(g) Their business is other than selling hearing aids to the public for a profit.

2. Misrepresenting in any manner:

(a) The nature or purpose of their business.

(b) The education or training of their sales personnel.

(c) The efficacy of their hearing aids.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative or employee; and failing to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

4. Failing to notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the initial decision, as modified by the accompanying opinion, and as above modified, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8765. Complaint, Aug. 5, 1968—Decision, May 5, 1971

Order requiring the nation's largest copper mining corporation with headquarters in New York City to divest itself within six months of the largest coal producer in the United States with headquarters in St. Louis, Mo., and not to make further acquisitions in the coal industry for the next ten years without prior Federal Trade Commission approval.

COMPLAINT

The Federal Trade Commission has reason to believe that Kennecott Copper Corporation, a corporation, has acquired the business

and assets of Peabody Coal Company, a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18); and therefore, pursuant to Section 11 of said Act, issues this complaint stating its charges as follows:

I

DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) "Coal" includes bituminous and sub-bituminous coal.

(b) "The Mountain Region" consists of Colorado, Utah, Wyomining, New Mexico, Montana, Arizona, Idaho, and Nevada.

II

RESPONDENT

Kennecott Copper Corporation

2. Respondent Kennecott Copper Corporation, herein referred to as "Kennecott," is a corporation organized and existing under the laws of the State of New York, with its executive offices located at 161 East 42nd Street, New York, New York.

3. Kennecott is the largest copper producer in the United States having accounted for approximately 33% of the 1,372,000 tons of primary copper produced domestically during 1966. Kennecott is also a substantial producer of lead, zinc, molybdenum and silver and is the nation's second largest producer of gold.

4. Kennecott's Western Mining Divisions operate four copper, and related metals, mining properties located in New Mexico (Chino Mines Division), Nevada (Nevada Mines Division), Arizona (Ray Mines Division), and Utah (Utah Copper Division).

5. Kennecott also operates an electrolytic copper refining plant at Baltimore, Maryland (Kennecott Refining Corporation), as well as a copper and other metal-producing and fabricating facility in Cleveland, Ohio (Chase Brass & Copper Company).

6. Kennecott, as a producer, smelter, refiner, and fabricator of copper and other metal products, consumes substantial amounts of electrical energy. During 1965 its total dollar purchases of electricity amounted to approximately $3,000,000, some 30% of which was purchased for use by its Western Mining Divisions.

7. Kennecott consumes varying quantities of natural gas, fuel oil and coal for energy purposes. During 1965, 225,000 tons of coal were purchased by Kennecott, approximately 134,000 tons of which were

bought by its Nevada Mines Division. Kennecott uses such fuels principally to generate substantial quantities of electrical power, primarily for use in its metal mining and processing operations. On occasion Kennecott has also sold certain quantities of electrical power to utility companies and others.

8. During 1966 Kennecott and its wholly owned subsidiaries had sales of metals and metal products of $739,714,423 which, with miscellaneous revenues of $11,124,110, resulted in a net income of $125,-375,300. Total consolidated assets of Kennecott as of December 31, 1966 were $1,075,245,000. Kennecott's rate of return on stockholders' investment during 1966 was 13.6%. Among all industrial corporations, Kennecott ranked 55th in terms of assets and 111th in terms of sales in 1966.

9. Beginning on or about April 1963, Kennecott undertook an intensive investigation of the feasibility of entering the coal industry on a local, regional, national and international scale. During the course of this investigation, Kennecott, among other things, engaged outside coal consultants; studied the availability of coal lands and leases; attempted to negotiate options to purchase selected coal reserves; negotiated an option to purchase coal reserves; had drilling and engineering studies conducted to determine the extent of coal reserves on the optioned land; explored the possibility of supplying the coal then being used by its Nevada Mines Division; studied the possibility of converting its Utah Copper Division to use coal; contacted potential purchasers of coal; investigated the competitive structure of local and regional coal markets; studied the cost of transporting coal; made detailed analyses of the profit potentials of a coal operation; and concluded it could mine coal as efficiently as any of the major national coal companies.

