COMMITTEE REPORTS

Report of The Committee on Antitrust

I. ELECTRIC UTILITIES

A. *Greenwood Utilities Commission v. Mississippi Power Co.*[1]

Greenwood, a municipally-owned Mississippi electric utility, had been denied an allocation of federally-generated hydroelectric power by the Southeastern Power Administration (SEPA) on the ground that Greenwood is located outside the area SEPA serves. Greenwood brought this suit against Mississippi Power Company under Sherman Act Sections 1 and 2,[2] alleging that Mississippi Power and its sister companies of the Southern Company System (Southern Companies) used their monopoly power over the transmission of electricity from SEPA projects to coerce SEPA to allocate power only in the Southern Companies' service areas. Among other things, Greenwood also alleged that the arrangements made between the Southern Companies and SEPA effected a horizontal division of the market for federal power.

Greenwood is located outside the Mississippi Power service area but is indirectly interconnected with Mississippi Power through another utility. A clause in a Mississippi Power/SEPA transmission contract restricted deliveries of SEPA power to municipalities that were within the Mississippi Power service area.

The Fifth Circuit, in upholding the district court summary judgment in favor of Mississippi Power, found that, for purposes of Sherman Act Section 1, Mississippi Power could not conspire with its sister companies because each was a part of the same "economic enterprise."[3]

The court also found that efforts by Mississippi Power and its affiliates to convince SEPA to adopt the restrictive power marketing policy at issue were protected by the First Amendment under the *Noerr-Pennington* doctrine.[4] The *Noerr-Pennington* doctrine, in the Fifth Circuit's words, "allows individuals or businesses to petition the government, free of the threat of antitrust liability, for action that may have anticompetitive consequences."[5]

The Fifth Circuit considered the applicability of the "sham" exception to the *Noerr-Pennington* doctrine to Mississippi Power's activities. The court found that, even assuming arguendo that the agency's action was improper

---

1. 751 F.2d 1484 (5th Cir. 1985).
2. 15 U.S.C. §§ 1, 2 (1982) (amended note 1984).
3. 751 F.2d at 1496 (citing Cooperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984).
4. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).
5. 751 F.2d at 1497.

under the public body preference of the Flood Control Act,[6] SEPA's violation of that statute alone would not be unauthorized agency action sufficient to trigger the sham exception. The court also found no support for Greenwood's allegation that SEPA officials had unlawfully conspired with the Southern Companies or otherwise acted outside the scope of their official duties.

The court concluded that the negotiations of the restrictive provisions of the transmission agreement were not the result of coercion by the Southern Companies. The court questioned whether Mississippi Power had the ability to coerce SEPA inasmuch as SEPA is a part of the federal government. The court considered the government's choice not to build its own transmission facilities to be a political one, reversible at any time.

The court distinguished *Otter Tail Power Co.* v. *United States*[7] on the ground that there the government was willing to sell power to the municipality and the private company's refusal to wheel was the only obstacle preventing the sale, whereas Mississippi Power had never refused any SEPA request to wheel power. Moreover, the court found that, while in *Otter Tail* the government was in a sense the victim of illegal anticompetitive conduct, in *Greenwood*, the restrictive contractual provision was the result of a decision by SEPA, albeit one encouraged by the legally protected petitioning conduct of the Southern Companies. The court determined that it should not second guess a government decision to adopt a restrictive plan for marketing power "even though that action may take the form of an agreement in restraint of trade."[8]

In passing on Mississippi Power's conduct, the court noted that it agreed with the 9th Circuit that there is no "commercial exception" to the *Noerr-Pennington* doctrine and noted that the protected status of commercial arrangements with the government should hinge on the petitioning conduct itself, not on whether or not the government was acting as a participant in the market as opposed to solely as regulator.[9]

B. Grason Electric Company v. Sacramento Municipal Utility District[10]

In this proceeding, private electrical contractors brought suit against Sacramento Municipal Utility District (SMUD), an electric utility created by state statute, alleging that SMUD violated Sherman Act Sections 1 and 2,[11] by monopolizing the markets for electrical distribution systems on private property and for street and outdoor lighting systems. Apparently plaintiffs did not allege that SMUD's monopoly of the electric energy market itself was illegal, but rather that SMUD had used that monopoly to gain an anticompetitive advantage in related markets. The lower court denied SMUD's motion for summary judgment which asserted that SMUD's actions were protected by the state action exemption to the antitrust laws. The Ninth Circuit, relying heavily on

---

6. 43 U.S.C. 825 s (1982).

7. 410 U.S. 366 (1973).

8. 751 F.2d at 1506.

9. *Id.* at 1505 n. 14 (citing *In re* Airport Car Rental Antitrust Litig., 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983)).

10. 770 F.2d 833 (9th Cir. 1985).

11. 15 U.S.C. §§ 1, 2 (1982) (amended note 1984).

