

KENNECOTT COPPER CORPORATION

Docket 8765. Order and Memoranda June 13, 1969

Order denying respondent's motion that Commissioner Jones withdraw from this case with two memoranda by Commissioner Jones.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE
MOTION OF RESPONDENT KENNECOTT COPPER CORPORATION THAT
SHE WITHDRAW FROM THIS PROCEEDING

Respondent Kennecott Copper Corporation by motion dated December 31, 1968, has requested that I disqualify myself from participation in the above captioned proceeding. If I decide not to disqualify myself, respondent moves the Commission to determine that I be disqualified from such participation.

Respondent's motion is based on certain statements attributed to me in the course of an interview on the general subject of conglomerate mergers and reported in the November 1, 1968, issue of Forbes Magazine, a copy of which is attached to respondent's motion. The "statements" in the article relied upon by respondent as the basis of its motion are quoted on page 2 of respondent's motion.¹ The complete "question" and "answer" containing the part of the "statement" which respondent excerpted in its motion papers appeared as follows:

In your written opinion in the General Foods case, you seem concerned with the way a company enters a market as well as the traditional lessening of competition by a specific merger. Why are you so preoccupied with just how a company gets into a market?

Comm. Jones. When we look at the structure of a market, we also must look at the barriers to entry. We have to determine whether the acquired com-

¹ Respondent also alleges in its motion that my letter of December 23, 1968, in reply to respondent's request that I withdraw from this proceeding also "indicated prejudgment" because it "characteriz[ed] what are the 'critical issues' in this case, and the types of evidence relevant to these issues." Respondent makes no further attempt to explain in what way this letter constitutes additional prejudgment nor indeed does it make any further reference to this letter in the body of its argument in the motion. Since counsel did not further pursue this aspect of its motion, I shall not pursue it further either except to note in passing that my December 23rd letter was simply responding to respondent's counsel's own characterization of my alleged prejudgment statements in the Forbes article as involving "a critical issue" in the case (counsel's letter of November 1, 1968, p. 2). My letter of December 23 merely noted the distinction between the language appearing in the context of the article and counsel's own description of the critical issues. If counsel were serious in pursuing this part of their motion, they would make it impossible for anyone to respond substantively to such a prejudgment charge.

pany could have gone into the market on its own or whether its new presence might keep others out. Perhaps it's easier to see in a case like the Kennecott Copper-Peabody Coal complaint. We have here an instance of a copper company that was actually moving into the coal industry on its own. Kennecott was experimenting with a small, previously acquired coal property. The complaint says that Kennecott, in effect, eliminated itself as a probable new entrant into the coal industry when it went out and bought a major coal company.

As I stated in my two letters to respondent's counsel dated November 8, 1968, and December 23, 1968, the article on which this motion is grounded was not written by me but by a Forbes reporter.² The "statements" attributed to me are in the words of that reporter reflecting his report of his conversation with me. The entire basis for respondent's motion, therefore, is respondent's construction of particular words and sentences which are not in fact mine but those of a third party.

This motion raises a basic question of general policy which I believe must be brought out in the context of the arguments of prejudgment being made here.

There is little doubt that today it is increasingly important to recognize and give heed to the public policy of ensuring as free as access as possible to government files and to public officials. This is clearly reflected, for example, in the recently enacted Freedom of Information Act. It is important that the public and the press have access to the all-too-often unfamiliar policies and procedures of our public agencies. Public officials, therefore, must make themselves available and be as candid and open about their own thinking on public issues as is possible within the bounds of propriety. In this regard, it is far preferable that in approaching the press they are not placed in such a position that it becomes essential for them to insist on editing the ultimate reporting of such interviews. This can only lead to conscious or unconscious efforts to tone down or even change thoughts originally and spontaneously expressed.

