Report of the Committee on Antitrust

I. Coal

A. *Western Fuels Ass'n, Inc. v. Burlington Northern Railroad Co., Civil Action No. C82-0443 (D.Wyo. filed Oct. 22, 1982)*

Western Fuels Association (Western Fuels) is a not-for-profit supply cooperative that purchases and/or mines coal on behalf of its members. In 1984 it settled its dispute with the Burlington Northern Railroad Company (BN) over BN's carriage of coal to the electric generating plants of three Western Fuels members. In its complaint, Western Fuels alleged that BN impermissibly monopolized the carriage of low-sulphur coal from points in northeastern Wyoming to other points in Wyoming and the central part of the United States. Western Fuels also alleged that BN misrepresented rates and breached contracts that the parties allegedly executed in 1979.

Members of Western Fuels own and operate three electric generating stations. Western Fuels obtained low-sulphur coal for the plants from the Powder River Basin in Wyoming. According to Western Fuels' complaint, the site for one of the plants was selected only after determining that the Powder River basin coal could be transported to the site. Western Fuels alleged that it negotiated tariff rates with BN in the 1970s. Western Fuels further alleged that, "through an exchange of correspondence and documents" in 1979, it entered into contracts with BN which contracts established the rate to be charged for hauling the coal.

In its complaint, Western Fuels alleged that BN breached the contracts in late 1982 by charging rates in excess of the contract rates. Western Fuels further alleged that BN is estopped from denying the existence of the contracts, that BN misrepresented to Western Fuels the rates that would be charged, and that BN has taken action to maintain and abuse its monopoly power.

With respect to the antitrust issues, Western Fuels alleged that BN made representations so as to induce reliance upon BN and, thereby, gain a monopoly in the relevant market. Western Fuels also alleged that BN provided the sole rail access to a large portion of the coal deposits in the Powder River Basin; that BN exploited this monopoly power in allegedly breaching and avoiding its contracts; that BN and other railroads have unlawfully combined or conspired to divide markets and thereby restrain trade; and that BN and others have conspired to prevent competition in the carriage of coal from coal slurry pipelines. It further alleged that BN and others prevented Energy Transportation Systems, Inc., and other entities from acquiring the necessary land, permits, water, capital and technology to build an operating pipeline.

The case was settled in 1984 when BN and Western Fuels agreed to four twenty-year contracts. There will be a separate contract for each of the three shipment agreements to three electric generating stations. The remaining fourth contract is a master contract covering potential future movements from the Powder River Basin to other Western Fuels members.

B. *Janklow v. Kansas City Southern Industries, Inc., Civ. No. 83-5046 (D.S.D. filed March 16, 1983)*

This is a pending matter that was filed in 1983. The State of South Dakota sued the Kansas City Southern Railway (KCSR) and its parent corporation for allegedly engaging in a continuing combination and conspiracy to restrain the construction and operation of a coal slurry pipeline and to monopolize the transportation of coal. To date, no trial date has been set.

The State had contracted with Energy Transportation Systems, Inc. (ETSI) to assign ETSI a water permit in return for the shipment of water through an aqueduct to persons residing in western South Dakota who were suffering from a shortage of potable water. ETSI would also appropriate 20,000 acre-feet of water per year for the transportation of coal from the Powder River Basin.

The State alleged in its complaint that KCSR and other conspirators have unreasonably restrained trade in the construction and development of coal slurry pipelines and unlawfully monopolized trade and commerce. The State alleged that the violative actions included, *inter alia,* prohibiting financing and development of coal slurry pipelines as well as any non-railroad method of transportation, delaying and impeding such construction and development, acquiring and maintaining their monopolistic position, intervening in bad faith in administrative proceedings, and engaging in sham litigation. The State alleged that, as a result, the aqueduct could not be built and western South Dakota could not obtain needed water supplies. The State seeks declaratory and injunctive relief, treble damages and punitive damages. Discovery is currently being conducted.

