

any other changes in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
KENNECOTT COPPER CORPORATION

Docket 8765. Interlocutory order, July 23, 1974

Denial of respondent's petition to reopen the proceedings on question of relief. Dissenting statement by Commissioner Nye; separate statement by Chairman Engman, concurred in by Commissioner Dixon.

Appearances

For the Commission: *Fiodie P. Favarella, Joseph Eckhaus and P. Abbott McCartney.*

For the respondent: *Sullivan & Cromwell, New York, N.Y. and Howrey, Simon, Baker & Murchison, Wash., D.C.*

DISSENTING STATEMENT

BY NYE, *Commissioner*:

Kennecott Copper Corporation has petitioned the Commission to reopen these proceedings on the question of relief.¹ I would grant the

¹The petition was filed pursuant to Section 3.72(b) (2) of the Commission's Procedures and Rules of Practice, which provides in relevant part:

(cont'd)

petition and reopen these proceedings for the limited purpose of supplementing the record with evidence relating to developments occurring since our original decision which may be relevant to the question whether the relief we ordered, divestiture of Peabody Coal Company and a ten year moratorium on further acquisitions, is still the most appropriate relief we can fashion to satisfy the purpose of Section 7 of the Clayton Act, 15 U.S.C. §18.

This conclusion does not proceed from recognition of any infirmities in our original decision or order. The Commission was correct on the basis of the facts as they existed when it acted and nothing occurring since the record was closed—or at least since our order was entered—can detract from the correctness of that decision. *Reynolds Metals Company*, 56 F.T.C. 1680 (1960). Nor do I accept any contention that the Commission did not give Kennecott a fair hearing on the question of relief or that the Commission somehow has the burden of proving it fashioned the least onerous relief possible after it determines a violation of the law has occurred. The Commission made clear its opposition to the Peabody acquisition long before that acquisition was consummated and there was no question before, during or after the trial that complete divestiture was the object of the Commission's effort. Divestiture is and should continue to be the normal remedy for violations of Section 7 of the Clayton Act. *United States v. E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 328-329 (1961). Finally, I find no merit in the suggestion that this case is in some way so important that the relief granted must be fashioned to uphold "the public interest" rather than to remedy a violation of Section 7 of the Clayton Act. When a distinction between these two objectives is to be drawn, it will be for Congress to do so.

Nevertheless, much which may be highly relevant to the question of appropriate relief has occurred since the trial record was closed over five years ago.² The shortage of energy supplies which developed in the summer of 1973 and became acute during the subsequent embargo imposed by some of the oil-exporting countries greatly altered this

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Whenever any person subject to a decision containing a rule or order which has become *** final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. ***

Statutory authority for the petition is contained in Section 11(b) of the Clayton Act, 15 U.S.C. §21(b), which provides in relevant part:

[T]he Commission *** may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission *** conditions of fact or of law have so changed as to require such action or if the public interest shall so require ***.

²The trial commenced on Jan. 27, 1969, and concluded on June 11, 1969.

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country's perception of its energy needs. The consequent national drive for self-sufficiency in energy production relies in significant part on accelerated exploitation of our abundant coal reserves and wider participation in that exploitation.³

There is substantial reason to believe these events have precipitated changes in fact central to important findings of the Commission, principally those findings relating to trends in industry concentration and foreseeable market entry by oil and gas companies and public utilities.⁴ In light of these events and the recent expertise developed by the Commission,⁵ I believe we should consider again, with a current record, the remedy appropriate to the violations involved in this case.⁶

SEPARATE STATEMENT BY CHAIRMAN ENGMAN,
CONCURRED IN BY COMMISSIONER DIXON

Although the Commission has decided to deny the petition to reopen the Commission's order of divestiture in this manner, this action does not deny recognition of the importance of the ultimate question that will eventually confront the Commission—whether divestiture under a plan to be submitted by respondent will accomplish not only separation of Kennecott's ownership and control over Peabody, but also continuation of Peabody "as a going concern and effective competitor in the mining, production and sale of coal" as provided in the Commission's order. This question—which in my view is the crucial question underlying the issues that have been argued to us on this petition—cannot be determined now

³See Energy Messages of President Nixon to the Congress, Nov. 8, 1973 and Jan. 23, 1974.

