

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.

Contrary to respondents' impression, Section 3.52(f) of the Commission's Rules does not apply solely to Commissioners who were members of the Commission at the time oral argument was heard on an appeal from an initial decision. Indeed, Section 3.52(f) contemplates that Commissioners not present at oral argument will participate in the consideration and disposition of an appeal in which oral argument has been stenographically recorded. Oral argument is not required by the Federal Trade Commission Act and the Commission possesses the authority, under Section 3.52(f), to dispense with oral argument on its own motion. Since respondents are "not entitled to present oral argument as a matter of right," neither are they prejudiced by the participation of Commissioners who have not heard oral argument. *Retail Credit, id.*

As for the delay of ten months in deciding this appeal, respondents themselves contend, in objecting to the participation of Chairman Pertschuk and Commissioner Dole, that this matter involves a "voluminous record" which would take an unreasonable amount of time for those ostensibly unacquainted with it to master. Respondents do not contend that this matter has taken longer than usual to dispose of similar proceedings or that the Commission has a "dilatatory attitude" in regard to this matter. *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964). Respondents themselves requested a four-month delay in this matter in which to prepare an appeal brief in a motion which was denied on July 22, 1976.

Respondents also renew their objection to the press release announcing issuance of the administrative complaint. That objection has been disposed of and we see no need to disturb our prior orders concerning that issue, 86 F.T.C. 896, 1570 (1975). Accordingly,

It is ordered, That respondents' "Objection to Participation of Chairman Pertschuk and Commissioner Dole, and Consolidated Motion for Expedited Decision and Hearing" be, and it hereby is, denied.

Complaint

90 F.T.C.

IN THE MATTER OF
WALGREEN CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2897. Complaint, Aug. 3, 1977—Decision, Aug. 3, 1977

This consent order, among other things, requires a Deerfield, Ill. retail drug store chain, to cease disseminating advertisements that offer any item for sale, unless such item is available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands. Further, respondent is required to conspicuously post advertisements and disclosure statements at designated locations; maintain specified business records; and institute a surveillance program designed to ensure that its stores comply with the terms of the order.

Appearances

For the Commission: *Richard A. Palewicz.*

For the respondent: *Pasquale A. Zambrino and John O'Connell,*
Deerfield, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Walgreen Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walgreen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 200 Wilmot Road, Deerfield, Illinois.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the operation of a large chain of retail drug stores throughout the United States. Its national distribution of products is broadened by the franchising of over 1800 independently owned "Walgreen Agency Stores." Respondent's volume of business has been and is substantial. In the operation of its retail drug stores, respondent offers to its customers an extensive line of general merchandise, drug and cosmetic products. Many of the said products offered for sale and sold are manufactured or processed by respon-