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May 23, 1979



Marshall E. Miller, Esquire
Michael L. Glaser, Esquire
Sheldon J. Wolfe, Esquire
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Houston Lighting & Power Company
South Texas Project, Units 1 and
2 (Docket Nos. 50-498A and 50-499A)

Gentlemen:

Houston wishes to advise the Board that on May 15, 1979, the United States District Court for the Northern District of Texas issued an order denying the plaintiffs' motion to amend judgment in the case West Texas Utilities Company et al. v. Texas Electric Service Company, et al., ___ F. Supp. ___ (No. CA3-76-633-F, Judgment filed February 27, 1979).

A copy of the court's order is enclosed.

Respectfully submitted,

Peter G. Flynn

Peter G. Flynn
Attorney for Eou on Lighting
& Power Company

cc: Attached service list

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DOCKETED

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FILED

MAY 15 1973

DALLAS DIVISION

JOSEPH MELROY, JR. CLERK
BY *Pam D...* Deputy

WEST TEXAS UTILITIES CO. AND)
CENTRAL POWER & LIGHT CO.)

VS.)

NO. CA3-76-633-F

TEXAS ELECTRIC SERVICE CO.,)
ET AL)

ORDER

The plaintiffs filed a motion to amend this Court's judgment alleging that:

- (1) The Court's opinion is "at war with itself" by finding that there was no "contract, combination, or conspiracy" under Section One of the Sherman Act and at the same time finding that participation in the South Texas Project (STP) was based upon the fundamental understanding that the members of the STP intended to operate on an intrastate basis; and,
- (2) Findings of the Court 13-17, 19-22, and 23-24 set forth under "Conclusions of Law" in Appendix A deal with matters outside the scope of this litigation.

Plaintiffs misconceive this Court's opinion and the case as presented to the Court for decision. The Court's findings with respect to an alleged Section One violation were in direct response to allegations by the plaintiffs that defendants had an illegal agreement (i.e., a group boycott) to disconnect from any member of TIS or ERCOT which commenced interstate operations. I found that the defendants' decisions to operate on an intrastate basis were matters of unilateral policy rather than a product of concerted action. On the other hand, the evidence also established that all of the parties in the STP joined in the project with the common intention of continuing to operate on an intrastate basis as they had operated since 1935. Each member of the participation agreement could commence interstate operations upon advance notice to the other members of STP and TIS. There was no contract, combination or conspiracy in the STP agreement which violated Section One of the Sherman Act. Plaintiffs labor under the misapprehension

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that if the defendants or others made an agreement, there was a Section One violation; that is not a correct interpretation¹ of the Sherman Act.

The evidence establishes that at the time the STP was conceived, every party to the agreement knew or should have known that unilateral efforts to establish synchronous ties with SWPP would result in unreasonable interference with the transmission system of the other STP participants (e.g., TR. 589, 2925-27). CPL ignored this understanding and Section 8.2 of the Agreement, failed to give notice of its intent to enter interstate commerce, and covertly attempted to force all members of TIS and STP into synchronous interstate operation against their will. The injunctive relief provided in this Court's opinion and judgment will protect Houston Lighting & Power from further precipitous actions by CPL designed to circumvent the participation agreement or force interstate operation on Houston Lighting & Power through subterfuge rather than negotiation.

The Plaintiffs raised the Nuclear Regulatory Commission proceedings, the Atomic Energy Act, and the new Federal Energy Act by referring to them throughout these proceedings. See supplemental findings of fact proposed by plaintiffs, at 12-13 (Nov. 22, 1978); Plaintiffs' trial brief at 10-11; plaintiffs' closing argument, Tr. 3620, 21. Plaintiffs specifically requested findings under the Public Utility Regulatory Policies Act of 1978 in their supplemental findings of fact proposed by plaintiffs (proposed finding 100a; filed November 22, 1978), and in a letter brief filed by the plaintiffs on December 18, 1978. Plaintiffs attached to the latter document a copy of the pertinent portions of the Act.