C. *ETSI Pipeline Project v. Burlington Northern, Inc., Civ. Action No. B-84-797-CA (E.D. Tx. Filed October 9, 1984)*

This is another pending case involving the planned construction of a coal slurry pipeline from the Powder River Basin. ETSI Pipeline project, a subsidiary of Energy Transportation Systems, Inc., was formed in 1973 in order to develop, construct and operate a coal slurry pipeline originating in the Powder River Basin and terminating in Arkansas. ETSI alleged that it had potential customers throughout the middle portion of the United States but that delays created by defendant-railroad companies resulted in substantial capital cost increases. It was alleged that this delay resulted in the termination of the ETSI project on July 31, 1984.

ETSI alleged that the defendant and other railroads engaged in an unlawful combination and conspiracy to delay, impede and prevent right-of-way acquisition, construction, financing and operation of the coal slurry pipeline project. The alleged unlawful conduct included, *inter alia,* a group boycott to refuse rights-of-way, requiring ETSI to litigate its right to cross railroad rights-of-way, collaborating in litigation to maximize delay, persuading landowners and others that the project was harmful, bad faith intervention in administrative proceedings, bad faith opposition to eminent domain legislation, sham litigation, combining and conspiracy in connection with bids for coal transportation service, and imposing upon coal users transportation contracts that effectively precluded such users from doing business with ETSI. A similar cause of action under the antitrust laws was also alleged against Kansas City Southern Railway.

ETSI requested declaratory relief, injunctive relief and treble damages. To date, no trial date has been set.

D. *Texas Utilities Co. v. Santa Fe Industries, Civ. Action No. 82-1419C (filed N.D. Tex. Dec. 18, 1981; transferred to D.N.M. Dec. 9, 1982)*

In a pending action in the U.S. District Court of New Mexico, Texas Utilities and its subsidiary, Chaco Energy Company, allege that Santa Fe Industries, along with certain Santa Fe subsidiaries and named coal production companies, fixed coal prices and further monopolized the production of, and transportation of, coal from the San Juan Basin Area. The complaint was originally filed in the Northern District of Texas in 1981 but has since been transferred to the district court in New Mexico.

In the early 1970s, Texas Utilities, through Chaco Energy, sought to acquire and develop coal reserves in New Mexico. Much of the coal would have fueled the electrical generating plants of Texas Utilities' other subsidiaries. The plaintiffs had initially negotiated with Sante Fe defendants and defendant Thercol Energy Company for the sublease and conveyance of coal rights in certain regions of the San Juan Basin. Although these initial joint negotiations failed, the plaintiffs did contract separately with Thercol and with alleged co-conspirator Haspah Coal Company (a subsidiary of Sante Fe Mining Company) in 1977. The contracts provided for royalty payments and the preparation of mining and development plans.

The plaintiffs also sought rail transportation from the Santa Fe defendants. It is alleged that the Santa Fe defendants and co-conspirator Star Lake Railroad Company (a subsidiary of Santa Fe Railroad Company) have refused to provide adequate railroad transportation on reasonable terms and have refused to permit the plaintiffs to construct, own and operate their own railroad from the San Juan Basin area. The plaintiffs allege that, because of the unavailability of rail transportation and the high royalty rates, they are being forced to pay for coal that cannot be mined economically.

The plaintiffs allege three causes of action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, three causes of action under the New Mexico Antitrust Act and three common-law causes of action. They allege three types of antitrust violations in the federal and state claims. First they allege that the defendants conspired to restrain trade by fixing royalty payments, preventing plaintiffs from obtaining rail transportation, imposing limits on the amount of coal plaintiffs could sell to third parties, discouraging plaintiffs from cutting prices on sales to third parties and refusing to negotiate on terms other than those agreed upon by defendants.

Second, it is alleged that this conduct by defendants constituted a combination and conspiracy to monopolize. Third, it is alleged that the Santa Fe defendants combined and conspired to monopolize, and have exercised their monopoly power to control prices and exclude competition.

This case is currently in discovery and no trial date has been set.

II. Electric Utilities

A. *City of Cleveland v. Cleveland Electric Illuminating Company, 734 F.2d 1157 (6th Cir. 1984)*

This litigation began in 1975 when the City of Cleveland ("City") filed suit in the Northern District of Ohio against Cleveland Electric Illuminating Company ("CEI"), Duquesne Light Co., Ohio Edison Co., Pennsylvania Power Company and Toledo Edison Company, alleging that they had conspired to violate Sections 1 and 2 of the Sherman Act. Before trial, all the defendants except CEI settled with the City. City alleged that CEI and several other utilities had combined to restrain trade, monopolize and attempt to monopolize the electric power market in Cleveland and the surrounding service areas. Among the specific claims was that CEI refused to wheel power to Cleveland's Municipal Electric Company ("Municipal Light").

