

IN THE MATTER OF
HERBERT R. GIBSON, SR., ET AL.

MODIFYING ORDER AND OPINION IN REGARD TO ALLEGED
VIOLATION OF SEC. 2 OF THE CLAYTON ACT AND THE FEDERAL
TRADE COMMISSION ACT

Docket 9016. Final Order, April 30, 1980—Modifying Order, Aug. 8, 1980

This order, granting in part, and denying in part, respondents' petitions for reconsideration, modifies the order issued on April 30, 1980, 45 FR 38352, 95 F.T.C. 564, by inserting the word "while" before the word "acting," in paragraph 1, line 2 of Section II; and by inserting a comma and the phrase "while acting as a buyer or acting for in behalf of or subject to the direct or indirect control of a buyer," after the word "respondent[s]," in paragraph 2, line 3 of Section II.

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENTS'
PETITIONS FOR RECONSIDERATION

An opinion and final order in this matter having been issued on April 30, 1980; respondents having been served by mail with the said opinion and order on May 20, 1980 and May 21, 1980; respondents having petitioned for reconsideration of said opinion and order on June 12, 1980; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petitions for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

In paragraph 1 of Section II of the Order, line 2, insert the word "while" in front of the word "acting"; and

In paragraph 2 of Section II of the Order, line 3, after the word "respondent[s]," insert a comma and the phrase "while acting as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer,".

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

Respondents have filed two petitions for reconsideration of our recent opinion and order. Each petition asserts: (1) that the language and coverage of Section II of the Final Order should be changed; (2) that application of the opinion of the Court of Appeals in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980), requires disqualification of the administrative law judge ("ALJ"), Theodor P. von Brand, and hence

dismissal or remand of the case; and (3) that certain actions taken by the Commission during periods of allegedly lapsed appropriations, including actions taken in the investigation and adjudication of this case, violated the Antideficiency Act, 31 U.S.C. 665(a) (1976), and hence require dismissal or remand of the case.

Section 3.55 of the Commission's Rules of Practice limits the scope of a petition for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." While certain of respondents' objections are appropriate for disposition by reconsideration, other contentions are not new or are untimely. We consider each of the objections raised *seriatim*.

A.

The petition filed by Herbert R. Gibson, Jr., Gerald P. Gibson and others objects to the inclusion of any respondent other than Herbert R. Gibson, Sr. in the provisions of Section II of the Final Order, which essentially enjoins respondents from violating Section 2(c) of the Clayton Act, 15 U.S.C. 13(c) (1976), as amended. This issue of order coverage is not new and these respondents had ample opportunity, which they exercised, to address this question during the course of trial and on appeal to the Commission. See, *e.g.*, Answering Brief of Herbert R. Gibson, Jr., filed May 29, 1979, at 9. The instant request is, therefore, inappropriate, *cf. Interstate Builders, Inc.*, 72 F.T.C. 1009, 1010 (1967); *Lester S. Cotherman*, 77 F.T.C. 1621, 1622 (1970), and is denied.

The petition filed by Herbert R. Gibson, Sr. and Belva Gibson notes that the language of paragraphs 1 and 2 of Section II of the Final Order are at variance, in that only the former includes the phrase "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer." The petition requests that the latter paragraph be altered to conform to the former. As the petitioners surmise, it was the Commission's intention that this phrase appear in both paragraphs, and an appropriate order correcting this typographical omission is annexed. To sum up, all Gibson respondents, except dissolved corporations, are bound by Section II of the Final Order not to receive or induce payments which would violate Section 2(c) of the Clayton Act. This proscription applies irrespective of whether the respondent acts as a buyer, or on behalf of or subject to the control of a buyer.

B.

