

IN THE MATTER OF  
JIM WALTER CORPORATION

*Docket 8986. Interlocutory Order, Nov. 23, 1976*

Denial of respondent's motion that the Commission disqualify Chairman Collier from participating in the decision of the case.

*Appearances*

For the Commission: *Peter W. Kitson, Harold J. Lamboley, Gilbert E. Geldon and Joseph J. O'Malley.*

For the respondent: *John J. Voortman, W. Donald McSweeney, Susan A. Henderson, Schiff, Hardin & Waite, Chicago, Ill. and Dan L. Saltsman, Tampa, Fla.*

ORDER DENYING MOTION TO DISQUALIFY

During oral argument before the Commission on respondent's appeal from the initial decision of the administrative law judge in this matter, respondent's counsel questioned Chairman Collier's participation in the decision of the case because of his prior service as the Commission's General Counsel from July 1973 to April 1975. The Commission allowed respondent 30 days to file a motion for disqualification. Respondent now requests access to all records pertaining to the Chairman's participation in this matter as General Counsel and leave to file a motion for disqualification 15 days after delivery of the records. In the alternative, respondent moves that the Commission immediately require Chairman Collier's disqualification.

In response to the motion, Chairman Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth at length his reasons therefor.

The Commission has carefully reviewed respondent's motion, complaint counsel's answer, and the memorandum of Chairman Collier. In light of such consideration, the Commission has determined that no grounds exist for granting the requested disqualification. As the Commission stated in *Grolier, Inc.*, CCH [1973 - 76 Transfer Binder] Trade Reg. Rep. ¶21,095, at 20,957-58, [87 F.T.C. at 180],

The requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions." See, Senate Judiciary Committee Print, June 1945. Those who have

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done the actual work of investigating and building the case and those who have prosecuted the case with a "will to win," Davis, *Administrative Law Treatise*, §13.07 (1958), may have a sufficient stake in the case to preclude the dispassionate judgment that due process and the Administrative Procedure Act require.

The General Counsel performs neither prosecuting nor investigative functions and lacks the kind of stake in the outcome of a case that would warrant disqualification. Because our decision turns on the nature of the General Counsel's responsibilities, we do not believe that documents relevant to Chairman Collier's participation in this matter as General Counsel would provide a basis for disqualification. Accordingly,

*It is ordered*, That the aforesaid motion be, and it hereby is, denied.

Chairman Collier did not participate in the Commission's determination of this matter.

MEMORANDUM OF CHAIRMAN COLLIER IN RESPONSE TO REQUEST  
OF RESPONDENT JIM WALTER CORPORATION THAT HE WITHDRAW  
FROM PARTICIPATION IN THIS PROCEEDING

At oral argument on September 15, 1976, respondent Jim Walter Corporation questioned my participation in this proceeding because of my prior service as the Commission's General Counsel from July 1973, to April 1975, but expressed uncertainty as to whether my former service would require disqualification. (Transcript of proceedings, September 15, 1976, p. 3). Respondent was given thirty days to file a motion for disqualification. In a motion of October 15, 1976, respondent now requests access to any records which would indicate that I had any involvement in the investigation, institution, or prosecution of this matter, and an additional fifteen days after receipt of such records within which to file such a motion for disqualification. Respondent filed a similar request for documents under the Freedom of Information Act on September 21, 1976. Alternatively, should the Commission deny that request, respondent asks the Commission to disqualify me at this time.

Because "the inquiry called for by a motion for disqualification is necessarily subjective in nature," I have decided to respond to respondent's motion in the first instance, in keeping with past Commission practice, *American Cyanamid Co., et al.*, 59 F.T.C. 1488 (1961); 60 F.T.C. 1881, 1885 (1962).<sup>1</sup> Respondent's specific concern is that my participation in this proceeding might constitute a mixture of

<sup>1</sup> See also *The B.F. Goodrich Co. and Texaco, Inc.*, 62 F.T.C. 1513, 1514 (1963); *The Texas Co.*, 62 F.T.C. 1558, 1559; 1560 (1963); *Kennerott Copper Corp.*, 75 F.T.C. 1091, 1096 (1969); *ITT Continental Baking Co., Inc., et al.*, 82 F.T.C. 1183, 1188 (1973); and *National Commission on Egg Nutrition, et al.*, Dkt. 8987 (July 14, 1976) [88 F.T.C. 84].

prosecutorial and adjudicative functions in violation of the Administrative Procedure Act, 5 U.S.C. §554(d).<sup>2</sup>

Respondent misapprehends the function of the Commission's General Counsel. As I said in *National Commission on Egg Nutrition, et al.*, Dkt. 8987 (memorandum of July 8, 1976):

