

Interlocutory Order

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, March 12, 1981

Denial of motions to disqualify Commissioner and dismiss complaint.

ORDER

On January 5, 1981, respondent filed a motion seeking recusal and alternatively, disqualification, of Commissioner Paul Rand Dixon based upon his public statement on April 23, 1980, which elucidated his reason for voting for the issuance of the complaint in this proceeding. On October 24, 1980, respondent had previously sought dismissal of the complaint from Administrative Law Judge Parker on the same basis. Although Judge Parker denied respondent's motion for dismissal and refused to certify this issue to the full Commission, respondent now seeks dismissal as a remedy from the Commission based upon Commissioner Dixon's statement. Complaint counsel seeks to have the motion returned to respondent "without Commission action" because Judge Parker had previously refused to certify the issue for Commission disposition.* On January 30, 1981, Commissioner Dixon placed a statement on the record in which he declined to recuse himself and stated his belief that it would be appropriate for the Commission to address the issue. On February 26, 1981, respondent filed a document denominated "Answer of Respondent Boise Cascade Corporation to Statement of Commissioner Dixon in Response to Motion for Recusal." The Commission has determined that respondent's motion should be denied.

We see no reason to disqualify Commissioner Dixon, since we do not believe that any bias, prejudice or apparent unfairness has been demonstrated. *Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). Commissioner Dixon's statement, in context, was an official, on-the-record expression of his view that the statutory requirement that the Commission's complaint be based on "reason to believe" had been fulfilled. *Cf., FTC v. Standard Oil Co.*, 101 S.Ct. 488, 493-94, 496-97 n. 14 (1980); *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 517-19 (4th Cir. 1974); *Pangburn v. CAB*, 311 F.2d 349, 356-58 (1st Cir. 1962). It is axiomatic that in determining

* The ALJ certified other claims presented in the motion to dismiss which will be treated in a separate order at a later date.

whether the Commission has "reason to believe" sufficient to issue a complaint, the Commissioners must be able to review information, gathered by the staff in the investigation, which may ultimately be offered in evidence in the adjudicative proceeding.

In his statement issued simultaneously with the complaint, Commissioner Dixon said, in pertinent part, "[F]rom my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation" Respondent contends that Commissioner Dixon's statement "shows that he has weighed the evidence and concluded before any trial that [respondent] is guilty." In particular, respondent argues that Commissioner Dixon should have said only that he had reason to believe there *may be* evidence sufficient to find a violation, not that he had reason to believe there *is* evidence sufficient to find a violation. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), clearly provides, however, that the Commission may issue a complaint only when it has "reason to believe any . . . corporation *has been or is* using any unfair method of competition. . . ." (emphasis added). See *FTC v. Standard Oil Co.*, 101 S.Ct. 488, 493-94 (1980). Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), contains a parallel provision. We conclude there is no basis to disqualify Commissioner Dixon or to dismiss the complaint.

It is ordered, (1) That respondent's motion to disqualify Commissioner Dixon be, and hereby is, denied;

(2) That respondent's motion to dismiss the complaint based on the alleged prejudgment of Commissioner Dixon be, and hereby is, denied.

Commissioner Dixon not participating.

IN THE MATTER OF

JIM WALTER CORPORATION, ET AL.

Docket 8986. Interlocutory Order, March 13, 1981

Reopening proceedings on remand of the United States Court of Appeals.

ORDER

On September 12, 1980, the United States Court of Appeals for the Fifth Circuit vacated the Commission's Final Order in this matter and remanded the case for reconsideration in light of its findings. Upon expiration of the time for filing petitions for rehearing and for a writ of certiorari, the matter has returned to the jurisdiction of the Commission.

It is therefore ordered, That the proceeding be, and hereby is, reopened;

It is further ordered, That complaint counsel and respondent file briefs presenting their views as to further disposition of this matter.* The parties should address all issues relevant to the question whether further evidentiary hearings are warranted, including, but not limited to, the facts to be established in any future evidentiary hearings, the current market shares of the respondent and the other firms in this relevant product market, any relevant post-acquisition experience of respondent and other firms in this relevant product market, the court's findings with respect to the relevant geographic market, the public interest in further evidentiary hearings and the likelihood of effective relief.

Complaint counsel shall submit their brief within thirty days of the date of this Order, and respondent shall submit its brief within thirty days of the date of service of complaint counsel's brief. No other brief will be permitted without leave of the Commission. All briefs shall follow the form and page limitations set forth in Section 3.52(b), (c) and (e) of the Commission's Rules of Practice.

Commissioner Pertschuk not participating.

* The briefs should be filed *in camera* initially. The Commission will thereafter request appropriate views of the parties, and determine which material should remain *in camera* in accordance with the standards in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), *Bristol-Myers Company*, 90 F.T.C. 455 (1977) and *General Foods Corp.*, Docket No. 9085, Order of March 10, 1980.