City of Cleveland appealed the jury verdict for CEI on several grounds. First, the City argued that the trial judge erred when he refused to admit into evidence information about CEI's secret sponsorship of a lawsuit challenging a 1972 Federal Power Commission order requiring CEI to interconnect with Municipal Light. The trial judge had ruled that evidence concerning the lawsuit was inadmissible on the basis of the *Noerr-Pennington* doctrine. On appeal, the City attempted to show that the sponsored suit fell under the sham litigation exception to the *Noerr-Pennington* doctrine. However, the Court of Appeals held that in absence of a showing of clear abuse of process or repetitive harassing and filing of meritless claims, the trial judge did not act erroneously in holding that evidence about the CEI-sponsored suit was inadmissible. The Court noted that the suit was promptly dismissed.

Second, the City contended that the trial judge erred in not granting collateral estoppel effect to certain findings of fact made in proceedings before the Nuclear Regulatory Commission ("NRC"). The NRC found that CEI had attempted to avoid a permanent parallel interconnection with Municipal Light by imposing severe operating problems, unnecessary restrictions and administrative delays to discourage interconnection. The appeals court held that it was within the broad discretion of the district court judge to decide whether collateral estoppel should have been appled, particularly because the City attempted to use collateral estoppel offensively, citing *Parkland Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979). In refusing to order collateral estoppel effect, the Sixth Circuit noted the different procedures and burdens of proof present in the NRC proceeding as opposed to judicial actions.

Finally, the City appealed the jury instructions relating to the definition of the relevant market. The court of appeals found that the trial judge properly excluded wholesale electric power as a relevant product market. The court held that it was proper for the trial judge to instruct the jury that the relevant geographic market was something less than CEI's service area, because the City introduced no evidence that it actually was competing for, or ever planned to compete for, customers in CEI's entire service area.

B. *Gulf State Utilities Company v. City of Lafayette, et al., Civil Action No. 84-13B (M.D. La.)*

Stauffer Chemical ("Stauffer"), a wholesale customer of Gulf States Utilities Company ("Gulf States"), sought to purchase power from the City of Lafayette

("Lafayette") for Stauffer's San Gabriel, Louisiana plant. Instead, Stauffer entered into a contract to purchase power for 7 years from the City of Plaquemine, which in turn would purchase the power from the City of Lafayette. Lafayette and Plaquemine proposed that such service be accomplished simply by designating the Stauffer chemical plant as a new Plaquemine delivery point, although the plant is remote from Plaquemine's service area. Stauffer asked Gulf States to wheel power from Lafayette to its San Gabriel plant. Gulf States declined to wheel the power and sued, requesting a declaratory judgment that a refusal to wheel would not violate the antitrust laws.

Gulf States' complaint characterized Stauffer's action as an attempt to force Gulf States to engage in wheeling from Lafayette to one of Gulf States' own retail customers so that Lafayette and Plaquemine could "pirate" away the retail customer. Gulf States requested a declaratory judgment that its refusal of wheeling service was in conformity with law and public policy. Plaquemine and Lafayette responded by contending that the denial of wheeling would violate the antitrust laws and requested an injunction requiring Gulf States to wheel power.

On October 11, 1984, a preliminary injunction was granted. The court ordered that effective January 1, 1985, Gulf States would be preliminarily enjoined from refusing to transmit power over its transmission lines from Lafayette to Stauffer, pending the outcome of the case. In December 1984, Gulf States filed a tariff with the Louisiana Public Service Commission for approval of its wheeling rate. Stauffer has opposed the tariff filing, arguing that the federal court has exclusive jurisdiction over the wheeling rate. No trial date has been set at this time.

C. *Wagner v. Central Louisiana Electric Co., Inc., 102 F.R.D. 196 (E.D. La. 1984)*

In this case brought under Section 1 of the Sherman Act, the court on May 31, 1984 denied for the second time plaintiffs' motion for certification of a class action under Rule 23(c)(1) of the Federal Rules of Civil Procedure.