Town of Hallie v. City of Eau Claire,[12] reversed and held that SMUD's actions furthered a clearly articulated and affirmatively expressed state policy to displace competition with regulation and, furthermore, that SMUD need not show active state supervision because it is a municipality for purposes of the state action exemption.

As demonstrated by *Grason* and *Cheyenne* (discussed below) the state action doctrine is an important consideration in actions brought against municipalities or other entities created by the state. A comprehensive survey of the state action doctrine is beyond the scope of this case summary. Practitioners, however, should be aware of the two requirement test for state action referred to in Grason: (1) a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and (2) active state supervision.[13] As to municipalities, *Hallie* removed the latter requirement entirely and the courts have found the first element of the test in rather terse general grants of authority to municipalities to take certain actions.[14]

Practitioners should also be aware that even if an antitrust plaintiff overcomes the state action hurdle, the Local Government Act of 1984[15] limits antitrust plaintiffs to injunctive relief against municipalities and other "general function governmental units established by State law." The application of the Act to proceedings commenced before its effective data depends on the circumstances of the individual proceeding.[16]

C. *Rural Electric Co. v. Cheyenne Light, Fuel & Power Co.*[17]

In this case, the Tenth Circuit affirmed the district court's dismissal of a Sherman Act claim brought by an unsuccessful bidder for a nonexclusive franchise to provide electricity to the location of a new industrial plant. Suit was brought against a rival power company and the City of Cheyenne, which pursuant to Wyoming statute, granted a nonexclusive franchise to that company. The Tenth Circuit found that the city's action in awarding a franchise to one power company and denying a franchise to another furthered the state policy of displacing competition with regulation. Moreover, the court found that the requirements of the state action exemption were met, since under *Town of Hallie v. City of Eau Claire*[18] there is no requirement of active state supervision where the actor is a municipality. The court also held that the successful power company's effort to influence the city council and the state public service commission came within the protection of the *Noerr-Pennington* doctrine because plaintiff had not shown that those efforts were a sham or were undertaken only to damage plaintiff.

---

12. 105 S. Ct. 1713 (1985).
13. *See* 770 F.2d 833 *passim*.
14. *See, e.g., id*; Springs Ambulance Serv. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984).
15. 15 U.S.C. §§ 34-36 (Supp. II 1984).
16. *Id.* at § 35(b).
17. 762 F.2d 847 (10th Cir. 1985).
18. 105 S. Ct. 1713 (1985).

D. *Ray v. Indiana & Michigan Electric Co.*[19]

In this case the Seventh Circuit affirmed a lower court judgment[20] holding that Indiana & Michigan Electric Company (I&M) did not violate the Sherman Act in acquiring the Fort Wayne municipal utility (City Light) or by subsequent actions, including certain rate filings. Plaintiffs, certain Fort Wayne residents, alleged that I&M, with an intent to eliminate its only competitor in the Fort Wayne area, among other things, prevented the expansion of City Light and had charged it excessive wholesale rates. The Seventh Circuit affirmed the district court's finding that City Light's failure to expand was a result of City Light's own decision not to invest in physical plant and any I&M opposition to City Light expansion was "fair and above board."[21] The Seventh Circuit also affirmed the district court's finding that the rates charged to City Light were fair and did not create a price squeeze, and that the post acquisition rate filings were not improper.[22]

The Seventh Circuit also ruled that the district court's refusal to give offensive collateral estoppel effect against I&M to certain issues litigated in *City of Mishawaka v. American Electric Power Co.*[23] was within that court's broad discretion. The Seventh Circuit noted that the City of Fort Wayne was not a party in *Mishawaka* and the price squeeze issue tried in that case did not involve I&M's rates or its activities in the Fort Wayne area. The Seventh Circuit also noted that I&M did not present any evidence in *Mishawaka*, nor did it have any incentive to litigate there the issues raised in the *Ray* proceeding.[24]

E. *City of Chanute v. Kansas Gas and Electric Co.*[25]

In this proceeding the lower court had granted plaintiffs, three municipal electric distribution systems, an injunction ordering their partial requirements supplier, Kansas Gas and Electric Co., to wheel power to them from Southwestern Power Administration (SWPA) projects. Plaintiffs' complaint sought damages and a permanent injunction under Sherman Act Sections 1 and 2,[26] and Section 3 of the Clayton Act.[27] Noting that the grant or denial of a preliminary injunction is within the sound discretion of the trial court, the Tenth Circuit applied a traditional four-prong test to determine whether the injunction would be adverse to the public interest and whether plaintiff's injuries, should the injunction be withdrawn, would outweigh possible injury to the defendant should the injunction remain in effect. The court found, however, that while two of the cities would lose their allocation of SWPA power should wheeling not be required, the third city would not lose the allocation but would