All respondents petition for reconsideration of the Commission's opinion and order in light of *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980). In that case, the Commission issued a complaint charging Grolier with violating Section 5 of the Federal Trade Commission Act. During the course of the hearings, Administrative Law Judge von Brand advised the parties that he had previously served as an attorney-advisor to former Commissioner Everette MacIntyre from 1963 to January 1971, during which time the Commission was investigating Grolier and its subsidiaries. "Upon learning of ALJ von Brand's advisory responsibility during the eight-year period, Grolier requested that the judge disqualify himself from further participation in the proceedings." 615 F.2d at 1217. Judge von Brand declined to recuse himself, and the Commission affirmed Judge von Brand's decision in an interlocutory order, 87 F.T.C. 179, 179-81 (1976), and again in its final order and opinion, 91 F.T.C. 315, 485-86 (1978). On appeal, the Ninth Circuit concluded that the Commission had incorrectly interpreted Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 554(d) (1976), in ruling on Grolier's disqualification challenge, and remanded the case to the Commission.

Although respondents in this case have not submitted a motion and affidavits as required by Rules of Practice Section 3.42(g)(2),¹ we understand the facts to be essentially as follows. Beginning in 1967, the Commission and its staff investigated respondents; the investigation culminated in a complaint issued in 1975. Judge von Brand presided over the proceedings from the issuance of the complaint, through trial (which began on December 19, 1977), and until his issuance of the initial decision in early 1979.

Judge von Brand had previously served with the Commission as an attorney-advisor to Commissioner MacIntyre from 1963 until 1971. During Judge von Brand's tenure as attorney-advisor to Commissioner MacIntyre, the Commissioners themselves, including Commissioner MacIntyre, participated in certain decisions connected

¹ In relevant part, Rules of Practice Section 3.42(g), 16 C.F.R. 3.42(g), provides: "Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary, a motion addressed to the Administrative Law Judge . . . to be supported by affidavits setting forth the alleged grounds for disqualification." The requirement of affidavits, grounded in 5 U.S.C. 556 (1976), is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding. There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission, lightly. "Such a charge, unfairly made, not only impugns without warrant the integrity of the government official entrusted with responsibility for deciding a given dispute, but it also unnecessarily tarnishes our beneficent traditions of legal due process." *Marcus v. Director, Office of Wkrs' Comp. Prog.*, 548 F.2d 1044, 1050 (D.C. Cir. 1976) (per curiam). Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

with the investigation of respondents (e.g., the Commission voted on two investigational resolutions and ruled on a motion to quash three subpoenas).

In a pretrial conference on February 23, 1977 (about one year after issuance of the Commission's interlocutory opinion affirming Judge von Brand's participation in *Grolier*, *supra*, and almost ten months before the start of trial in this case), Judge von Brand, apparently acting out of candor and an abundance of caution, disclosed to the parties on the record² the fact of his prior service to Commissioner MacIntyre, and recited his "understanding that none of the respondents * * * would raise an objection to [his] continuing in the case on that ground." (Tr. at 242.) All counsel, including counsel for the instant petitioners, responded unequivocally that there would be no such objection. (*Id.* at 242-43.) The case proceeded through trial, and, consistent with their statements, respondents did not object to Judge von Brand's participation. Neither did respondents object in their appeal papers before the Commission, or at oral argument in July, 1979.

The Ninth Circuit's opinion in *Grolier* was issued on January 24, 1980; respondents did not attempt to present a *Grolier*-type challenge to Judge von Brand in this case before the Commission's decision and order issued on April 30, 1980.

Respondents now urge, for the first time, that the Ninth Circuit's decision in *Grolier* requires the Commission, under the Constitution, the Administrative Procedure Act, and the Commission's Rules of Practice³ either (1) to disqualify Judge von Brand and (a) dismiss the case or (b) vacate its decision and remand for a new trial;⁴ or (2) to grant discovery in the form, *inter alia*, of a deposition from Judge

² The transcript reveals that Judge von Brand disclosed his prior service off the record as well. (Tr. at 242.)

³ The Court of Appeals' decision in *Grolier* involved only an interpretation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 554(d) (1976), and did not purport to interpret the Constitution or the Commission's Rules of Practice; accordingly, it offers no basis for relief on those grounds.