Defendants are the Central Louisiana Electric Company, Inc. (CLECO) and the Washington-St. Tammary Electric Cooperative (Co-op), both of which supply electricity to the city of Slidell, Louisiana. Plaintiffs allege that in 1966 the defendants executed an agreement purportedly dividing Slidell into two parts, constituting a conspiracy in restraint of trade in the form of a horizontal allocation of territory. This arrangement, plaintiffs contend, violates federal antitrust law in that plaintiffs have been deprived, to their detriment, of free and open competition in the distribution and sale of electric power. Plaintiffs sought to represent past and present customers of CLECO in a class action. The only issue before the court was whether the class should be certified.

In denying certification, the court held that the plaintiffs had failed to prove a necessary element in the existence of the proposed class, *i.e.*, that the alternative source of electric power (Co-op) would have offered service to all members of the proposed class in the absence of the defendants' agreement. The Co-op only extended service to areas which would improve its overall line density and plaintiffs failed to show that service to the proposed class would have had that result.

D. *John F. Ray et al. v. Indiana & Michigan Electric Co., Civil No. F78-148 (N.D. Ind.)*

On May 11, 1984 in a decision as yet unreported, a federal district court ruled that the defendant's 1974 long-term lease of municipal electric utility distribution facilities in Fort Wayne, Indiana did not constitute monopolization. Plaintiffs were a class of former and current Fort Wayne electric consumers who claimed that they had paid excessive prices for electric service. The decision was reached despite the court's apparent finding that the investor-owned company engaged in price competition with the intent to become the sole electric distributor in the area.

E. *United States v. Kentucky Utilities Co., No. C81-0109-L (W.D.Ky.)*

This action, noted in the last two Committee reports, remains pending before the district court. The Government contends that Kentucky Utilities has attempted to monopolize and has monopolized electric power distribution in violation of Section 2 of the Sherman Act by refusing to wheel Southeastern Power Administration ("SEPA") wholesale electricity to "captive" wholesale customers. As defined in the complaint, such customers are those that are connected to electric transmission facilities owned and operated only by Kentucky Utilities and for whom it would be economically impractical to contract alternative facilities for electric power transmission from sources such as SEPA.

As a result of the refusal to wheel, the Government alleges that Kentucky Utilities' wholesale customers have been deprived of alternative sources of power. The Government seeks an injunction against the utility's refusal to transmit electric power from other suppliers over its facilities and asks that the utility be required to file pertinent tariffs with the FERC. During 1984, discovery continued and a trial date of September 1985 has been set.

It should be noted that in a case of first impression before the FERC involving interpretation of the Commission's authority to require wheeling under the Public Utility Regulatory Policies Act of 1978, the Commission denied SEPA's request to require Kentucky Utilities to wheel SEPA's power to eight municipally-owned electrical systems. *Southeastern Power Administration v. Kentucky Utilities Company,* Opinion No. 198, 25 FERC ¶ 61,204; *reh'g. denied,* 26 FERC ¶ 61,127 (1984).

F. *Pacific Power & Light Co. and Pacific Gas & Electric Co., 26 FERC ¶ 63,048 (1984)*

This case involves a lengthy investigation of the California Power Pool, the Pacific Intertie Agreement and related contracts. The case was originally filed in 1972, when a group of wholesale customers, known as the Northern California Power Agency, filed a complaint against Pacific Gas & Electric claiming that certain of its contracts were anticompetitive. During the twelve years of litigation which resulted in over 55,000 pages of transcripts, practically every investor-owned utility, municipal utility, and wholesale customer in California became involved.

The most notable part of the ALJ's decision from an antitrust viewpoint is that Pacific Intertie ("Intertie") was found to be a bottleneck facility and that the California Power Pool's ("CPP") ability to deny municipal power companies access to Intertie gives CPP monopoly power over relevant markets for wholesale power and impairs the ability of the municipal power companies to obtain coordination services or ability to provide retail services competitively.