---

19. 758 F.2d 1148 (7th Cir. 1985).
20. Civ. No. F. 78-148 (N.D. Ind. May 11, 1984).
21. 758 F.2d at 1150.
22. *Id.*
23. 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in part, vacated in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).
24. 758 F.2d at 1150.
25. 754 F.2d 310 (10th Cir. 1985).
26. 15 U.S.C. §§ 1, 2 (1982) (amended note 1984).
27. 15 U.S.C. § 14 (1982).

only have to pay an ongoing demand charge. In view of this fact, the Tenth Circuit found that the latter city had not demonstrated irreparable harm.[28] In regard to the two cities showing of irreparable harm, the court noted that the value of the availability of a potential supplier could not always be measured in dollars, particularly when such availability changes the competitive structure of the market.[29]

The Tenth Circuit went on to state that, where the other three requirements for a preliminary injunction are satisfied, the requirement that a substantial likelihood of success be demonstrated is satisfied where plaintiff "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."[30] Finding that the two cities had raised such questions in their antitrust claims, the Tenth Circuit allowed the preliminary injunction to stand as to them.[31]

F. Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration[32]

In an agency review action challenging a Bonneville Power Administration (BPA) policy regarding access to certain Northwest transmission lines, the City of Los Angeles argued that by displacing competition, the policy violated the antitrust laws. In a terse footnote, the Ninth Circuit stated that this argument was frivolous because the antitrust laws do not apply to the federal government.[33] Similar dicta appears in *Greenwood*.[34]

G. Empire State Electric Energy Research Corp.[35]

This Federal Register entry is a notice of a filing by Empire State Electric Energy Research Corporation (ESEERC) with the Attorney General and the Federal Trade Commission pursuant to the National Cooperative Research Act,[36] 15 U.S.C. §§ 4301 to 4305, invoking that Act's limitations on antitrust damages stemming from certain joint research and development activities. ESEERC is a joint venture corporation made up of seven New York investor-owned utilities which plans to carry on advanced research on fossil fuel, nuclear power, the environment, electric systems and electric equipment topics.

H. City of Vernon v. Southern California Edison Company[37]

There has been no significant activity of public record in this case since

28. 754 F.2d at 313-14.
29. *Id.* at 313.
30. *Id.* at 314.
31. *Id.*
32. 759 F.2d 684 (9th Cir. 1985).
33. *Id.* at 693 n.12.
34. *See* 751 F.2d at 1504.
35. 50 Fed. Reg. 5443 (Feb. 8, 1985).
36. 15 U.S.C. §§ 4301-4305 (1982).
37. No. 83-8137-MRP (C.D. Cal., filed Dec. 15, 1983).

this committee's last report noted its filing.[38]

In this proceeding, the City of Vernon, a municipal wholesale customer of Southern California Edison Company (Edison), alleges that Edison, in combination with other California electric utilities, violated Sections 1 and 2 of the Sherman Act[39] by foreclosing Vernon from access to transmission too the Pacific Northwest through a foreclosure of access to the Pacific Intertie.

Vernon also alleges, among other things, that Edison violated Sherman Act Section 2 by preventing Vernon from obtaining low cost supplies from other sources, by delaying Vernon's use of a diesel generator plant to reduce peak and intermediate power purchases from Edison, by unreasonably refusing to offer Vernon certain rate designs which it offered its own retail customers, and by engaging in price squeeze and predatory pricing.

Edison has asserted a number of counterclaims against Vernon including Sherman Act Section 2 claims alleging monopolization by Vernon of retail service and monopolizing the commerce and trade of cogeneration within the municipal boundaries of the city.

I. Cities of Anaheim, et al. v. Southern California Edison Company[40]

This long standing proceeding involves Sherman Act Section 1 and 2 claims brought by municipal wholesale customers of Southern California Edison Company (Edison) alleging that Edison engaged in price squeeze and foreclosed plaintiffs from access to bulk electric power supplies, including access to the Pacific Intertie. There was little significant activity of public record in the past year.

J. City of Cleveland v. Cleveland Electric Illuminating Company[41]

This opinion was summarized in the last report.[42] Certiori was denied on October 9, 1984.[43]

K. United States v. Kentucky Utilities Co.[44]

There has been no significant activity of public record in this proceeding since the last report. This case was summarized in the last report under the Western District case number, No. C81-0109-L.[45]

L. Cable TV Puget Sound, Inc. v. Peninsula Light Company[46]

This case, which was noted in the last report as a recently filed case, was dismissed by stipulation on January 4, 1985.

---

38. *See Report of the Committee on Antitrust*, 6 ENERGY L.J. at 89 (1985).
39. 15 U.S.C. §§ 1, 2 (1982) (amended note 1984).
40. No. 83-8137-MRP (C.D. Cal. Mar. 2, 1978).
41. 734 F.2d 1157 (6th Cir. 1984).
42. *See* 6 ENERGY L.J. at 86 (1985).
43. 105 S. Ct. 253 (1984).
44. No. 81-52 (E.D. Ky.) (transferred from W.D. Ky., Apr. 2, 1981).
45. *See* 6 ENERGY L.J. at 88 (1985).
46. No. 84-131 (W.D. Wash. filed Mar. 2, 1984).

