

~~FEDERAL~~ FEDERAL TRADE COMMISSION DECISIONS

Interlocutory Order 96 F.T.C.

IN THE MATTER OF
TENNECO, INC.

Docket 9097. Interlocutory Order, Sept. 22, 1980

~~DER~~ DENYING RESPONDENT'S MOTION FOR RELIEF NECESSITATED
~~EX~~ ~~PARTE~~ CONTACT WITH THE COMMISSION AND RESPONDENT'S
~~MOTION~~ MOTION TO DISQUALIFY COMMISSIONER PITOFSKY

On August 12, 1980, respondent, Tenneco, Inc., filed two motions alleging due process violations and procedural irregularities arising out of Commission consideration of a separate staff investigation of certain acquisitions by respondent, acquisitions that are not at issue in the present adjudicative matter. Because the issues raised by respondent in those two motions are so closely related, as are our conclusions, we find it appropriate to respond to both motions in a single order.

In one motion, respondent seeks alternative forms of relief occasioned by what it describes as improper *ex parte* contacts with the Commission by complaint counsel involving factual issues yet to be decided in the present proceeding.¹ In another, respondent moves that Commissioner Pitofsky be disqualified from participation in the decision of this appeal because, in presenting the facts of that separate merger investigation to the Commission, he allegedly prejudged certain issues in the present adjudication.² Complaint counsel have responded to each of these motions,³ and Commissioner Pitofsky has submitted a response to the disqualification motion.⁴

Background

The issue central to this controversy is whether the investigation of a series of foreign acquisitions by Tenneco distinct from the acquisition in adjudication here was conducted as, and was in fact, a "separate" investigation as that term is used in Rule 4.7(f) of the Commission's Rules of Practice. Briefly, these are the relevant facts. Respondent contends that in December 1976, in response to a letter of inquiry from the Bureau of Competition, issued in order to

¹ Respondent's Motion for Relief Necessitated by Complaint Counsel's *Ex Parte* Contact with the Commission, August 12, 1980 (hereinafter "*Ex Parte* Motion").

² Respondent's Motion To Disqualify Commissioner Pitofsky, August 12, 1980 (hereinafter "*Disqualification Motion*").

³ Opposition to Respondent's Motion for Relief Necessitated by Complaint Counsel's *Ex Parte* Contact with the Commission, September 12, 1980; Opposition To Respondent's Motion To Disqualify Commissioner Pitofsky, September 12, 1980.

⁴ Decision of Commissioner Pitofsky in Response to Motion of Tenneco, Inc. To Disqualify Him from Participation in This Proceeding, September 9, 1980.

investigate whether Tenneco's acquisition of Monroe Auto Equipment Company ("Monroe") violated Section 7 of the Clayton Act and Section 5 of the FTC Act, it provided documents relating to its acquisition of five European companies involved in production and sale of exhaust system parts. In March, 1977, the Commission issued a complaint challenging Tenneco's acquisition of Monroe because of its alleged effects upon competition in replacement markets for shock absorbers and exhaust system parts. It is undisputed that that complaint did not challenge Tenneco's five foreign acquisitions. The issue is whether the five foreign acquisitions were investigated separately as a suspected violation of Section 7.

By complaint counsel's account, the file of documents regarding those foreign acquisitions was kept separate from the documents relating to the Tenneco/Monroe matter and, after separate clearance by the Department of Justice on the matter, the foreign acquisitions were investigated *separately* from the Tenneco/Monroe matter, with separate Bureau of Competition designation. Even so, certain factual information about the foreign acquisitions originally came from the Tenneco documents submitted pursuant to the letter of inquiry issued in the Tenneco/Monroe investigation. After further investigation, and during the trial of the Tenneco/Monroe acquisition, the staff recommended that the Commission issue a complaint alleging that Tenneco's acquisition of the five foreign exhaust system parts firms violated Section 7 of the Clayton Act and Section 5 of the FTC Act. It was in the normal course of presentation of that matter to the Commission for consideration that Commissioner Pitofsky made the written and oral statements about facts relating to replacement markets for shock absorbers and exhaust system parts that respondent claims prejudged similar questions of fact at issue in this adjudication. A complaint challenging the five foreign acquisitions was not issued by the Commission and the matter was closed.