Both the intervenors and the FERC staff argued that Intertie is a bottleneck facility. The ALJ agreed and decided that antitrust principles require that direct access be granted to competitors. The ALJ found that because Intertie could not be duplicated, and because those not given access to Intertie face significant handicaps, denial of access to Intertie in the absence of legitimate operational justifications is "unduly anticompetitive, unduly discriminatory, unjust, unreasonable and contrary to the public interest." The ALJ decided that access to Intertie should be awarded on a non-discriminatory, interruptible basis to those not now using it, at rates that are just and reasonable. The ALJ did not require that the municipal utilities be afforded firm transmission service on Intertie because he adhered to the rule of the bottleneck boycott case that those controlling an essential facility need not curtail their own use in order to accommodate others.

G. City of Loudoun, Tennessee (d/b/a/ Loudon Utilites) v. Tennessee Valley Authority, 585 F. Supp. 83 (E.D. Tenn. 1984)

On January 30, 1984, the district court granted summary judgment for defendant Tennessee Valley Authority (TVA) on the basis that its status as an agency of the federal government exempts its actions from the antitrust laws. Loudoun had complained that TVA was selling electric power directly to an industrial customer in Loudon's service area. TVA's contract with Loudon expressly provided for such direct industrial sales but Loudon claimed, *inter alia,* that the contract provision violated Section 2 of the Sherman Act. The court found that the Congressional statute creating TVA expressly encouraged direct industrial sales and also found that Congress itself directly oversees TVA's exercise of its contracting and ratemaking powers. Under these circumstances, the court found TVA's actions to be valid governmental activity and exempt from Sherman Act scrutiny.

H. Recently Filed Electric Utility Antitrust Cases

Electric utility antitrust cases filed since the last Committee report include the following:

1. *Cable TV Puget Sound, Inc. v. Peninsula Light Company, et al.,* Case No. 84-131 (W.D. Wash., filed March 2, 1984).

2. *Vernon City v. Southern California Edison Company,* 83-8137-AWT (C.D. Cal., filed December 15, 1983).

3. *Citizens Electric Corporation v. Union Electric Company,* 83-2756 (E.D. Mo., filed December 2, 1983).

4. *Malden (Missouri) v. Union Electric Company, et al.,* Case No. 83-2533 (E.D. Mo., filed November 4, 1983). Among the defendants is the Missouri Utilities Company.

5. *Kansas Power and Light Company v. Fischback & Moore, Inc., et al.,*·Case No. 83-1549-B (W.D. Wash., filed November 3, 1983). Among the other defendants are Commonwealth Electric Company and Wismer and Becker Contracting Engineers, Inc.

6. *Coast To Coast CATV of Marion County v. Clay Electric Coopertive, Inc., et al.,* Case No. 83-128 (M.D. Fla., filed September 2, 1983).

III. OIL

A. *E.I. DuPont De Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984)*

In this appeal, the Second Circuit set aside the order of the Federal Trade Commission (FTC) which was described in last year's report, 5 Energy L.J. 160, under the heading of *In the Matter of Ethyl Corporation.* The FTC's order found that the four manufacturers of lead-based antiknock gasoline compounds had engaged in unfair methods of competition in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). Specifically, the FTC found that the manufacturers engaged in business practices which, although independent and unilateral and neither restrictive nor predatory, collectively had the effect of removing uncertainty about each other's pricing, thereby facilitating supracompetitive price parallelism in the industry. The practices were (1) use of advance notice of price change clauses in sales contracts and providing notice in excess of 30 days; (2) providing advance notice of price changes to the press and others; (3) use of "most favored nation" price clauses in sales contracts; and (4) use of uniform delivered pricing.

The Second Circuit reversed the FTC. The court did not find that substantial evidence supported the FTC's claim that the challenged practices lessened competition in the antiknock industry. Influencing the court to reach that decision were the facts that (i) the practices had developed during the indisputably competitive earlier periods of the industry and (ii) the pricing information could have been communicated as easily via other admittedly legal means. The Court also focused on the fact that the industry today faces limits on its competitive vitality due to its ever-shrinking market resulting from continual reduction in the number of automobiles using leaded gasoline. The Court also held generally that enforcement of the FTC's Section 5 "unfairness" jurisdiction should be limited to situations in which the challenged practices are either *per se* anticompetitive or cannot be explained by legitimate business purposes.