⁴The affidavit of Leonard B. Rahn, vice president of sales for Peabody Coal Company, filed in support of the Kennecott petition provides some detail with respect to a number of the new entrants, the expansion of certain firms in the industry, and other information relevant to present trends in concentration. Earlier, our opinion stressed that the coal industry was "experiencing a steady trend toward rising concentration" which "unless halted, foreshadows ominous developments in the coal industry, with production and sale of coal concentrating in fewer and fewer hands." *Kennecott Copper Corp.*, 78 F.T.C. 744, 914 (1971). In explaining our concept of potential competition we conceded that, as a general rule, a violation of Section 7 is generally found only in those circumstances in which the acquired firm is a leading factor in a "tight" oligopoly, whereas the coal industry, at least on a national level, was a "loose" oligopoly. *Id.* at 922. We recognized an exception to this rule, however, because two additional factors were present in the coal industry, i.e., "the growth of the leading firms compared with the growth of the coal industry as a whole" showed a "demonstrated trend toward high concentration" and "barriers to entry [were] high and * * * becoming more formidable." *Id.* at 922, 924. We warned that competition might become nonexistent if we did not act promptly: "[T]he Commission should not wait until an industry has become engulfed in oligopoly's stranglehold before [it should] intercede." *Id.* at 928.

While it is clear that the Commission should not commit itself to such a wait, it is also clear that the Commission should not preclude itself from considering facts which occur during the process of judicial review if that is necessary to better serve the purposes of Section 7 of the Clayton Act.

⁵See, e.g., Staff Economic Report, Interfuel Substitutability in the Electric Utility Sector of the U.S. Economy (1972) and Staff Economic Report, Concentration Levels and Trends in the Energy Sector of the U.S. Economy (1974).

⁶The supplemental record should include evidence showing what firms have newly entered the coal industry, the means by which entry was effected, the other business enterprises in which these firms are engaged, the prospect of future entry by additional firms, the kind and amount of investment capital available for the development of coal resources, and the extent to which coal is being or may be substituted for other sources of energy. See Staff Economic Report, re: Interfuel Substitutability in the Electric Utility Sector of the U.S. Economy (1972).

but must await completion of steps by Kennecott to develop an appropriate divestiture plan for submission to the Commission.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On May 23, 1974, Kennecott Copper Corporation (hereinafter Kennecott) filed a "Petition to Reopen the Proceedings on the Question of Relief," pursuant to Section 3.72 of the Commission's Rules of Practice, including therein a request for oral argument on the petition, and submitted at the same time a request for oral discussion. Kennecott has subsequently filed various supplemental submissions relevant to its petition. The Bureau of Competition has replied, by answer of June 20, 1974, opposing the petition. Oral argument upon the petition was held on July 10, 1974. The Commission has considered the arguments of petitioner, and does not believe that adequate grounds have been shown to warrant reopening these proceedings for the purpose of considering the issue of relief. The issue of appropriate relief was considered by the Commission at the time it issued its original decision, and its order has been affirmed by the United States Court of Appeals [467 F. 2d 67], and certiorari denied by the Supreme Court [416 U.S. 963 (1974)]. Alleged changed conditions of fact and law described by petitioner are not such as to warrant reopening of these proceedings.

Accordingly, *It is ordered*, That the "Petition to Reopen the Proceedings on the Question of Relief" be, and it hereby is, denied.

Commissioners Thompson and Nye dissenting.

IN THE MATTER OF

GER-RO-MAR, INC., TRADING AS SYMBRA'ETTE, ET AL.

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

*Docket 8872. Complaint, Nov. 24, 1971—Decision, July 23, 1974**

Order requiring a San Jose, Calif., manufacturer of brassieres, girdles, swimwear, wigs and lingerie, among other things to cease using an open-ended, multi-level (pyramid) marketing plan to recruit distributors for its products; misrepresenting the earnings and profits a distributor may expect to make; maintaining resale prices; and restricting distributors as to whom they may sell their merchandise.