M. Citizens Electric Corporation v. Union Electric Company[47]

This case, which was noted in the last report as a recently filed case, has been set for trial.

N. Malden (Missouri) v. Union Electric Company[48]

This case, which was noted in the last report as a recently filed case, was withdrawn by plaintiff. Order of dismissal was dated December 20, 1985.

O. Recently Filed Electric Utility Antitrust Cases

Recently filed electric utility antitrust cases, not covered in the last Committee report include the following:

1. *Kaw Valley Electric Co-op Inc. v. Kansas Electric Power Co-op Inc.*[49] (Sherman Act and Clayton Act complaint against Kansas Electric Power co-op Inc. and Kansas Electric Co-op Inc. alleging monopolization of Southwestern Power Administration hydropower and illegal tying of participation in that power to participation in nuclear project).

2. *Greensboro Lumber Co. v. Georgia Power Company*[50] (lumber company operating wood waste fueled small power production plant seeking to sell excess production brought suit against virtually every electric utility in Georgia (including Georgia Power Company; Municipal Electric Authority of Georgia and members; and Oglethorpe Power Corporation and members) under Sherman Act 1 and 2 and Clayton Act for monopolization of wholesale power market and transmission).

3. *United States of America, et al. v. Coosa Valley Electric Cooperative, Inc.*[51] (rural electric cooperative seeking to break away from full requirements supply by generation and transmission cooperative was sued by REA; coop counterclaimed with antitrust allegations; REA summary judgment motion on antitrust counterclaims is pending).

II. Oil

A. *Conoco, Inc. v. Inman Oil Co.*[52]

A distributor alleged illegal price discrimination as a counterclaim against Conoco in a suit Conoco brought to recover money owed by the distributor. The counterclaim alleged that Conoco solicited Inman's customers for direct sales of petroleum products. It was alleged that Conoco accomplished this by setting its base price below the base price of the same products for Inman oil and by absorbing some costs. Inman Oil argued that these facts constitute proof of price discrimination in violation of Section 2(a) of the Clayton Act, as

47. No. 83-2756 (E.D. Mo. filed Dec. 2, 1983).
48. No. 83-2533 (E.D. Mo. filed Nov. 4, 1983).
49. No. 85-4009 (D. Ks. filed Jan. 9, 1985).
50. No. 84-2022 (D.N. Ga. filed Oct. 5, 1984).
51. No. CV85-C-0515-s (D.N. Ala. Feb. 15, 1985).
52. 774 F.2d 895 (8th Cir. 1985).

amended by the Robinson-Patman Act,[53] and proof of an attempt to monopolize the sale of petroleum products in violation of Section 2 of the Sherman Act.[54]

The Eight Circuit held that Inman did not make out a Robinson-Patman claim because it failed to show primary line competition with Conoco.[55] The court held that the mere fact that a customer of Inman Oil became a customer of Conoco does not prove primary line competition between the two. Inman Oil alleged only an injury to primary line competition for the price discrimination counterclaim.

The court also found no merit to Inman's Sherman Act Section 2 claim. While finding that Conoco and Inman *were* competitors for Sherman Act (if not Robinson-Patman Act) purposes, the court held that anticompetitive intent alone without anticompetitive behavior or "monopolistic conduct" could not support a Sherman Act Section 2 claim.[56] Specifically, Inman failed because it "presented no economic data to indicate that Conoco, by bidding low, forewent profits it would otherwise have made."[57] Thus, the court applied a predatory pricing analysis and found no predation. There was no "price squeeze" or Sherman Section 2 price discrimination analysis.

While finding that the antitrust laws imposed no obligations on Conoco to refrain from underbidding Inman, the court of appeals found that the franchise agreement did impose such obligations. The court reversed the district court on Inman's claim of breach of contract, finding that Conoco's competition for Inman's customers was a breach of an "implied obligation of good faith and fair dealing" inherent in the franchise agreement between Conoco and Inman.[58]

B. Russ' Kwik Car Wash v. Marathon Petroleum Co.[59]

Relying on the Supreme Court's recent discussion in *Copperweld Corp. v. Independence Tube Corp.*[60] of intra-corporate activities under the antitrust laws, the Sixth Circuit found that a transfer of a product from a parent corporation to its wholly-owned subsidiary is not a "sale" for purposes of the Robinson-Patman Act.