B. *Bogosian v. Gulf Oil Corporation, et al., Civil Action Nos. 71-1137 and 71-2543 (E.D. Pa.)*

This case, one of the longest-running antitrust cases in U.S. history, had its origins in a suit brought in 1967 by the named plaintiff against Gulf Oil in which Bogosian complained, *inter alia,* that Gulf's requirement that its dealers purchase effectively all their gasoline from Gulf wholesalers violated the antitrust laws. The case was converted into a class action in the late 1970s involving 200,000 past and current gasoline dealers as plaintiffs and including as defendants Amoco, Atlantic Richfield, Amerada Hess, BP, Chevron, Cities Service, Exxon, Getty (now Texaco), Gulf (now Chevron), Mobil, Phillips, Shell, Sunoco, Texaco, and Union. Sunoco and Getty settled with plaintiffs in 1979, agreeing to allow their dealers to carry more than one brand of gasoline.

On September 24, 1984, the remaining defendants announced that they had entered into a proposed settlement in which they would agree to allow dealers to sell other brands of gasoline as long as certain conditions are met. Specifically, station operators would be required to store the supplementary gasoline in separate tanks and pump it through separate pumps, and carry a certain amount of branded gasoline at all times. The settlement was presented to Judge VanArtsdalen in October 1984 and he granted plaintiff class until February 15, 1985 to lodge objections to the terms of the settlement. As of this writing, some objections to the settlement reportedly had been submitted.

C. *Oil Pipelines: Justice Department Preliminary Report On Competition In The Oil Pipeline Industry*

During the past few years, bills have been introduced in Congress to remove the oil pipeline industry from FERC regulation. The general position of the executive branch as presented in testimony at Congressional hearings has been that deregulation is appropriate for oil pipelines which face adequate competition from other oil pipelines. On May 9, 1984, the Antitrust Division of the Department of Justice released a preliminary report of its study of competition in the oil pipeline industry which sought to identify those pipelines for which deregulation is appropriate. The report identifies both product and geographic markets and, according to enumerated criteria for defining market shares, assesses the degree of concentration in the identified markets. The report also identifies other factors in addition to market concentration which are considered relevant to an assessment of competition and market power in oil pipeline markets. Finally, the report seeks public comment on whether deregulation is appropriate for oil pipelines which operate to a significant degree both in competitive and noncompetitive markets. A final report with pipeline-specific recommendations for deregulation is to follow.

IV. NATURAL GAS

A. *Continuation of Special Marketing Programs*

Partially as a result of the Commission's Notice of Inquiry referred to in the last Committee report on special marketing programs (SMP), 5 Energy L.J. 152, the Commission on September 26, 1984 issued a generic SMP order extending until October 31, 1985 all such programs in the natural gas industry, *Tenneco Oil Co.,* 28 FERC ¶ 61,383, *reh'g granted in part and denied in part,* 29 FERC ¶ 61,334 (1984). The order did not specifically address antitrust considerations as such, but in its rehearing order issued on December 21, 1984, the Commission addressed Maryland People's Counsel's concerns about alleged price-fixing and market allocation resulting from the SMPs. Maryland People's Counsel argued that the

SMPs permit producers and pipelines to target discounted gas to price-sensitive markets while continuing to sell "above market-clearing price" gas to consumers. The Commission responded that SMP customers can include "core" market customers which arrange direct purchases from producers at prices unrelated to pipeline posted SMP prices, and that if transportation for such gas were not provided, the party denied transportation could file a formal complaint with the Commission. Maryland People's Counsel has sought judicial review of the new SMP orders in Case No. 85-1029 in the United States Court of Appeals for the District of Columbia Circuit.

B. *FERC Letter to Congress*

On January 22, 1985, FERC Chairman O'Connor sent a letter to Congressmen John Dingell (D-Mich.) and James Broyhill (R-N.C.) of the House Energy and Commerce subcommittee which contained responses to twenty-six (26) questions addressed to the Commission by the subcommittee. Of particular note here, the Commission stated that it has not determined that a refusal by an interstate pipeline to transport gas which would be sold in competition with the pipeline's system sales constitutes a possible violation of the antitrust laws. The Commission also stated that it has not requested that either the Justice Department or the FTC investigate any particular interstate pipeline for possible antitrust violations. The Commission added, however, that where information developed in a particular investigation or in a hearing in a particular case indicates a possible antitrust violation by an interstate pipeline, the Commission, in accordance with Section 20(a) of the Natural Gas Act and in its discretion, may transmit evidence of such violation to the Justice Department.