When requests are made for interviews with the press or other members of the public, in my judgment the public interest in such interviews is manifestly not served if officials respond by speaking only in vague generalities. I believe that an important part of the duties owed by a Commissioner to the public in this respect would be severely hampered if we were in effect prohibited from mentioning any pending cases and the allegations contained in the complaint. These are precisely the cases in which

² Altogether, six letters were exchanged between myself and respondent's counsel, and copies of this entire correspondence are attached.

the public is interested since they represent the most up-to-date and concrete applications by the agency of the more generalized policy which the statute commands the agency to administer.

The Forbes "question" and "answer" I think illustrates this general problem. The economic theories involved in evaluating the competitive and anticompetitive potentials of conglomerate acquisitions are by their very nature general and frequently theoretical. The Forbes reporter was attempting to direct the discussion to the practical application of these economic theories which by themselves are neither novel nor difficult to understand as theories. I could not have responded meaningfully and helpfully to this reporter's effort to shed some light on the policies of the Commission without talking in terms of concrete examples of actual applications of the general economic theories about which the Forbes reporter was inquiring.

I agree with the principle that it is important to the integrity of the administrative process to preserve the appearance of impartiality as well as impartiality in fact. Nevertheless, in judging the appearances of statements, one must consider their context. Obviously ideas attributed to me by a third party cannot be interpreted in quite the same light as statements which I make directly. In this regard, although the Forbes article represents not my words but the reporter's synthesis of thoughts and statements expressed in the course of my discussions with him in this interview, even the reporter's version of what I said is clearly in the context of the complaint allegations in the Kennecott Copper case as an illustration of the use of entry barriers which was the purport of his "question" to me. There is very little likelihood indeed of anyone concluding from this article that I am making independent statements of fact as the motion asserts.

The Forbes "question" and "answer" relied upon does no more than state what the Commission alleged in its complaint against Kennecott Copper Corporation. The complaint alleges, *inter alia*, that "Kennecott undertook an intensive investigation of the feasibility of entering the coal industry" (Par. 9) and that its board of directors "approved purchase of the Knight-Ideal Coal reserves" and "allocated funds for the opening and operating of a coal mine" (Par. 10). It is further alleged that "Kennecott incorporated a Utah subsidiary, Kennecott Coal Company, to mine, sell and ship coal and to perform all functions ancillary thereto" (Par. 11), and Kennecott's acquisition of Peabody is

charged as a violation of Section 7 in that among other things Kennecott was eliminated as a "substantial potential entrant into the production and sale of coal to electric utility companies" (Par. 30(c)).

Respondent is not denying its previous acquisition of the Knight-Ideal coal property. Respondent's claims of prejudgment are based on two phrases excerpted from the Forbes article which allegedly appear not as a description of the complaint allegations but rather as statements of fact by me. These two phrases and the particular "excerpt" of the article relied upon by respondent as evidencing my prejudgment of "crucial issues" in the case is that Kennecott was "moving into the coal industry on its own" and was "experimenting with a small, previously acquired coal property."³ As I pointed out in my letter to counsel of December 23, 1968:

These two statements . . . appeared as part of a discussion of why the Commission had a concern with market entry as a factor in considering the applicability of Section 7 of the Clayton Act and must be so read. Thus the discussion started with a reference to what the Commission "must look at" when it is dealing with market structure and market entry; the next reference is to what the Commission "must determine" with respect to market entry. Then comes the illustrative reference to Kennecott Copper involving a market entry situation and summarizes the specific charge in the complaint on this market entry illustration [to the effect that] . . . the "complaint says that Kennecott eliminated itself as a probable new entrant."

In sum, the complete context of this report is clear. I was directing my attention to a general issue and alluding to the Kennecott Copper complaint as an illustration of the way in which such issues manifest themselves. Certainly no issue of prejudgment can arise on the basis of a simple reference to a pending case and to the allegations contained in that complaint. This is in fact the way in which I referred to the Kennecott Copper complaint, and in my judgment the Forbes reporter did not distort the thrust of my remarks.