Specifically, the Court affirmed a district court summary judgment in favor of Marathon Oil and its subsidiary, Emro Marketing Company, on the grounds that an oil company's sale of gasoline to a wholly-owned subsidiary was not a "sale" for purposes of the Robinson-Patman Act. Russ' Kwik Car Wash, a competitor of a service station owned by Emro Marketing, alleged, *inter alia*, that Marathon sold gasoline at a cheaper price to Emro than to Russ' Kwik and that such discrimination entailed the possibility of an adverse effect on competition.[61] Therefore, Russ' Kwik argued, prohibited discrimina-

53. 15 U.S.C. § 13(a) (1982).
54. *Id.* at § 2 (1982).
55. 774 F.2d at 904.
56. *Id.* at 904-06.
57. *Id.* at 906.
58. *Id.* at 909.
59. 772 F.2d 214 (6th Cir. 1985).
60. 104 S. Ct. 273 (1984).
61. 772 F.2d at 215, 217.

tion existed.

At least two separate sales to different purchasers must take place in order to constitute discrimination under the Robinson-Patman Act.[62] Relying on *Copperweld*, the Court found that two sales did not take place since the transfer of gasoline from Marathon to Emro was not a "sale."[63] The Court reached this conclusion by looking at the economic reality of the transaction. Since the parent and the subsidiary are a single economic unit, the subsidiary acts for the benefit of the parent. By acting for the benefit of the parent, the subsidiary is like an unincorporated division of the parent. The Sixth Circuit followed the *Copperweld* rationale: "Antitrust liability should not depend on whether a corporate sub-unit is organized as an unincorporated division or a wholly-owned subsidiary."[64] The Sixth Circuit concluded that such an internal transfer could not be a "sale" under the Robinson-Patman Act.

C. *Power Test Petroleum Distributors, Inc. v. Calcu Gas, Inc.*[65]

In this trademark tying case, the Second Circuit found that a franchisor may require a branded franchisee to sell only the franchisor's product with violating the antitrust laws.

Yonkers, the franchisee, asserted an antitrust defense to Power Test's trademark infringement claim based on a tie-in between the trademark (the tying product) and gasoline (the tied product). Yonkers argued that the "Power Test" trademark was a separate product from the gasoline because Power Test purchases its gasoline from other suppliers and merely warrants its quality to its dealers. Therefore, Yonkers argued, "Power Test" is a quality trademark capable of being tied to another product. The Second Circuit declined to determine whether a distinction between a "source" or a "quality" mark is helpful in an antitrust context.[66] Instead, the court determined that the "Power Test" trademark and the gasoline are inextricably interrelated as defined by the perceptions that exist in the minds of the relevant buying public.[67] Thus, the Court used trademark principles stressing the perceptions of the consuming public to resolve the antitrust inquiry and found no separate products. The district court's preliminary injunction prohibiting Yonkers from both purchasing gasoline from suppliers other than Power Test and covering any Power Test signs on the premises was left in place.[68]

D. *Kellam Energy, Inc. v. Duncan*[69]

This decision on motion to compel production discusses the scope of discovery in a Robinson-Patman and Sherman Act price discrimination case. Kellam Energy, a petroleum products supplier, brought a breach of a requirements

62. *Id.* at 217 (citing Bruce's Juices, Inc. v. American Can Co., 330 U.S. 755 (1947).
63. *Id.* at 217-221.
64. *Id.* at 221 (quoting *Copperweld*, 104 S. Ct. at 2743).
65. 754 F.2d 91 (2d Cir. 1985).
66. *Id.* at 96.
67. *Id.* at 96-98.
68. *Id.* at 99.
69. 616 F. Supp. 215 (D. Del. 1985).

contract action against the operator of convenience stores. The convenience store operator's counterclaim alleged that Kellam has engaged in unlawful price discrimination by selling petroleum products to its own outlets at a price lower than it sells the same products to defendant; that Kellam has used the contracts in question to set the price paid for petroleum products by competing convenience stores at an artificially high price; and that Kellam has used these contracts as a part of a plan to monopolize the gasoline-convenience store market in southern Delaware.[70]

The district court affirmed the general policy to allow liberal discovery in antitrust cases, holding that the discovery was not confined to the statute of limitations period of the antitrust statutes, and that the geographic scope of discovery was not limited to specific locations where defendant's convenience stores directly competed with plaintiff's stores.[71] Instead, the geographic scope of discovery extends to the region alleged to be targeted in the monopolization scheme.[72]

E. Unocal Corp. v. Mesa Petroleum Co.[73]

Unocal Corporation and Union Oil Company of California (Unocal) brought this antitrust action against Mesa Petroleum Company seeking damages and injunctive relief under Sherman Act Sections 1 and 2[74] to prevent Mesa from taking it over and to prevent Mesa from voting its shares at Unocal shareholders' meetings. The complaint was based on the effect such activities would have on off-shore leasing. Unocal alleged that Mesa's attempted takeover of Unocal and its previous attempts to take over major oil companies constituted an unlawful conspiracy to restrain trade and domestic oil and gas leasing and exploration on the Outer Continental Shelf in the Gulf of Mexico in violation of Sections 1 and 2 of the Sherman Act. Takeover attempts, they argued, may affect leasing and exploration by "restructuring" (greatly increasing the debt to equity ratio of) numerous major oil companies.[75] The increased debt restricts the working capital available for the purchasing of leases and for exploration, thereby reducing competition.