The Commission added that it is aware of the potential antitrust ramifications of interstate pipelines' off-system transportation policies and is seeking public input on this issue. The Commission referred in the letter to its Notice of Inquiry, Interstate Transportation of Gas for Others, in Docket No. RM85-1-000, issued December 24, 1984, 29 FERC ¶ 61,336 (1984). The Notice of Inquiry inquires into the relationship between the Natural Gas Act and antitrust laws, and seeks comment on the Commission's responsibility to review and take account of allegations that an interstate pipeline's refusal to offer transportation service constitutes a violation of the antitrust laws.

C. *Hart-Scott-Rodino Premerger Notification Program*

On August 30, 1984, the Department of Justice filed a civil suit in United States District Court for the District of Columbia charging Coastal Corporation with violation of the Hart-Scott-Rodino premerger notification provisions in connection with Coastal Corporation's purchase in January 1984 of 75,000 shares of Houston Natural Gas Corporation. Specifically, the Justice Department alleged that the transaction was subject to notification and waiting period requirements with which Coastal did not comply. The case was settled in December 1984 with Coastal agreeing to pay a fine of $230,000.

D. In Re New Mexico Natural Gas Antitrust Litigation, MDL Docket No. 403 (D. Colo.)

Chief Judge Sherman Finesilver entered orders on August 1, 1984 approving a settlement which contemplates resolution of the claims remaining in this class action brought by past and present New Mexico residential gas users. The claims allege price-fixing by certain gas producers and transporters in the San Juan Basin Region of New Mexico. The settlement addresses the liability of Southern Union Gas Company and Southern Union Gathering Company, the sole remaining defendants. The settlement was approved by the New Mexico Public Service Commission, the Federal Trade Commission, and Southern Union's shareholders and became final in January 1985.

On October 12, 1984, however, an action alleging price-fixing antitrust violations similar to those addressed by the foregoing settlement was filed against Southern Union Gas Company and other defendants on behalf of New Mexico commercial and small industrial customers of Southern Union. That lawsuit is identified below.

E. Jicarilla Apache Tribe v. Supron Energy Corp., et al., 728 F.2d 1555 (10th Cir. 1984)

The Tenth Circuit upheld the trial court's decision for defendants on price-fixing claims raised by the plaintiff. The Court of Appeals agreed that merely because the defendants entered into gas purchase contracts that contained similar terms, including a most favored nation type of provision, did not prove price-fixing. The Court noted that such gas purchase contracts were typical of the industry, are supportable by legitimate business justification, and did not result in prices higher than the national trend.

The plaintiffs also made a claim against defendants of illegal interlocking directorates in violation of Section 8 of the Clayton Act. The Tenth Circuit found a "technical violation" of the statute, but no evidence of harm to the plaintiff as a result of the interlocking directorates among competing defendants. The Court therefore upheld the trial court's denial of damages to the tribe under the Clayton Act.

F. Business Review Procedure

By letter dated January 8, 1984, now outgoing Attorney General for the Antitrust Division J. Paul McGrath advised that the Justice Department has no present intention to initiate enforcement action to challenge the National LP-Gas Association's (NLPGA) establishment of a trade association fund to promote through national advertising the use of propane as an automotive fuel. NLPGA is a trade association of liquefied petroleum gas industry members including producers, transporters, wholesalers and retailers of propane gas. The proposed fund would be comprised of voluntary contributions from participating members. Each participating member would continue to determine independently the price of its products and, as the Department noted, there was no express or implied agreement to raise prices by the amount of contributions to the fund.