Respondents' very general assertion of their right to trial by a "fair and impartial judiciary" is based upon the due process clause of the Fifth Amendment. While we are and must be sensitive to such considerations, neither will we substitute our judgment for that of the federal judiciary or the Congress. Assuming *arguendo* that Judge von Brand possessed some familiarity with the facts of the case gained through his service to Commissioner MacIntyre (notwithstanding that Judge von Brand's tenure as an attorney-advisor ended four years before issuance of the complaint), his presiding over the trial would not constitute a due process violation. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not * * * disqualify a decisionmaker." *Hortonville Joint School District No. 1 v. Horton Education Ass'n*, 426 U.S. 482, 493 (1976); *accord*, *Withrow v. Larkin*, 421 U.S. 35, 47-59 (1975) (contention that combination of investigative and adjudicative functions violates due process carries difficult burden of persuasion); *Pangburn v. CAB*, 311 F.2d 349, 358 Cir. 1962). Moreover, under the exception contained in the fourth sentence to Section 5(c) of the APA, agency members may participate in investigative and adjudicative decisions in the same case. To hold that Judge von Brand's participation violated the Constitution would thus be to declare that the Administrative Procedure Act is constitutionally deficient. *Cf. Withrow v. Larkin*, *supra*, 421 U.S. at 56 (APA not unconstitutional).

As to the respondents' reference to the Commission's Rules, they cite none, and we are aware of none, that might be relevant.

⁴ Even if fully applicable, *Grolier* at most would require reconsideration by the Commission. The Ninth Circuit's opinion, by its terms, requires neither retrial nor dismissal. 615 F.2d at 1222.

von Brand and access to Commission records. In our view, even apart from estoppel due to respondents' waiver, there is an important element—timeliness—present in *Grolier*, but lacking here, which makes the cases altogether different; indeed, respondents' lack of timeliness bars them from any relief.

"A basic requirement for any disqualification motion is, of course, that it be presented either at the outset of the proceeding or immediately after ascertainment of the circumstances that prompt its filing." *Kroger Co.*, Dkt. 9102 (Order filed June 5, 1980, at 2) (quoting 5 U.S.C. 556(b)). See Rules of Practice Section 3.42(g)(2) (motion to be filed "[w]henever" a party deems ALJ disqualified; also provides for expedited Commission determination). In this respect, the Commission's requirements are consistent with the "general rule governing disqualification, normally applicable to the federal judiciary and the administrative agencies alike," that disqualification claims must be raised "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." *Marcus v. Director, Office of Wkrs.' Comp. Prog.*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) (per curiam) (footnotes omitted); accord, *Capitol Transp., Inc. v. United States*, 612 F.2d 1312, 1325 (1st Cir. 1979); *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (4th Cir. 1974) (collecting cases); *Safeway Stores, Inc. v. FTC*, 366 F.2d 795, 802-03 (9th Cir. 1966), cert. denied, 386 U.S. 932 (1967); *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 454-55 (2d Cir. 1966), cert. denied, 389 U.S. 991 (1967); *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 592 (7th Cir.), aff'd, 333 U.S. 683 (1945). See also *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952). The rule of timeliness requires that a party act as soon as possible after the facts have become known. *Satterfield v. Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574 (4th Cir. 1975) (citing cases); and inaction may waive a separation-of-functions disqualification claim, *International Paper Co. v. FPC*, 438 F.2d 1349, 1357 (2d Cir.), cert. denied, 404 U.S. 827 (1971); *Democrat Printing Co. v. FPC*, 202 F.2d 298 (D.C. Cir. 1952); see *Satterfield v. Edenton-Chowan Bd. of Ed.*, *supra*; *Duffield v. Charleston Area Medical Center*, *supra*. Under Section 3.42(g)(2) of the Commission's Rules of Practice, a party "may" choose to present a disqualification challenge; it need not do so. However, if it chooses to do so, it must do so promptly after the facts supporting the charge are known to it. A disqualification challenge to an ALJ's participation subsequent to the Commission's final decision based on circumstances known to a party before the Commission's final decision is not timely. *Capitol Transp., Inc. v. United States*, *supra*; *International Paper Co. v. FPC*, *supra*; *Safeway Stores, Inc. v. FTC*, *supra*.