10. In June 1965 Kennecott's board of directors approved purchase of the Knight-Ideal coal reserves in Carbon County, Utah, and allocated funds for the opening and operating of a coal mine with a projected annual capacity of 1,165,000 tons, which would have made it one of the largest coal operations in the West. The coal to be produced was intended to be used by Kennecott to supply a part of its Utah Copper Division fuel requirements, all of its Nevada Mines Division fuel requirements, and to make sales to outside customers. During 1964 the Knight-Ideal Coal Company had mined 185,000 tons of coal from these Carbon County reserves.

11. Subsequent to its purchase of the Knight-Ideal reserves, Kennecott incorporated a Utah subsidiary, Kennecott Coal Company, to mine, sell and ship coal and to perform all functions ancillary

thereto. Kennecott Coal Company applied for and received acceptance for associate membership in the National Coal Association. Kennecott examined and bid upon coal lands in the immediate vicinity of the Knight-Ideal reserves, and recommended the purchase of additional coal lands, leases and options. Kennecott undertook a search for an experienced coal operating and marketing executive to assist its subsidiary in entering the coal industry and explored the possibility of acquiring certain local and regional coal companies. Such activities continued until Kennecott initiated plans to acquire Peabody Coal Company.

12. At all times relevant herein, Kennecott has sold and shipped its products in interstate commerce throughout the United States and is engaged in "commerce" within the meaning of the Clayton Act.

III

Peabody Coal Company

13. Peabody Coal Company, herein referred to as "Peabody," is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 301 North Memorial Drive, St. Louis, Missouri.

14. Peabody is one of the two leading producers of coal in the United States, having accounted for approximately 10.1% of the 530 million tons of coal produced domestically during 1966. In addition, during 1966, Peabody sold some 8,000,000 tons of brokerage coal produced by other coal companies.

15. Approximately 77% of Peabody's total coal sales are made to electric utility companies, making Peabody the nation's leading supplier of coal to such customers.

16. Peabody operates approximately 37 wholly-owned domestic mines (with an interest in 6 additional domestic mines) in the States of Alabama, Colorado, Illinois, Indiana, Kentucky, Missouri, Ohio and Oklahoma with additional operations being planned for Arizona. As of mid-1967, Peabody owned, leased or held under option in excess of 5.5 billion tons of estimated recoverable coal reserves located in fourteen States. In addition to such recoverable reserves, Peabody owns, leases, has under option or otherwise controls substantial acreage known to contain large amounts of coal, most of which is located in certain Western States.

17. Peabody's principal domestic marketing areas are the North Central and South Central regions of the United States. In addition, Peabody is aggressively expanding its marketing areas with

sizable long-term contracts in the Southeast and Southwest. Peabody also has extensive reserves of coal in sections of the Western and Southwestern States which offer promising opportunities for substantial tonnages of new business.

18. During 1966 Peabody and its subsidiaries had coal sales and other revenues of $233,923,483 providing a net income of $26,279,973. Total consolidated assets of Peabody as of December 31, 1966, were $315,629,163. Peabody's rate of return on stockholders' investment during 1966 was 14.6%. Among all industrial corporations, Peabody ranked 186th in terms of assets and 317th in terms of sales in 1966.

19. Kennecott's activities relating to its planned entry into the coal business were known to Peabody and caused it both to recognize Kennecott as a probable entrant and to undertake certain steps to discourage or prevent such entry.

20. At all times relevant herein, Peabody has sold and shipped its products in interstate commerce throughout the United States and is engaged in "commerce" within the meaning of the Clayton Act.

IV

The Nature of Trade and Commerce

21. Total domestic coal production in 1966 approximated 530 million tons having a mine mouth value of approximately $2.4 billion. Coal production in 1966 was approximately 20 million tons greater than in 1965.

22. In 1954 the four largest producers accounted for 15.8%, and the eight largest for 23.6%, respectively, of total domestic coal production.

23. This growth in concentration has been accompanied by a trend toward fewer but larger companies, with the number of concerns producing over 1 million tons of coal annually having declined by approximately 42% between 1949 and 1966. Mergers and acquisitions have contributed to the increase in concentration and the decline in the number of companies, with the three largest coal companies having acquired approximately 25 coal producers since January 1, 1955.

24. Electric power utility companies have become increasingly important as consumers of coal. In 1955 they represented approximately 33% and in 1966 approximately 54% of total domestic coal consumption.

