
IN THE MATTER OF

KENNECOTT COPPER CORPORATION

Docket 8765. Order, July 22, 1975

Denial of respondent's petition to reopen proceeding to consider the question of relief.

Appearances

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

For the respondents: *John L. Warden, Sullivan & Cromwell*, New York City. *John Bodner, Francis O'Brien, Howrey, Simon, Baker & Murchison*, Wash., D.C.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On July 7, 1975, Kennecott Copper Corporation filed a "Petition to Reopen the Proceeding" pursuant to Section 3.72 of the Commission's Rules of Practice. The Bureau of Competition filed an "Answer in Opposition" on July 14, 1975. The arguments raised in both Petition and Answer are essentially the same as those presented before the Commission one year ago when it denied a similar petition by respondent to reopen. The Commission has again considered the arguments of petitioner and does not believe that adequate grounds have been shown to warrant reopening to consider the question of relief. The order in this matter was intended to separate Peabody from Kennecott in a way that would leave Peabody as a viable, vigorous competitor in the mining and sale of coal, as it was before its acquisition. We fully expect that Kennecott will come forth with a firm proposal as of October 1 to achieve this result, either via sale or spinoff. Accordingly,

IT IS ORDERED, That the "Petition to Reopen the Proceeding" be, and it hereby is, denied.

Commissioners Thompson and Nye dissenting.

DISSENTING STATEMENT

JULY 23, 1975

BY THOMPSON, *Commissioner*.

Respondent Kennecott has petitioned the Commission to reopen this matter for the purpose of receiving evidence on the question of whether, in view of certain alleged changes in the industry and in the economy at large since our divestiture order was entered and affirmed by the courts, reconsideration of that order might now be in the public interest. I believe this petition raises a number of serious issues that ought to be examined thoroughly by this Commission and thus would have granted it to the extent of ordering an administrative hearing on the relief question before one of our administrative law judges on an expedited basis, subject, however, to an agreement by respondent that no appeal would be taken from the decision rendered by the Commission on the basis of that supplementary record.

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Dissenting Statement

SEPARATE STATEMENT

SEPTEMBER 4, 1975

BY ENGMAN, *Chairman*.

In ruling on a similar petition to reopen filed by Kennecott approximately one year ago, I stated:

Although the Commission has decided to deny the petition to reopen the Commission's order of divestiture in this matter, 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 but must await completion of steps by Kennecott to develop an appropriate divestiture plan for submission to the Commission.

Nothing in the present petition causes me to believe that the situation is any different today than it was a year ago.

DISSENTING STATEMENT

SEPTEMBER 4, 1975

BY NYE, *Commissioner*.

I continue to believe these proceedings should be reopened for the purpose of assessing the changes in the structure of the coal industry which have occurred since the Commission filed its original order in this case over four years ago.

During just the last year, every government and private study of the national energy problem has concluded that the energy needs of the country can be met only by a massive increase in coal production.¹ The Federal Energy Administration has begun to order public utilities to convert their generating plants from oil and natural gas to coal.² More large oil companies and public utilities have entered the coal industry. The most recent production statistics indicate that 20 percent of the total industry production of coal was produced by firms which were either not involved in coal production, or only negligibly so, when the Commission entered its original order.

It thus appears indisputable that, since the Commission last examined the facts, the need for coal has increased dramatically, concentration in the coal industry has declined markedly, major companies have aggressively acquired and begun to exploit coal

¹ *E.g.*, National Plan for Energy Research, Development and Demonstration, Prepared by the Energy Research and Development Administration, at the direction of Congress, released by the President on June 30, 1975.

² *Wall Street Journal*, July 2, 1975, page 3, column 2.

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reserves, and the feared entrenchment of Peabody's dominance of the coal industry through Kennecott's ownership has not materialized.

There is no suggestion that any customer, competitor, or potential purchaser of Peabody will be prejudiced if the Commission undertakes the requested reexamination. Therefore, I find no substantial public interest to weigh against the benefit to be derived from examining the evidence concerning current developments in the coal industry. I would grant the petition to reopen.