The reasons supporting such a rule are manifold. A contrary holding, *inter alia*, would allow a party the possibility of invalidating the proceedings retroactively, unilaterally, and at will, if it feared or received an unfavorable ruling, or merely wished to delay the proceedings; might cause substantial delays, and, if retrial were required, significant unnecessary duplication of effort and expenditure of resources; and might make determinations of disqualification more difficult and less certain because of the passage of time. See generally *Marcus v. Director, Office of Wkrs.' Comp. Prog.*, *supra*, 548 F.2d at 1050-51; *Duffield v. Charleston Areas Medical Center*, *supra*.

Applying these principles to this case, it is clear that the facts are substantially different from those in *Grolier*. In *Grolier*, the respondents in the Commission's adjudicative proceedings raised the issue promptly after Judge von Brand's record announcement of his prior service as attorney-advisor to Commissioner MacIntyre; both the ALJ and the Commission considered the claims promptly, during trial and before the closing of the record. Despite the ALJ's and the Commission's interlocutory rulings, the *Grolier* respondents pressed their claim—as was their right—on appeal of the initial decision to the Commission and on appeal of the Commission's decision to the Ninth Circuit. Moreover, the *Grolier* respondents never agreed not to present their disqualification claims.

In this case, Judge von Brand formally notified the parties on February 23, 1977, of his prior service to Commissioner MacIntyre. It is thus clear that, in the event that respondents did not know of Judge von Brand's service to Commissioner MacIntyre as of the time of Judge von Brand's appointment as an ALJ or as of the time the Commission issued its interlocutory order in *Grolier* in 1976, they did know of it at least nine months before trial began. Respondents agreed to put forward no objection, and, indeed, honored that agreement throughout the administrative trial and appeal of this case. Consistent with the above-cited authorities, which require timeliness in a disqualification application, respondents may not now for the first time raise this issue.

Of course, respondents do not contend that their failure to object—indeed, their agreement not to object—was predicated upon the Commission's 1976 *Grolier* ruling. Rather, they only suggest, in an indirect manner, that their failure to raise the issue at oral argument in July, 1979 was based on their reliance on *Grolier*. Yet, after the Ninth Circuit's decision in *Grolier*, they waited months before presenting any objection. During this time, the Commission issued its final order and opinion. Accordingly, even assuming that

an objection might have been timely after the Ninth Circuit's decision in *Grolier*, it is untimely now.

Finally, we note that respondents have not demonstrated or even asserted that they were prejudiced by any bias or reliance on extra-record materials by Judge von Brand; our review of the record convinces us that Judge von Brand was impartial in every respect, that his decision was thoroughly researched, and that his meticulous findings and conclusions were firmly and exclusively based on the record evidence. Of course, to the extent respondents challenged Judge von Brand's findings, conclusions, and proposed order, we undertook an exhaustive, independent review. In that review, we did not find that issues of demeanor or discretion were especially important in the determination of the case; thus, even if it were to be determined that Judge von Brand was disqualified, our decision of April 30, 1980, would not be void, as respondents have neither demonstrated nor suggested actual prejudice from his presiding, and we perceive none.⁵ See Attorney General's Manual on the Administrative Procedure Act at 73-74 (1974).

For the foregoing reasons, respondents' motion for reconsideration based upon Judge von Brand's participation is denied.

C.

Finally, respondents assert that the Commission took various actions in this adjudication and in the investigation preceding it at times when the Commission was without authority and without appropriated funds, and, consequently, that the Commission violated the Antideficiency Act. Respondents assert that the Commission should either declare the entire adjudicatory proceeding void or remand the proceeding to the Administrative Law Judge to allow discovery by respondents as to the Commission acts performed during periods of lapsed appropriations.

The Antideficiency Act, 31 U.S.C. 655(a) (1976), prohibits any government officer or employee, unless expressly authorized by statute, from incurring any obligation on the part of the United States to pay money in advance of appropriations for that purpose.

