement or any other binding obligation or the payment by the prospective franchisee of any consideration in connection with the sale or proposed sale of a franchise." Respondent requests that the order provisions imposing these requirements be modified by adding thereto the words "unless, however, the prospective franchisee and its attorney execute a written waiver of the fifteen business days requirement." The Bureau of Consumer Protection has filed an answer opposing the requested modification.

As grounds for its petition, respondent contends that there have been "a number of occasions when a prospective franchisee, represented by counsel, has requested a formal franchise agreement be executed prior to the running of fifteen business days" and that it believes that the prospective franchisee's rights will be fully protected since the prospective franchisee will be represented by an attorney who must sign the waiver.

We agree with the Bureau of Consumer Protection that the petition should be denied. Respondent does not allege that changed conditions of fact or law require the proposed modification nor has it made a showing that public interest considerations require such a modification. There is no indication that the order has or will cause undue hardship on respondent or prospective franchisees, and the Commission is not persuaded that legal representation is in all respects an adequate substitute for the required fifteen day waiting period.

Accordingly, *It is ordered*, That respondent's petition for modification of the order to cease and desist be, and it hereby is, denied.

IN THE MATTER OF
PORTER & DIETSCH, INC., ET AL.

Docket 9047. Interlocutory Order, July 28, 1977

Denial of respondent's objection to participation of Chairman Pertschuk and Commissioner Dole, and consolidated motion for expedited decision and hearing.

ORDER DENYING "RESPONDENT'S OBJECTION TO PARTICIPATION
OF CHAIRMAN PERTSCHUK AND COMMISSIONER DOLE, AND
CONSOLIDATED MOTION FOR EXPEDITED DECISION AND
HEARING"

On July 22, 1977, respondents filed a motion for dismissal or, in the alternative, a hearing "in order to demonstrate to the Commission prejudicial delay in rendering a decision in this case sufficient to warrant dismissal . . ." The stated grounds are that: (1) Chairman Pertschuk's participation is unauthorized by Section 3.52(f) of the Commission's Rules, 16 C.F.R. 3.52(f), because he was not a member of the Commission at the time of the oral argument on appeal from the initial decision; (2) Commissioner Dole took a brief leave of absence of eight weeks during which she, also, was absent from the same oral argument; (3) apart from the "impropriety" of Chairman Pertschuk or Commissioner Dole participating, both would have to review and consider the record in this matter, causing the respondents prejudicial delay; and (4) the ten-month delay to date in deciding this matter has forced Kelly Ketting Furth to discontinue its business and has cost Porter & Dietsch lost sales.

As we said in *Retail Credit Co.*, Dkt. 8920, "Order Denying Motion for Reargument," October 26, 1976, a Commissioner who has not heard oral argument can participate in the decision of a case.

The decision of numerous courts and administrative agencies establish that, even without agreement of the parties, a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him. *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802 (D.C. Cir. 1965) (footnotes omitted).

Respondents' only authority for the contrary proposition is, in the words of the *Gearhart* opinion, the "only case which looks in the opposite direction," *WIBC, Inc. v. FCC*, 259 F.2d 941 (D.C. Cir.), *cert. denied, sub nom. Crosley Broadcasting Corp. v. FCC*, 358 U.S. 920 (1958), which is "easily distinguishable," in part because oral argument was required by then-existing provisions of the Communications Act, 47 U.S.C. 409(b) (1952). 348 F.2d at 802.