Based on such information, McGrath noted that neither the purpose nor the likely effect of the fund is to restrain trade. The proposed fund was found to be potentially procompetitive in that it could, by increasing sales of propane and propane-related equipment, stimulate competition with other forms of engine fuel and related equipment. McGrath noted that no one manufacturer would be likely to undertake the expense of national advertising by itself. McGrath observed that because the proposed fund's voluntary contribution formula bears a direct relationship to units sold, the formula could facilitate unlawful collusion. McGrath determined, however, that the risk of collusion was outweighed by potential procompetitive benefits. As is customary in such business review letters, the Department reserved the right to initiate enforcement action if it subsequently determines that the fund has an anticompetitive purpose or effect.

G. *Recently Filed Natural Gas Antitrust Cases*

Natural gas antitrust cases filed since the last Committee report include the following:

1. *State of Illinois v. Panhandle Eastern Pipe Line Co.,* Case No. 84-1048 (C.D. Ill., filed February 7, 1984) (the State of Illinois has alleged that Panhandle has violated the Sherman Act by using its transportation system and has established "guidelines" to monopolize markets in the state by refusing to transport lower-cost gas supplies; preliminary injunction denied; trial currently set for April, 1985).

2. *Colorado Interstate Gas Co. v. Public Service Company of Colorado,* Case No. 84-JM-1744 (D. Colo., filed August 29, 1984) (the plaintiff interstate gas pipeline alleges that the defendant local distribution company has violated the antitrust laws by refusing to transport gas to an end-user despite its monopoly of distribution in the relevant market; the case is in discovery).

3. *MIGC, Inc. v. Colorado Interstate Gas Co.,* Case No. C-83-0299 (D. Wyo.) (the allegations of monopolization of transportation capacity were dismissed without prejudice under a settlement providing for litigation of the issue at the FERC in Docket No. RP84-7).

4. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* Case No. C-84-0139 (D. Wyo.) (plaintiff alleges violations of the Sherman Act in misuse of monopoly power over transportation of gas eastward from the Overthrust Belt region; defendant has counterclaimed that CIG and others have attempted to monopolize purchase and transportation of gas westward from the Overthrust Belt region; trial currently set for April, 1985).

5. *Northern New Mexico Insurance Agencies, Inc. et al. v. Southern Union Gas Company, et al.,* Case No. Civ. 84-1520M (D. N.M., filed October 12, 1984) (antitrust action by commercial and small industrial gas customers alleging price-fixing of wellhead prices in the San Juan Basin Region; motion for certification of plaintiff class is pending).

6. *Consolidated Gas Co. of Florida, Inc. v. City Gas of Florida,* Case No. 83-1010 (S.D. Fla.) (plaintiff alleges that defendant violated Section 2 of the Sherman Act by refusing to sell or transport gas; case is pending while the FERC has determined in a related proceeding (28 FERC ¶ 61,350) that Consolidated is entitled to build a connection to Florida Gas Transmssion's system which connection could provide the natural gas quantities Consolidated is seeking from City Gas).

7. *Gas Service Company, et al. v. Amoco, et al.,* Case No. 84-0999-CV-W-9 (W.D. Mo., filed September 20, 1984) (two distributors of natural gas sued various producers and Northwest Central Pipeline, alleging conspiracies to fix the price of natural gas sold to Northwest Central and to maintain such prices through exploitation of Northwest Central's alleged monopoly over transportation service to plaintiffs).

8. *Pearce Bottled Gas, Inc. v. Anson & Clark, Inc.,* Case No. 84-217-C (S.D. Ind., amended complaint filed September 6, 1984) (plaintiff distributor of bottled gas alleges that the defendant, a retail propane gas dealer, has sold propane gas to some customers at substantially lower prices than to others in violation of the Robinson-Patman Act).

9. *N. Earl Baldwin et al. v. Getty Oil Company,* Case No. 84-0135-H-S (S.D. Ala., filed February 2, 1984) (class action on behalf of various individuals who leased oil, gas, and mineral rights to Getty Oil in the Hatters Pond field in Mobile County, Alabama; among the counts is one brought under Section 2 of the Sherman Act in which it is alleged that the defendant attempted to monopolize production from this field).

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John A. Myler
Mary Ann Oliver
William C. Pitcher
Harry M. Reasoner
Harvey Reiter
George Rothschild, Jr.
Johnson A. Salisbury
J.D. Steelman, Jr.
David E. Varner
Sarah K. Walls
Stephen E. Williams