⁵ Ironically enough, at another point in this proceeding, Judge von Brand suggested to the parties that it might be necessary or advisable to have another ALJ assigned to this case because of his heavy case load. When asked for his reaction to this possibility, counsel for Herbert R. Gibson, Sr., and Herbert R. Gibson, Jr., told Judge von Brand "We'd like to keep you." Tr. at 276.

Although the Commission's funding did lapse during several of the periods listed by respondents in their petitions for reconsideration,⁶ the legal validity of the Commission's actions is unaffected by the temporary lapse of appropriations for the following reasons.

First, actions by Commission employees completed prior to the expiration of appropriations do not create an unfunded obligation and, therefore, do not result in a violation of the Antideficiency Act.

Second, even if a Commission action on the *Gibson* matter was not completed prior to the expiration of appropriations and, therefore, were to be interpreted as incurring a Commission obligation, such action was ratified by Congress when the Commission's funding was made retroactive either explicitly or implicitly to the start of the period of lapsed appropriations.⁷ As noted in the recent opinion letter of the Attorney General, on which respondents rely, such a ratification has the effect of providing legal authority for agency actions, even where there was none before. Letter from Attorney General Benjamin Civiletti to President Jimmy Carter (April 25, 1980). Thus, even assuming that respondents have standing to challenge the Commission actions,⁸ none of the Commission's activities has been invalidated by the Antideficiency Act.

In this respect, too, therefore, the petitions for reconsideration are denied.

⁶ Contrary to respondents' assertion, the Commission's funding did not lapse during the periods July 1-September 30, 1976, and March 12-March 15, 1980. See Public Laws 94-121 and 96-123, respectively. The former period, in particular, related not to a lapse in funding, but to a change in the United States Government's fiscal year.

⁷ See Public Laws 93-118, 93-124, 93-448, 93-563, 95-431, 96-86, and 96-219.

⁸ Neither the Antideficiency Act itself nor its legislative history or scheme suggests that private persons are to be afforded a remedy under the Act. The language of the statute specifies that a government officer or employee who violates Sections 665(a) or (b) of the Act will be subjected to administrative and/or criminal penalties. 31 U.S.C. 665(i)(1). Moreover, the legislative history clearly indicates that the intended beneficiary of the regulatory scheme was Congress; the statutory scheme was designed to require the careful apportionment by Federal agencies of the funds distributed by Congress and thereby ensure the efficient administration of the government's business.

Complaint

96 F.T.C.

IN THE MATTER OF
CHRYSLER CORPORATION

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

Docket C-3033. Complaint, Aug. 12, 1980—Decision, Aug. 12, 1980

This consent order requires, among other things, a Highland Park, Mich. manufacturer of motor vehicles to cease failing to notify owners of 1976/1977 Aspens and Volares, purchased or driven in specified states and locales, of the availability of replacement and reimbursement programs for premature rusting; remove and replace, without charge, the front fender(s) of vehicles that began to experience premature rusting within 36 months-in-service; and reimburse owners of affected vehicles for costs incurred in attempting to correct the premature rusting problem. The manufacturer is further required to notify dealers, in writing, of the existence of premature rusting; supply them with an adequate supply of replacement parts; and inform them of the firm's obligations under the terms of the order.

Appearances

For the Commission: *Aaron H. Bulloff, Richard H. Gateley, David Montgomery, Noble F. Jones and David V. Plottner.*

For the respondent: *Robert T. Talbot-Stern, Detroit, Mich.*

COMPLAINT

Having reason to believe that Chrysler Corporation, a corporation, has violated Section 5 of the Federal Trade Commission Act, and that a proceeding against it would be in the public interest, the Federal Trade Commission issues this complaint stating its charges. This complaint is issued pursuant to the provisions of and by virtue of the authority granted by the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Chrysler Corporation is a Delaware corporation. Respondent's address is 12000 Lynn Townsend Drive, Highland Park, Michigan.

PAR. 2. Respondent is now, and has been, engaged in the manufacture, advertising, sale, and distribution of motor vehicles.

PAR. 3. Respondent causes motor vehicles to be shipped to purchasers in various states, and therefore maintains, and at all times mentioned in this complaint has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of this complaint, "premature rusting"