The Ex Parte Communications

Respondent contends that the *ex parte* communications by staff detailed in its motions necessitate drastic forms of relief, including a) dismissal of the instant complaint or b) preclusion of any finding or conclusion that was the subject of improper *ex parte* communication and disclosure of the entire file of the now-closed investigation of the foreign acquisitions and c) disqualification of Commissioner Pitofsky.⁵

⁵ Respondent brings this motion to the Commission, it says, in the event that the ALJ's dismissal is not affirmed. But the contentions presented raise such important and, we think, clear-cut questions going to the lawful, constitutional functioning of the Commission that we hereby dispose of them, prior to the oral argument.

We find that no relief whatsoever is necessitated, for we find in the first instance that no improper *ex parte* communications have occurred. The communications that undoubtedly occurred were quite proper and complied precisely with the Commission's procedures for treatment of such communications which themselves conform to the standards of the Administrative Procedure Act, 5 U.S.C. 552(a), 554(d), and the Due Process Clause. We also find that Commissioner Pitofsky, who has removed himself from the decision of these immediate questions, has not prejudged any issue of fact or law in this appeal and therefore should not be disqualified from participation.

Respondent argues too broadly when it says that, in the course of the Commission's consideration of the proposed complaint against Tenneco for its foreign acquisitions, "extensive" presentations were made concerning the manufacture and sale of exhaust system parts. But, in any event, it admits that presentations of this nature are not "improper" under Commission Rule 4.7(f) if they involve, *inter alia*, "the initiation, conduct or disposition of a separate investigation." Rules of Practice, Section 4.7(f). In the event of an *ex parte* communication described in Rule 4.7(b), but made in the context of a separate investigation, Rule 4.7(f) provides that the portion of the communication that relates to a fact in issue in an adjudicative proceeding is to be placed in the docket binder of the adjudicative proceeding to which it pertains. We find that the prescribed procedure was followed assiduously here.⁶

Turning to the central issue before us, we reject respondent's assertion that this adjudication and the investigation of the legality of the foreign acquisitions were the same proceeding. They were not. Respondent makes much of the similarity or even identity of some of the arguments about product and geographic markets that appear in both complaint counsel's brief in this case and the staff's memorandum to the Commission in the other investigation, but this argument is not persuasive or controlling. As we also discuss in the context of the disqualification argument, the common facts and arguments cited by respondent simply relate to fundamental and threshold determinations that arise in any antitrust matter—the relevant geographic and product markets.⁷ The fact that one or more of the

⁶ We note that Rule 4.7(f) does not call for the parties to the adjudicative proceeding in question to be notified that the material is in the docket binder.

⁷ Respondent also cites two findings by the Administrative Law Judge (IDF 395, 465) that purportedly demonstrate that the foreign acquisitions are an issue of fact in the instant adjudication. But both of those findings relate solely to Tenneco's exploration of the possibility of acquisition of a British shock absorber manufacturer (not one of the five foreign firms) that the law judge mentions in the context of available threshold acquisition for Tenneco or Monroe. *Ex Parte* Motion, p. 20 n. 9. The five foreign acquisitions are not mentioned in those findings.

markets is involved in adjudication does not immunize the markets or the firms in them from further law enforcement scrutiny.

Respondent concedes that it does not obtain immunity from a separate Commission investigation of its conduct or its industry just because it is a party to adjudication. Its complaint is that Rule 4.7 has been violated because there has never been a "finding" that the investigation of the foreign acquisitions was "separate." But we find ample support in the record to establish that the investigation of whether Tenneco's acquisition of the five firms independently violated Section 7 and Section 5 was a separate investigation. That record evidence includes the separate staffing, separate Justice Department clearance, separate file number, separate document management, separate subject matter and the manner of compliance with Rule 4.7 itself, involving the release of factual portions of staff papers and Commission memoranda bearing on this adjudication.

The Prejudgment Argument

In addition to the foregoing, we find it unassailable that the combined functions of investigator and decisionmaker in the office of the Federal Trade Commissioner do not give rise to a denial of due process. It is the duty of the commissioners to weigh the facts of investigations of acts or practices which may violate the laws entrusted to them, in order to determine whether there is reason to believe that such a violation has occurred, in contemplation of the issuance of a complaint. Because the commissioners are purposefully appointed to terms sufficiently long to allow them to accumulate and bring to bear expertness in industries as well as in the law, *FTC v Cement Institute*, 333 U.S. 683, 701-02 (1948), it is neither unusual nor improper that they may have occasion to perform reason-to-believe analysis of a potential violation involving a company, industry or market that is the subject of on-going litigation. When this occurs, i.e., when a commissioner has ruled on a previous complaint involving certain facts or firms, he or she is not precluded from performing further statutory duties of investigation merely because a subsequent investigation involves some of those facts or firms. *Withrow v Larkin*, 421 U.S. 35 (1974); *FTC v Cement Institute*, 333 U.S. 683 (1948).