The district's court's discussion in this opinion concerns Unocal's request for preliminary injunctive relief pursuant to Section 16 of the Clayton Act.[76] The court denied injunctive relief because Unocal failed to carry its burden of establishing a substantial likelihood that it would prevail on the merits, and of showing a substantial threat that it would suffer irreparable injury unless the injunction were granted.[77] The court found that Unocal's statistical evidence showing a reduction in Outer Shelf expenditures was more easily explained by market factors and management decisions than by the "restructuring." In addi-

70. *Id.* at 217.
71. *Id.* at 217-220.
72. *Id.*
73. 616 F. Supp. 149 (W.D. La. 1985).
74. 15 U.S.C. §§ 1, 2 (1982) (amended note 1984).
75. 616 F. Supp. at 150.
76. 15 U.S.C. § 26 (1982).
77. 616 F. Supp. at 150.

tion, Unocal's arguments to prove the existence of a substantial threat of injury were speculative. New management may or may not run Unocal more efficiently. Unocal may or may not be able to maintain their leases, and even if they are unable to maintain them, it is uncertain whether exploration will be beneficial.[78]

F. Lieberman v. FTC[79]

This decision addresses the FTC's powers under the Clayton Act in releasing information on oil company mergers. The Attorneys General of several states alleged that the FTC acted improperly under the Clayton Act in denying their request for access to documents in connection with a merger proposed between Texaco and Getty Oil.

The Second Circuit held, in light of the congressional purpose, that Section 7A(h) of the Clayton Act[80] prohibits the FTC from furnishing pre-merger information to state attorneys general acting in their *parens patriae* capacity. This holding reverses the district court opinion but is in agreement with the Fifth Circuit in *Maytox v. FTC*,[81] and the majority of the FTC.

The attorneys general requested access to documents generated by the FTC in connection with a merger proposed between Texaco and Getty. The information was sought as part of an effort to enforce both federal and state antitrust laws. The FTC held that it was not authorized to share the information pursuant to Section 7A(h) of the Clayton Act.

The Second Circuit agreed, based upon the notion that where Congress provides such express exceptions, the courts should not apply others.[82]

G. Palazzo v. Gulf Oil Corp.[83]

The Eleventh Circuit held that under the Florida Antitrust Act, a corporate officer had no standing to bring an antitrust action in his individual capacity. In addition, Gulf did not violate Florida antitrust laws by charging an independent dealer the same tank wagon price for gasoline that it charged its branded, Gulf retail dealers. So even assuming Palazzo's standing to prosecute the individual claims, his case could not withstand a motion for summary judgment.

I. Typhoon Car Wash, Inc. v. Mobil Oil Corp.[84]

This case deals with lingering problems of the interface of petroleum pricing regulations with the antitrust laws. The Temporary Emergency Court of Appeals held that the Emergency Petroleum Allocation Act of 1973[85] does not

78. *Id.* at 152.
79. 771 F.2d 32 (2d Cir. 1985).
80. 15 U.S.C. § 18(a)(h) (1982).
81. 752 F.2d 116 (5th Cir. 1985).
82. 771 F.2d at 38.
83. 764 F.2d 1381 (11th Cir. 1985).
84. 5 TRADE REG. REP. (CCH) ¶ 66,805 (TECA July 2, 1985), *cert. denied*, 106 S. Ct. 386 (1985).
85. 15 U.S.C. §§ 751-760h (1982).

preempt the Robinson-Patman Act. Mobil Oil was allowed to use a Robinson-Patman-type defense to a charge of improper classification of a retail purchaser under the Emergency Petroleum Allocation Act (EPAA).

Relying on *Evanson v. Union Oil*,[86] the district court had not allowed Mobil to argue that the competitive allowance discount it had given to Typhoon and later withdrew was justified under the Robinson-Patman Act. In reversing the district court, TECA held that the class of purchaser regulations had explicitly incorporated Robinson-Patman Act defenses and Mobil had successfully shown such a defense.

The cost justification argument offered by Typhoon was not persuasive. Typhoon argued that because it cost more to build a car wash facility than a regular station, the discount from Mobil should have been maintained. However, the pertinent cost is the cost savings to the *supplier* due to the differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered to purchasers. The additional cost of building a car wash does not represent a cost savings to the supplier according to the court.

Typhoon's attempt to justify the discount based upon an average annual volume of petroleum purchased by the car wash group also failed. Justification based upon volume purchased must be proven by evidence that purchasers in the favored groups place larger individual orders than purchasers in the non-favored group. Typhoon only presented evidence of larger average annual volume rather than larger individual orders which might result in a cost savings to the supplier.