I reiterate my unequivocal denial: I have not prejudged any issue in this case to any degree. This magazine article is not itself evidence of prejudgment. Moreover, in my opinion it does

³ Respondent's letter of November 1, 1968, and present motion assert that Kennecott was neither engaged in coal *mining* nor capable of doing so. I am not quite sure of the relevance of this argument in view of the fact that the "statements" attributed to me in the Forbes article do not speak of coal mining. This argument exemplifies to me the extent to which respondent is reading into the article its own interpretation of the issues which it sees in this case.

not on its face give the appearance of prejudgment nor does it reflect any ideas or attitudes which are likely to be interpreted as any prejudgment by me of any issues in the pending complaint against this respondent.

Since I cannot agree that there is any ground on which I should or must disqualify myself, I must deny respondent's request to disqualify myself from participation in this proceeding.

I shall not be present and shall not participate in any deliberation or decision by the Commission on respondent's alternate request that I be disqualified from participation by the Commission.

SUPPLEMENTAL MEMORANDUM OF COMMISSIONER JONES IN RESPONSES TO THE MOTION OF RESPONDENT KENNECOTT COPPER CORPORATION THAT SHE WITHDRAW FROM THIS PROCEEDING

On rereading my memorandum to the Commission in connection with the above-captioned matter and respondent's motion to disqualify me, I realize that it does not state precisely what I said and did not say to the Forbes reporter in that interview. I am afraid that my concern not to impugn in any way the integrity of Forbes' reporting and not to overstate my own ability to recall the exact words and sentence sequence which I used in talking to the Forbes reporter may have been the cause of my failure to explain more precisely what I can in fact recollect affirmatively about that interview. Accordingly, I am submitting this supplemental memorandum to the Commission to make my recollection as clear as possible.

I can state unequivocally and affirmatively that all statements made to the Forbes reporter by me about the Kennecott Copper case were strictly and carefully made in the context of what the filed complaint charged. I could as easily have handed the reporter a copy of the complaint and pointed out the charging allegations to show him what the Commission's complaint charged. Instead, I reviewed what the complaint charged, and I am certain that this context of my remarks was clear to the reporter.

I cannot now, however, either deny or affirm whether the exact words which are attributed to me in the Forbes report in describing the complaint allegations are literally mine or the reporter's version of them.

I do know and can state affirmatively that in fact I did not once in my remarks to the reporter ever refer to the Kennecott Copper matter except in the context of telling him what the complaint alleges. If I did not repeat the words "the complaint

alleges" before each statement I made to the reporter concerning this case, I am quite certain he understood that to be the context of my remarks. The reporter's account of this conversation would have been more accurate had he made this context more explicit, but I presume the reporter is not a lawyer and therefore not sensitive to this important qualification.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Kennecott Copper Corporation, by motion dated December 31, 1968, requested that Commissioner Jones withdraw from participation in this proceeding, or in the alternative, that the Commission determine that Commissioner Jones be disqualified from such participation.

Commissioner Jones, for the reasons stated in the attached memoranda, has decided not to withdraw from participation in any further proceedings in this matter.

Traditionally, the Commission has viewed requests for disqualification as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of the Commissioner's sound and responsible discretion. This is only proper and consistent with the law and no basis for departing therefrom has been demonstrated in the instant proceeding. Accordingly,

It is ordered, That the motion for disqualification of Commissioner Jones be, and it hereby is, denied.

Commissioner Elman was unable to concur in this action for the reason that he is unable to distinguish *Texaco, Inc. v. F.T.C.*, 336 F.2d 754 (D.C. Cir. 1964). The rationale of that case, as well as *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757 (6th Cir. 1966), and *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2d Cir. 1959), appears to him to be controlling. Since Section 7 of the Administrative Procedure Act compels the agency to determine such a matter as a part of the record and decision in the case, Commissioner Elman has reluctantly reached the conclusion that the awkwardness and embarrassment of disqualifying a fellow Commissioner cannot be avoided here.

Commissioner Jones did not participate.