MEMORANDUM

October 5, 1948

To: Milton P. Kroll, Assistant General Counsel

From: Arden L. Andresen

Subject: A majority of a quorum may bind the Commission.

I understand that Mr. Lobell has inquired regarding the number of Commissioners which are necessary to make decisions for the Commission.

The Commission has ruled formally that a majority of a quorum has power to act for the Commission, even though those favoring the action constitute less than a majority of the Commission; see International Paper and Power Company, 2 SEC 792, 793 (1937). This decision on the quorum question was reached notwithstanding the fact that the Commission's decision on the merits might have been different had all the interested Commissioners been present.

International Paper and Power Company had filed an application under Section 3 of the 1935 Act for a complete exemption, and, by virtue of the pendency of this application, was enjoying a temporary exemption. While this matter was still pending, the company proposed a plan of reorganization involving various steps which would have been subject to the Act, except for its temporary exemption. It requested the Commission to enter an order which would provide an exemption for the transactions involved in the reorganization, the exemption for the reorganization to be effective notwithstanding the outcome of the pending application for an exemption of the company from the entire statute. Four Commissioners had presided at the taking of evidence and at oral argument on various matters relating to the company, but the application for the exemption of the proposed reorganization was approved by the vote of only two Commissioners (Landis and Mathews), with Commissioner Douglas dissenting and Commissioner Healy being absent and taking no part in this

particular decision (2 SEC 580). Thereafter a stockholder of the company, John Lawless, Jr., applied for a rehearing and appealed. Two or three months later, when the Commission decided the application for rehearing, Commissioner Healy had returned and Commissioner Landis was no longer with the Commission. The application for rehearing was denied by a unanimous vote of the three Commissioners then participating, for the reason that the company's reorganization had already been carried through and the public was trading in the new securities. Moreover, the Commission expressly upheld the validity of the earlier action taken on the two-to-one vote in Commissioner Healy's absence, notwithstanding an express statement that if the earlier order were up for initial decision by the three Commissioners then participating it would fail of passage by two votes to one, 2 SEC 792, 793.

The Commission's ruling on this point was based on Section 210 of the Securities Exchange Act, which provided for the transfer of functions from the Federal Trade Commission to the SEC upon the expiration of 60 days after the date on which a "majority" of the members of the SEC had qualified and taken office, and on analogy to various cases cited in the opinion.

In the briefs on appeal, the petitioner cited no case which rejected the majority-of-a-quorum rule. The Commission cited and discussed the cases on which it had relied in its opinion (dealing with legislative bodies and the United States Tariff Commission) and certain additional cases, particularly cases in which the United States Supreme Court had decided cases by a four-to-three vote with two justices not participating; (see the briefs in our Litigation File U-53 for the cases and further discussion). In disposing of the appeal, the Court reversed the Commission's action on other grounds and found it unnecessary to consider whether the two-to-one vote was valid under the circumstances, Lawless v. Securities and Exchange Commission, 105 F. 2d 574, 578 (C.C.A. 1, 1939).

Since the time of the Commission's decision in the International Paper matter, there have been various court decisions upholding the right of a majority of the members of an agency to bind the agency, but I have been able to find only one subsequent case dealing with the powers of a majority of a quorum which happens to be less than a majority of the full membership of an agency: Chicago, B. & L. R. Co. v. U. S., 60 F. Supp. 580, 584 (D.D. Ky. 1945). The question in that case related to the validity of certain "reports" by the Interstate Commerce Commission under Section 14(1) of the Interstate Commerce Act. The Commission consisted of eleven members, two of whom did not participate in the matter. Four of the nine participating members agreed to the reports, a fifth member concurred in the result, and the other four dissented. The Court concluded that the concurring member agreed to certain ultimate findings, which were the only things essential in this case to the validity of the report and a subsequent order based upon it. With reference to our problem, the Court concluded that concurrence by five of the nine participating members was sufficient to constitute the reports in question "reports by the Commission" within the meaning of the statute. Section 17 of the Interstate Commerce Act refers to the quorum problem and was the basis of this decision; the Court stated that Section 17 "makes it clear that 'a majority of the commission shall constitute a quorum for the transaction of business' with power and authority by a majority thereof to exercise all the jurisdiction and powers conferred by law upon the Commission." While our statute do not contain such an express provision, the same principles may well be implied from Section 210 of the Securities Exchange Act, cited in the International Paper decision.

Allen L. Andresen

APPROVED FOR FILING:

Jim P. Rose