III. NATURAL GAS

A. *FERC Docket No. RM85-1-000 (Part D)*

On November 18, 1985, the Antitrust division of the Department of Justice filed comments on the Federal Energy Regulatory Commission's proposal regarding "block billing," *i.e.*, billing of customers separately by pipelines for costs of regulated old gas and deregulated new gas. The Division argued that the proposal would not further "the Commission's statutory obligation to enhance competition and promote economic efficiency" in the natural gas industry. Instead, the Division suggested the Commission issue a rule that permits gas regulated under Sections 104, 106, and 109 of the Natural Gas Policy Act to be sold at a competitive market price. Further, the Division urged the Commission to establish a presumption that the market price of such gas is just and reasonable within the meaning of the Natural Gas Act.

B. *Congressional Inquiries of the Federal Trade Commission*

On November 15, 1985, Congressmen John Dingell (Chairman, Committee on Energy and Commerce), and James Broyhill (Ranking Minority Member, Committee on Energy and Commerce) wrote to the Honorable Terry Calvani, Acting Chairman of the Federal Trade Commission (FTC), asking

86. 1974-1980 ENERGY MGMT. (CCH) ¶ 26,158 (D. Minn. July 31, 1979).

the FTC to investigate the decisions of "most pipelines" not to offer the "open access" to transportation services provided in Order No. 436.

On January 9, 1986, the same congressmen wrote again to Acting Chairman Calvani, noting that Mr. Calvani's response to the November 15 inquiry was being held in confidence and bringing two related matters to the FTC's attention. First, it was stated by the Congressmen that, with one exception, the major interstate gas pipelines "are not operating as nondiscriminatory transporters" under the FERC's Order No. 436-A. Second, with specific reference to Occidental Petroleum's acquisition of MidCon Corporation, the Congressmen noted a trend toward vertical and horizontal integration within the natural gas industry raising serious questions as to the state of competition and the potential for abuse of monopoly power in the natural gas industry. The FTC should, said the Congressmen, condition approval of vertical or horizontal mergers of interstate pipeline companies on the pipeline company operating as a nondiscriminatory transporter under Order No. 436-A.

C. *Powers v. Nassau Development Corp.*[87]

This action arose under the Sherman and Clayton Acts from an agreement between a land development company (Nassau) and Houston Gas under which those who in the future purchased land from the development company were required to obtain heating and cooling services exclusively from Houston Gas at rates to be fixed by agreement between the developer and Houston Gas.

The plaintiff purchased land from the development company to erect an office building and was required to purchase cooling services from Houston Gas. The plaintiff's successor in title refused to comply with the agreement between the developer and Houston Gas and installed its own cooling units.

When a successor to Houston Gas to the contract brought a breach of contract suit in state court against the plaintiff for the actions of the plaintiff's successor, the plaintiffs brought this antitrust action against the developer, Houston Gas, and Houston Gas' successor alleging a conspiracy to coerce individuals to enter into contracts with Houston Gas and for monopolization. It was alleged that the state court action was part of a scheme for maintaining a monopoly position.[88]

The district court had held that the suit as filed was outside the four year statute of limitations period under the Clayton Act for antitrust damage actions and also granted summary judgment for the defendants. The court of appeals reversed saying that the state court action, which was alleged to be part of the conspiracy, had been brought within the statute of limitations and that there were genuine issues of material facts as to the conspiracy allegations.[89]

D. *Illinois v. Panhandle Eastern Pipeline Co.*[90]

On January 17, 1985, the district court denied plaintiff's motion for a

87. 753 F.2d 457 (5th Cir. 1985).
88. *Id.* at 459.
89. *Id.* at 463-65.
90. 603 F. Supp. 786 (C.D. Ill. 1985).

preliminary injunction enjoining Panhandle from enforcing its Transportation Guidelines, while making preliminary findings that take or pay obligations are relevant to the issue of anticompetitive intent, that the transportation of gas is a separate product from natural gas sales, and that transportation guidelines based on sale displacement may create an unreasonable interference with pipeline facilities. Further, Panhandle's motion to dismiss on grounds that the complaint was filed on behalf of indirect purchasers is on appeal to the Seventh Circuit.

E. Consul Ltd. v. Transco Energy Co.[91]

This case concerns an action brought by a gas broker alleging that the defendant, a gas pipeline, had violated Section 1 of the Sherman Act[92] by engaging in a conspiracy to keep Consul from purchasing gas from the Greens Creek Field in Mississippi and violated Section 2 of the Sherman Act[93] by abusing its monopoly position relative to the Greens Creek Field. In 1984, the district court granted Transco's motion for partial summary judgment concerning Consul's allegations that Transco had violated the Sherman Act by causing delays in Federal Energy Regulatory Commission proceedings thereby failing to dedicate the field to FERC price regulation.

The case continues in litigation.

F. Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America[94]

This case, involving claims and counterclaims of attempts to monopolize the purchase, transportation, and sale of natural gas produced in gas producing areas of the Overthrust area of Wyoming, Idaho, and Utah, is presently set for trial in April of 1986.

G. The Gas Service Co. v. Amoco[95]

The complaint in this action alleged a Sherman Act Section 2 conspiracy, and fraud in an amendment of the defendants' contract to sell and buy gas under Section 107 of the Natural Gas Policy Act (NGPA). The district court, ruling on defendants' motion to dismiss on grounds of exclusive, or in the alternative primary, FERC jurisdiction found that the NGPA and the Natural Gas Act do not establish a pervasive system of regulation over the wellhead prices of natural gas, such as to preclude a Sherman Act cause of action.

H. Recently Filed Antitrust Cases

(1) *District of Columbia Hospital Energy Cooperative, Inc. v. Washington Gas Light Company*, No. 85-3720 (D. D.C. filed November 20, 1985) (Allegation of § 2 violation for refusal to transport).

---

91. No. C-82-574-WS (M.D.N.C. filed May 24, 1982) *earlier decision at* 596 F. Supp. 432 (1984).
92. 15 U.S.C. § 1 (1982) (amended note 1984).
93. 15 U.S.C. § 2 (1982).
94. No. C-84-0139 (D.C. Wyo.).
95. No. 84-099-CV-/W-9-5 (W.D. Mo. Mar. 22, 1985).

(2) *Carolina Utilities Customers Association, Inc. v. Transco Energy Company*, No. C-C85-309 (W.D.N.C. filed May 13, 1985) (Allegation of § 2 violation for refusal to transport except under restrictive conditions).
(3) *Horsehead Industries, Inc. v. Transcontinental Gas Pipeline Corporation and Union Gas Company*, No. 85-0707 (E.D. Pa. filed February 8, 1985). Antitrust case concerning alleged wrongful termination of natural gas transportation service.
(4) *Kansas v. Amoco Production Co., et al.*, No. 85-2364 (D. Kan. filed July 10, 1985.)
(5) *Kansas Gas & Electric Co.* v. *Amoco Production Co., et al.*, No. 85-2438 (D. Kan. filed August 26, 1985).
(6) *Gas Service Co., et al.* v. *Amoco Production Co., et al.*, No. 85-568-B (N.D. Okla. filed June 14, 1985).
(7) *Shelby L. P. Gas Co.* v. *Wanda Petroleum Co.*, No. 84-223 (E.D. Tex. filed October 15, 1984).
(8) *Orbit Gas Co.* v. *Texas American Energy Corp.*, No. 84-204 (W.D. Ky. filed July 25, 1984).
(9) *McGoldrick Oil Co.* v. *United Gas Pipeline Co.*, No. 84-40971 (S.D. Tex. (Houston) filed December 20, 1984).
(10) *Lomak Petroleum, Inc.* v. *Columbia Gas Transmission Corp.*, No. 85-45 (D.N.C. filed January 17, 1985).
(11) *Big Horn Fractionation Co.* v. *MIGC Inc., et al.*, No. 85-28 (D. Wy. (Cheyenne) filed January 25, 1985).
(12) *Mountaineer Gas Co.* v. *Columbia Gas Transmission Corporation*, No. 85-0663 (S.D. Wa. filed June 21, 1985).
(13) *Quantum Production Services-1, Inc.* v. *Public Service Electric and Gas Co., et al.*, No. 84-3133 (D. N.J.) (Newark) filed August 16, 1984.

IV. MISCELLANEOUS

A. R.C. Dick Geothermal Corp. v. Thermogenics, Inc.[96]

In this case a landowner brought an action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, alleging that certain geothermal steam developers had conspired to restrain the development of geothermal steam properties and attempted to monopolize the development of geothermal steam properties.

In 1964, the property in question was leased to a development company for the purpose of developing geothermal resources. The original lease was transferred among a series of companies. The plaintiff alleged that these companies to whom the lease was transferred had conspired with one another to avoid developing the steam resources and to artificially reduce the price of steam rights on adjacent land.

In the course of the proceedings the court adopted a geographic market definition encompassing the entire geothermal basin in Sonoma and Lake Counties in California instead of a more narrow definition offered by the plaintiff. The court also rejected the plaintiff's argument that the defendant developers were horizontal competitors thereby rejecting a *per se* analysis approach. Instead, the court held that the defendants were vertically related and that a rule of reason analysis was applicable.[97] The court held that at trial the plaintiff had failed to prove an unreasonable restraint of trade. The court also held

96. 619 F. Supp. 441 (N.D. Cal. 1985).
97. *Id.* at 448-49.

that the plaintiff had failed to offer evidence that the defendant had substantial power in the market for geothermal steam rights. In rejecting the plaintiff's Section 2 argument the court state "[t]here was no shortage of actual competitors in the [geographical area] market for geothermal steam rights."[98]

98. *Id.* at 451.