This investigative analysis of reason-to-believe is based upon *ex parte* presentation of facts, and, as noted above, Commission rules provide for disclosure of such facts where appropriate. This reason-to-believe function also necessitates tentative and preliminary conclusions, and in antitrust matters preliminary conclusions about

Interlocutory Order

— 96 F.T.C.

geographic and product markets are essential and inescapable. Prior contact with such market-related facts does not preclude the Commission from further investigations involving them. As the Supreme Court has said by way of an example more extreme than the issue before us,

No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. *Withrow v Larkin*, 421 U.S. at 48-49.

The Supreme Court has specifically upheld the constitutionality of the combination of investigative and decision-making functions in the FTC, *FTC v Cement Institute*, and has directly addressed the issue of prior Commission contact with facts that are subsequently adjudicated:

The fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondent's basing point practices . . . Id. at 701.⁸

It is clear from the cautious and qualified language he used in presenting the matter of Tenneco's foreign acquisitions to the Commission that Commissioner Pitofsky was reaching only the preliminary conclusions appropriate to the reason-to-believe function. For example, he stated a) that the proposed product market "may be an appropriate one," that the foreign and domestic sales of exhaust system parts were joined "in the complaint in Tenneco I," that "it does appear that there is a strong argument in favor," and that evidence "would seem to support" the market proposal before the Commission.⁹ Furthermore, the transcript of the Commission meeting on the investigation of the foreign acquisitions, which has been released and appended to Commissioner Pitofsky's response,¹⁰ shows that he has not prejudged any issue of fact in the current adjudication.

Conclusion

For the foregoing reasons, we conclude that the discovery of

⁸ Even where an agency conducted two separate, sequential investigations of an identical set of facts for two separate legal determinations, the court found no due process violation in the agency's conduct of the second hearing after reaching conclusions in the first. *Pangburn v C.A.B.*, 311 F.2d 349 (1st Cir. 1962).

⁹ Respondent's Disqualification Motion, pp. 3-4.

¹⁰ Appendix C, Decision of Commissioner Pitofsky in Response to Motion To Disqualify Him.

information about the foreign acquisition during the course of the investigation of the Tenneco/Monroe acquisition did not violate due process or any rule of the Commission, that the record establishes the separateness of the foreign-acquisitions investigation, that the presentation of the separate investigative matter to the Commission by the staff involved *ex parte* communications of the type described by subsection (f) of Rule 4.7, that such *ex parte* communications are not prohibited so long as proper procedures for their treatment are followed, that such procedures were followed, that those procedures satisfy the standards of due process and fairness under the Administrative Procedure Act, that the presentation of the subsequent matter to the Commission by Commissioner Pitofsky was proper and constitutional and that it involved no prejudgment of issues in this adjudication. Having reached these conclusions, we find that the relief requested by respondent is not warranted and is hereby denied.

Commissioner Pitofsky did not participate.

Complaint 96 F.T.C.

IN THE MATTER OF
THE BENDIX CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-3042. Complaint, Sept. 23, 1980—Decision, Sept. 23, 1980

This consent order requires, among other things, a Southfield, Mich. industrial firm engaged in four major business segments: automotive, aerospace-electronics, forestry and industrial-energy, to divest itself of the Warner & Swasey Rotating Toolholder Business and the Bendix Crush-Form Grinder Business within one year of the effective date of the order to a Commission-approved firm. Further, the order requires Bendix to maintain the businesses as viable business entities, and prohibits any diminishing of their value prior to their divestiture. The order also places a ten-year ban on the purchase of any concerns engaged in the rotating toolholder market or in the external cylindrical grinding machine market without prior Commission approval.

Appearances

For the Commission: *Robert Doyle and Richard Rosen.*

For the respondent: *Abe Krash, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, The Bendix Corporation ("Bendix"), a corporation subject to the jurisdiction of the Commission, has made a tender offer and has entered into a merger agreement either of which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I.

DEFINITIONS

1. For purposes of this Complaint, the following definitions apply:
 - (a) "Machine tool" means a stationary, power-driven machine,