As the Commission's General Counsel, I neither possessed nor exercised prosecutorial responsibility. On the contrary, the Commission's General Counsel is freed of such duties so that he may advise the Commission or individual Commissioners in all matters of law and policy in adjudicative or nonadjudicative settings.<sup>3</sup>

To protect against the intermingling of prosecutorial and adjudicative functions, the Commission has assigned exclusive responsibility for advocacy of administrative complaints to the Bureaus of Competition and Consumer Protection and its Regional Offices. Counsel supporting a complaint are organizationally independent of the General Counsel and are not subject to his supervision or control.<sup>4</sup>

As the Commission noted in *Grolier, Inc.*, Dkt. 8879 (Order Denying Motion to Disqualify Administrative Law Judge, February 10, 1976) [87 F.T.C. at 180], the

requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions."

The Commission concluded that an assistant to a Commissioner, "who provides advice during the pre-complaint stage of an investigation," does not have the kind of stake in the outcome that would inhibit a fair decision. The General Counsel is in a similar position.

The General Counsel routinely attends meetings of the Commission and receives memoranda circulated by the Commissioners, including recommendations of the prosecuting Bureaus that complaints be issued. This case was no exception.<sup>5</sup> I knew of the staff's complaint recommendation and the Commission's response to that recommendation. As I recall, and as my records indicate, I had no other role in this matter. The Commission is not disqualified from adjudicating a matter simply because the Commission received and accepted the recommendation of its staff that a complaint issue, *FTC v. Cinderella Career and Finishing Schools, Inc., et al.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968), and I

<sup>2</sup> "Respondent's Motion Requesting the Production of Documents or, in the Alternative, the Disqualification of Chairman Calvin J. Collier," at 3-4.

<sup>3</sup> [Note 7 in the original.] See 35 F.R. 10627 (1970), amended 36 F.R. 2943 (1971).

<sup>4</sup> [Note 8 in the original.] See 35 F.R. 10627 (1970). Unlike the situation in *National Commission On Egg Nutrition*, I was not called upon in this case to represent the Commission in collateral litigation.

<sup>5</sup> Because these documents are internal memoranda of the Commission, it is for the Secretary or the Commission to decide whether they should be made available to respondent either as discovery in response to respondent's motion or, pursuant to Section 4.11 of the Commission's Rules, 16 C.F.R. §4.11, in response to respondent's Freedom of Information Act request.

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do not see why I should be disqualified simply because, like the Commission, I received the same information.

I therefore conclude that there is no reason for me to decline to carry out my statutory duty to participate in this proceeding. My participation would neither result in a prohibited mixing of the Commission's prosecutorial and adjudicative functions, in violation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. §554(d), nor would my participation create an "appearance of impropriety." I therefore decline to recuse myself from further participation in this proceeding.

IN THE MATTER OF  
THE PILLSBURY COMPANY, ET AL.

*Docket 9091. Interlocutory order, Nov. 24, 1976*

Commission issues instructions to ALJ pursuant to order of the court, and establishes reporting schedule as to status of case.

*Appearances*

For the Commission: *Peter J. P. Brickfield, Joseph Tasker, Jr.*

For the respondents: *Murphy & Pearson, Chicago, Ill. and Faegre & Benson, Minneapolis, Minn.*

INSTRUCTIONS TO ADMINISTRATIVE LAW JUDGE

On November 15, 1976, the Commission and the respondents, together with the United States Attorney for the Northern District of Illinois, entered into a stipulation and order which was approved and entered by Judge Flaum of the United States District Court for the Northern District of Illinois, a copy of which is attached. Section V of that order calls for all parties to these proceedings to expedite final disposition of this matter, without waiver of any legal rights.

Pursuant to the order of the court, the Commission hereby directs that the administrative law judge take all appropriate steps to expedite the proceedings before him and that he make a brief written report to the Commission on February 15, 1977, and on the 15th of every third month thereafter during the pendency of proceedings in this matter before him as to the procedural status of the matter and the steps which have been taken to expedite the proceedings.

STIPULATION AND ORDER

Pursuant to the motion filed by the Federal Trade Commission, Judge Leighton, U. S. District Judge for the Northern District of Illinois, Eastern Division, issued on November 12, 1976 a Temporary Restraining Order prohibiting the consummation of the acquisition of the assets of Fox Deluxe Foods, Inc. ("Fox") by The Pillsbury Company ("Pillsbury") for ten days.

The parties having met to consider the most appropriate manner in which to assure the continued viability of Fox's frozen prepared pizza operations as a readily identifiable operation which might most easily be divested by Pillsbury as a viable, separate and independent company, in the event a final order of divestiture results from the administrative proceeding against Fox and Pillsbury commenced by the Federal Trade