25. Total coal production in the Mountain Region approximated 16.4 million tons in 1966. Of the eight States comprising the Moun-

tain Region, Colorado's production of 5.2 million tons and Utah's 4.6 million tons ranked them first and second, respectively, in both the Mountain Region and among all coal-producing States west of the Mississippi River.

26. In 1966 the four largest producers accounted for about 40% and the eight largest for about 63% of the total coal produced in the Mountain Region. In the State of Utah the top four companies accounted for approximately 75% of total coal production.

27. In 1955 electric power utilities consumed approximately 9% of the coal produced in the Mountain Region. By 1964 their consumption represented approximately 42% of the total coal produced in this area.

V

The Proposed Acquisition

28. A tentative agreement, signed July 1, 1966, and subsequently formalized on March 17, 1967, provided that Kennecott would acquire all of the business and assets of Peabody. Stockholders of Peabody approved the acquisition on January 26, 1968. On or about March 29, 1968, a subsidiary of Kennecott exchanged approximately $74 million in cash for the business and assets of Peabody, subject to the reservation of a production payment from Peabody's coal properties which was sold by Peabody for about $400 million in cash.

29. The combined assets of the two companies in 1966 were as great as the 44th largest industrial corporation as contrasted to Kennecott's rank of 55th in that year.

VI

Violations

30. The effect of the acquisition of Peabody by Kennecott has been, or may be, to lessen competition substantially or to tend to create a monopoly in violation of Section 7 of the Clayton Act, in the following ways, among others:

(a) The acquisition of Peabody by Kennecott has eliminated a substantial competitive factor in the coal business in Utah, the Mountain Region, and the United States and relevant portions thereof;

(b) Kennecott has been permanently eliminated as a substantial potential entrant into the production and sale of coal in Utah, the Mountain Region, and the United States and relevant portions thereof;

(c) Kennecott has been permanently eliminated as a substantial potential entrant into the production and sale of coal to electric utility companies in Utah, the Mountain Region, and the United States and relevant portions thereof;

(d) Kennecott has been permanently eliminated as a substantial potential competitor having an actual and potential influence upon competition in the coal industry in Utah, the Mountain Region, and the United States and relevant portions thereof;

(e) Concentration may be substantially increased, and the possibility of future deconcentration has been substantially reduced, in the production and sale of coal in Utah, the Mountain Region, and the United States and relevant portions thereof;

(f) The substitution of Kennecott, with its vast resources as the leading company in the copper industry and its existing relationships with utility companies, tends unduly to increase barriers to the entry of new competition, and to deprive smaller coal companies of an equal opportunity to compete in the sale of coal in Utah, the Mountain Region, and the United States and relevant portions thereof; and

(g) Users of coal have been, or may be, denied the benefits of free and open competition in the sale of coal in Utah, the Mountain Region, and the United States and relevant portions thereof.

Mr. Joseph J' O'Malley, *Mr. Wilbur W. Sacra, Jr.*, and *Mr. Charles Kadish*, supporting the complaint. (*Mr. Larry D. Sharp*, Law Clerk, on the Brief.)

Sullivan & Cromwell, New York, N.Y., by *Mr. Arthur H. Dean*, *Mr. Roy H. Steyer*, *Mr. John L. Warden*, and *Mr. John M. McCarthy;* and *Howrey, Simon, Baker & Murchison*, Wash., D.C., by *Mr. William Simon*, *Mr. John Bodner, Jr.*, and *Mr. Francis A. O'Brien*, for respondent.

Initial Decision by Donald R. Moore, Hearing Examiner

MARCH 9, 1970

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PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on August 5, 1968, and was duly served on respondent. The complaint charges that respondent violated Section 7 of the Clayton Act, as amended, by reason of its acquisition of the business and assets of the Peabody Coal Company. Respondent filed its answer on October 11, 1968, admitting in part and denying in part the various factual allegations of the complaint and essentially denying any violation of law.

Following a series of prehearing conferences, the trial commenced on January 27, 1969, and concluded on June 11, 1969. Evidentiary hearings, at which 54 witnesses gave oral testimony, were held on 48 hearing days in New York, New York, San Francisco, California, Salt Lake City, Utah, and Washington, D.C. As a part of the hearings, the hearing examiner, in the company of counsel for both sides, made a physical inspection of some of the operations concerned in the case, including two of Peabody's coal mines in Illinois (strip and underground); Kennecott's open pit copper mine in Utah, together with related facilities; and certain coal mining properties and facilities in Carbon County, Utah.