The Court must also evaluate the reasonableness of Defendants' actions under Section One of the Sherman Act. The history of the restraint, the evil believed to exist, the nature of the business, the public interest, and the reasons for adopting a particular remedy are all relevant considerations under a "rule of reason" analysis. Chicago

Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). Plaintiffs, for example, recognized these considerations in their trial brief and in their proposed findings of fact and conclusions of law.

"Plaintiffs do agree that either defendant individually would be justified in refusing interconnection which would have an irreparable adverse effect on its system, and thereby jeopardize the safety and well being of its customers."

Plaintiffs' trial brief, September 29, 1978 at 52.

"88. Mode 4 operation will not adversely affect the operations or reliability of any electric system in Texas, and in fact may have some beneficial effects on the operations on these other systems."

Plaintiffs' proposed findings of fact and conclusions of law filed October 3, 1978. Findings 14-17 and 19-22 all relate to the Court's analysis under the "Rule of Reason", in addition to the Public Utility Regulatory Policies Act of 1978.

Plaintiffs also raise in this case the legality of defendants' actions in relation to the FPC, PUC, NRC and SEC proceedings. See plaintiffs' trial brief at 22-26; Tr. 2812-2822. Plaintiffs continually attacked defendants' petitions to various governmental agencies and courts. See Tr. 2813; 2822; 2824; 2846; 3467-3476; 3674. These petitions sought to persuade these bodies to retain the Texas intrastate system. Plaintiffs proposed findings which implied that the Defendants had improperly sought agency or court rulings. Tacita Quaedam habentur pro expreis. See proposed findings of fact and conclusions of law No. 60,73, 74 filed October 3, 1978; supplemental findings of fact proposed by plaintiffs. No. 77J, filed November 22, 1978; amended findings of fact and conclusions of law proposed by Plaintiffs, No. *60, *90, filed November 22, 1978. Plaintiffs specifically requested that these actions by the defendants and the Texas Public Utility Commission be incorporated as a part of the facts comprising the alleged antitrust violations in this case.

"90. At a minimum, the actions of defendants and others in the order of the Texas Public

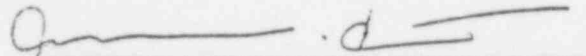
Utility Commission have foreclosed an interstate market of electric energy worth billions of dollars."

Plaintiffs' proposed findings of fact and conclusions of law, filed October 3, 1978.

The Plaintiffs raised these issues, and in conclusions 23 and 24 the Court has determined that defendants' attempts to petition various governmental bodies were genuine attempts to influence public officials, were not a sham to cover up an attempt to directly interfere with plaintiffs' business relationships, were not part of any alleged antitrust violations, and were protected by the First Amendment.

The motion of the Plaintiffs under Rules 59 and 52(b) is hereby overruled. Certified copies of the memorandum opinion filed January 30, 1979, the judgment filed February 27, 1979, and this order shall be sent to the Texas Public Utilities Commission, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, and the Securities & Exchange Commission where related matters are currently pending.

It is so ORDERED.


UNITED STATES DISTRICT JUDGE

DATE May 12, 1979

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1. Even if the STP agreement had the characteristics of an agreement in violation of Section 1, plaintiffs only established de minimus competition between plaintiffs and defendants, and "Defendants can't conspire to deprive plaintiffs of a market they do not share . . . and cannot share. . .". Plaintiffs' complaint also named only one of the participants in the STP, Houston Lighting and Power Co., as a defendant or alleged co-conspirator in this case. If the evidence established that the STP agreement did violate the antitrust laws, which it does not, the court could not grant the plaintiffs relief because the proper defendants would not be before this Court.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
HOUSTON LIGHTING & POWER)	Docket Nos. 50-498A
COMPANY, et al.)	50-499A
)	
(South Texas Project,)	
Units 1 and 2))	
)	
TEXAS UTILITIES GENERATING)	Docket Nos. 50-445A
COMPANY, et al.)	50-446A
)	
(Comanche Peak Steam Electric)	
Station, Units 1 and 2))	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing letter dated May 23, 1979, and Order dated May 15, 1979, were served upon the following persons, by hand*, or by deposit in the United States Mail, first class postage prepaid, this 23rd day of May.

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