The record consists of more than 6,400 pages of trial transcript and approximately 450 documentary exhibits comprising several thousand pages.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and

conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and by counsel for respondent. Reply briefs were also filed by counsel for both parties. Those proposed findings not adopted either in the form proposed or in substance are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used:

CPF—Numbered paragraphs in the Proposed Findings of Fact, Conclusions of Law and Order filed by counsel supporting the complaint.

CPF–Br—Arguments and proposed conclusions in the nature of a brief contained in complaint counsel's Proposed Findings of Fact, Conclusions of Law and Order (see *infra.* p. 4).

CRB—Complaint Counsel's Reply to Respondent's Brief and Proposed Findings of Fact.

CX—Commission Exhibit.

RPF—Numbered paragraphs in Respondent's Proposed Findings of Fact and Conclusions of Law.

RB—Respondent's Brief.

RRB—Respondent's Reply Brief and Exceptions.

RRB–Ex—Respondent's exceptions (keyed to page numbers and contained in Respondents Reply Brief and Exceptions; see *infra*, p. 4).

RX—Respondents Exhibit.

Tr.—Transcript.

References to the proposed findings of counsel are to paragraph numbers preceded by "CPF" or "RFP," while references to the

briefs are to page numbers. Complaint counsel's arguments and proposed conclusions, in the nature of a brief, are interwoven with their proposed findings in a single document entitled "Proposed Findings of Fact, Conclusions of Law and Order." When reference is made to such material, as distinguished from numbered proposed findings (CPF), the citation is "CPF–Br," keyed to page numbers—for example, CPF–Br, pp. 19–20. Respondent filed its proposed findings and its brief separately, followed by a document entitled "Respondent's Reply Brief and Exceptions." The exceptions contained in this document are abbrevitaed "RRB–Ex" and keyed to the page numbers.

Sometimes references to testimony cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Milliken 6295.

FINDING OF FACT

Kennecott Copper Corporation

Respondent Kennecott Copper Corporation (hereinafter referred to as "Kennecott" or as "respondent") is a corporation organized and existing under the laws of the State of New York, with executive offices at 161 East 42nd Street, New York, New York (Complaint and Answer, par. 2).

Kennecott was incorporated in 1915 (CX 6, p. 1) and has been engaged in the mining of copper and associated metals since that time (C. D. Michaelson 5422–23).

Kennecott is the largest copper producer in the United States, having accounted for approximately 33 percent of the 1,372,000 tons of primary copper produced domestically during 1966. Kennecott is also a substantial producer of molybdenum and silver and is the nation's second largest producer of gold. Kennecott is also a producer of lead and zinc. (Complaint and Answer, par. 3.)

Kennecott owns and operates four copper mines in the United States (Milliken 6301; C. D. Michaelson 5426). Each mine is a separate operating division within the Western Mining Divisions (sometimes referred to as "WMD"), which in turn, is a part of the Metal Division of the company: (1) the Utah Copper Division in Utah (sometimes referred to as "UCD"), (2) the Nevada Mines Division in Nevada, (3) the Ray Mines Division in Arizona, and (4) the Chino Mines Division in New Mexico. (Complaint and Answer, par. 4; C. D. Michaelson 5421, 5426; CX 9, p. 7.) Each of these mines is over 50 years old (C. D. Michaelson 5426–27).

Kennecott also operates a fifth copper mine. El Teniente mine in Chile, of which it is part owner. Kennecott had owned and operated

this mine for more than 50 years, but in 1967 it sold a 51 percent interest to Chile. Kennecott retains a 49 percent interest in the mine through its subsidiary, Braden Copper Company, which operates the mine under a management contract. (CX 9, pp. 9, 21, 26; C. D. Michaelson 5452.)

Kennecott Refining Corporation, a subsidiary of respondent Kennecott, operates an electrolytic copper refining plant in Anne Arundel County, Maryland. Through another subsidiary, Chase Brass & Copper Company, sometimes referred to as "Chase"), respondent Kennecott fabricates some copper and brass products. (Complaint and Answer, par. 5.) The principal customers for the copper and brass products manufactured by Chase are the automobile and construction industries and the electrical equipment manufacturers, such as General Electric and Westinghouse (C. D. Michaelson 5423).

Kennecott operates two lead and zinc mines in Missouri and Utah and partially owns a relatively small subsidiary that produces iron and titanium slag (CX 9, pp. 11, 13; Milliken 6301).

Before Kennecott acquired the assets of Peabody Coal Company in 1968, Kennecott's business was confined almost entirely to the production of copper and its by-products, such as gold, silver, and molybdenum, and the fabrication of certain copper and brass products by Chase (CX 9; C. D. Michaelson 5422–24). All of Kenecott's production of copper is sold in raw form to processors, with about 13 percent sold to Chase (C. D. Michaelson 5426). The company derives about 90 percent of its net income from its copper and copper-related operations (Milliken 6301).

As a producer, smelter, refiner, and fabricator of copper and other metal products, Kennecott consumes substantial amounts of electrical energy (Complaint and Answer, par. 6; RX 13–N, 13–Z–1). Respondent takes issue with the characterization "substantial" (Answer, par. 6; RRB–Ex 5), but for the purposes of these findings, the characterization may be accepted on the basis of the statistical record: Electrical power consumed each year by the Utah Copper Division alone totals 1.1 billion kilowatt hours (RX 13–Z–1), and the Magna power plant, with a capacity of 175,000 kilowatts, can produce enough power for a city of 350,000 population (RX 117). The issue to which this has primary relevance (Complaint, paragraph 30(f)) seemingly has been abandoned by complaint counsel. (Compare CPF–Br, par. (i)(1)–(7), pp. 125–26, with Complaint, par. 30(a)–(g).) (For further detail, see also CX 106.)

Kennecott consumes varying quantities of natural gas, fuel oil, and coal for energy purposes. During 1965, Kennecott purchased 225,000 tons of coal, of which approximately 134,000 tons were

bought by its Nevada Mines Division. Kennecott uses such fuels principally to generate substantial quantities of electric power, primarily for use in its metal-mining and processing operations. On occasion, Kennecott has sold some electric power to utility companies and others. (Complaint and Answer, par. 7; RX 13–N.) Respondent again questions the term "substantial" and dismisses its power sales as *de minimis.* (Answer, RRB–Ex 6.) However, substantially the same comment that was made in the preceding paragraph is applicable here. (For further detail, see CX 105A–B.)

During 1966, Kennecott and its wholly-owned subsidiaries had sales of metals and metal products of $739,714,423 which, with miscellaneous revenues of $11,124,110, resulted in a net income of $125,375,300. Total consolidated assets of Kennecott as of December 31, 1966, were $1,075,245,000. Kennecott's rate of return on stockholders' investment during 1966 was 13.6 percent. (Complaint and Answer, par. 8.) Among United States industrial corporations listed in "Fortune's 500" for 1966, Kennecott ranked 55th in terms of assets and 111th in terms of sales (CX 188, p. 6).

Although respondent denies the allegation that "Kennecott has sold and shipped its products in interstate commerce throughout the United States," it admits that at all times relevant to this proceeding it has been engaged in "commerce" within the meaning of the Clayton Act (Complaint and Answer, par. 12).

II. Peabody Coal Company

Prior to March 29, 1968, Peabody Coal Company (hereinafter referred to as "Peabody") was a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 301 North Memorial Drive, St. Louis, Missouri. On or about March 29, 1968, Peabody changed its name to PDY Coal Company and transferred its business and certain assets to a wholly-owned subsidiary of Kennecott, also named Peabody Coal Company, which was organized under the laws of the State of Deleware. (Complaint and Answer, pars. 13, 28; CX 162 Z–16, Z–28–29.) Unless otherwise indicated, references to "Peabody" in these findings are intended to refer to the Illinois corporation.

Peabody was one of the two leading producers of coal in the United States. In 1966 it produced approximately 52.8 million tons of coal, or approximately 10 percent of the 530 million tons of coal produced domestically in that year. In addition, Peabody sold approximately 8.3 million tons of coal produced by others. (Complaint and Answer, par. 14.) In 1967 Peabody accounted for 59.4 million

tons of the coal industry's total production of 552.6 million tons. The other industry leader was Consolidation Coal Company, which produced 51.4 million tons in 1966 and 56.5 million tons in 1967. (CX 183; RX 170 A-C.)

In 1966, approximately 77 percent of Peabody's coal sales were made to electric utility companies. Peabody was the nation's leading supplier of coal to such companies. (Complaint and Answer, par. 15.)

Peabody operated approximately 37 wholly-owned domestic mines and had an interest in 6 additional domestic mines in the States of Alabama, Colorado, Illinois, Indiana, Kentucky, Missouri, Ohio, and Oklahoma, with additional operations planned for Arizona (Complaint and Answer, par. 16).

In 1966 approximately 84 percent of the coal mined by Peabody came from strip mines. The profitability of its strip mines was materially higher than that of its underground mines. (CX 162-R.)

As of mid-1967, Peabody owned, leased, or held under option more than 5.5 billion tons of proved recoverable coal reserves located in 14 States—Alabama, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, and Wyoming. All of its reserves were bituminous, except for the reserves in Montana and Wyoming (lignite and subbituminous), North Dakota (lignite), and Colorado (bituminous and lignite). These reserves are about equally divided between strip and underground. However, the reserves assigned to active mines comprises nearly 700 million tons of strip reserves and nearly 225 million tons of underground reserves. (Complaint and Answer, par. 16; CX 162 S-T.)

In addition, Peabody owned, leased, had under option, or otherwise controlled substantial acreage in the West which was known to contain large amounts of coal but which had not been fully explored or tested for mineability. (Complaint and Answer, par. 16; CX 162-T.)

On October 23, 1967, a consent judgment was entered by the United States District Court for the Northern District of Illinois requiring Peabody to divest as an operating business coal properties producing 6 million tons of coal a year and having the ability to continue to produce coal at that rate for 20 years. The judgment also precludes Peabody from acquiring any operating coal company or mine in Illinois or neighboring states for 10 years and limits its acquisition of reserves in the same area for 5 years. *United States* v. *Peabody Coal Company*, 1967 Trade Cas., ¶ 72,213 (N.D. Ill. 1967).

As of mid-1967, Peabody's principal domestic marketing areas were the North Central and South Central States. In addition, Peabody was aggressively expanding its marketing areas, with sizable, long-term contracts in the Southeast and Southwest. Peabody also had extensive reserves of coal in Western and Southwestern States that offered promising opportunities for substantial tonnages of new business. (Complaint and Answer, par. 17.) One contract provides for the delivery by Peabody of a minimum of 117 million tons of coal from the Black Mesa area of Arizona to a power station to be built at Davis Dam in Nevada, starting in 1970 and continuing for 35 years (CX 152 D–E, CX 162–R).

During 1966, Peabody and its subsidiaries had coal sales and other revenues of $233,923,483 that provided a net income of $26,279,973. Total consolidated assets of Peabody as of December 31, 1966, were $315,629,163. Peabody's rate of return on stockholders' investment during 1966 was 14.6 percent. (Complaint and Answer, par. 18; CX 162–O, W.) Among United States industrial corporations listed in "Fortune's 500" for 1966, Peabody ranked 186th in terms of assets and 317th in terms of sales (CX 188, p. 14).

At all times relevant to this proceeding, Peabody has sold and has shipped its products in interstate commerce and has been engaged in "commerce" within the meaning of the Clayton Act (Complaint and Answer, par. 20; CX 118, p. 8; CX 119, p. 8; CX 120, pp. 8–9; CX 121, p. 8).

In addition to its domestic operations, Peabody owned 58 percent of an Australian company that operated a large metallurgical (coking) coal mine in Australia. Most of its output was sold to the Japanese steel industry. (CX 162–U.)

III. The Acquisition

The first reference to the possible acquisition of Peabody by Kennecott was in the course of a conference that Frank R. Milliken, president of Kennecott, had on July 29, 1965, with C. D. Michaelson, vice president for mining, and C. H. Burgess, vice president for exploration, on the general subject of "Commodity Objectives of Exploration Department." [1] In a discussion of activities relating to coal, mention was made of the possible acquisition of coal companies as such rather than the purchase of reserves or the discovery of reserves, and Mr. Burgess expressed the view that the acquisition of coal companies would make for faster progress. On the subject of coal companies that might be purchased, Mr. Milliken mentioned

[1] Other aspects of this conference are considered *infra*, pp. 860–61.