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May 7, 1984

William Lambe
Site Analysis Branch
Office of Nuclear Regulation
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Lambe:

As you requested, I enclose further pleadings in response to the Gulf States complaint referenced in our transmittal of March 26, 1984.

Very truly yours,

Daniel Guttman

Enclosure

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY,	:	CIV. ACTION FILE NO. 84-132
Plaintiff,	:	
v.	:	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, et al.	:	
Defendants.	:	

ANSWER AND COUNTERCLAIM

For answer to each numbered paragraph of the complaint, Stauffer Chemical Company states as follows:

1. Admits the allegations of this paragraph, except that it lacks knowledge or information sufficient to form a belief as to the state of plaintiff's incorporation.

2. Admits the allegations of subparagraph (c), except alleges that its principal place of business is Westport, Connecticut. Stauffer admits that it is engaged in interstate commerce and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

3. Admits the jurisdictional and venue allegations of this paragraph insofar as they relate to Stauffer, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

4. No response to this paragraph is required of Stauffer.

5. Admits that venue as to Stauffer is appropriate and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

6. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

7. Admits the allegations of this paragraph except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning approvals and concerning the Public Utility Commission of Texas.

8. Admits that Gulf States is a party to various interconnection agreements with other electric utility systems in or adjacent to its service area and that such agreements are subject in some respects to the jurisdiction of FERC, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

9. Admits the allegations of the first two sentences of this paragraph and states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of this paragraph.

10. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph, except admits the allegations of the last sentence of this paragraph.

11. Admits that Stauffer demand has ranged from 50 to 85 MWs of power at its Iberville plant, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

12. Admits the allegations of this paragraph, except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning the locations of Lafayette's sales.

13. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph, except that it admits the allegations of the first sentence of this paragraph.

14. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

15. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph, except that it admits the allegations of the second sentence of this paragraph.

16. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

17. Denies the allegations of this paragraph and alleges and avers that, while its chlorine plant is competitive with those of other producers, it has informed representatives of Gulf States that its plant will not be able to remain competitive if Stauffer is required to pay Gulf States the high rates for electricity that Gulf States has indicated it will charge Stauffer after the term of the present contract between Gulf States and Stauffer has expired and that it has also informed representatives of Gulf States that in order to keep its chlorine plant operating, Stauffer will be required to buy electric power from another less expensive source, or close down its plant.

18. Admits the allegations of this paragraph except avers that the term of the Lafayette-Plaquemine-Stauffer contract is for five years and eight months, that Stauffer has the right to terminate said contract on 13 months' notice only for certain specified reasons, and that sale of power under said agreement is not conditioned on use by Gulf States of its agreements with Plaquemine and Lafayette.

19. Denies the allegations of this paragraph and respectfully refers the Court to the agreements alleged for a correct interpretation thereof.

20. Admits that Plaquemine has proposed that Gulf States lease or sell its substation located at the Stauffer plant, which substation is on the east side of the Mississippi River approximately 7 miles from Plaquemine, to Plaquemine, and denies the remaining allegations of this paragraph.

21. Avers that this paragraph is argumentative and does not require a responsive answer, but if such answer is required, denies the allegations of this paragraph, except admits that the total maximum load under the proposal made to Gulf States would be in excess of 30 MW.

22. Avers that this paragraph is argumentative and does not require a responsive answer, but if such answer is required, denies the allegations of this paragraph.

23. Denies the allegations of this paragraph except that it lacks knowledge sufficient to form a belief as to the truth of the allegations as to Gulf States' reasons for, and internal consideration thereof, refusing to transmit power from Lafayette to Plaquemine for use by Stauffer.

24. Admits that Stauffer believes and contends that a refusal by Gulf States to transmit electric power to Stauffer, which power Stauffer can purchase at competitive rates in the manner proposed, would be a violation by Gulf States of, inter alia, 15 U.S.C. § 2, and further admits that Gulf States herein contends that such refusal would not subject it to antitrust liability.

25. Admits that an actual controversy exists between the parties, denies that the agreement among Stauffer, Plaquemine and Lafayette requires antitrust litigation, and otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

26. Admits that Count One of the complaint is what it purports to be.

27. Admits that Stauffer contends, inter alia, that Gulf States has monopoly market power over the transmission of electric power over high voltage transmission and distribution lines in the relevant geographic market, and that a refusal by Gulf States to permit access for the proposed use to its transmission and distribution facilities would be a violation of, inter alia, Section 2 of the Sherman Act.

28. Denies the allegations of this paragraph.

29. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

30. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

31. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph except that Stauffer denies that competition to the extent required by the Sherman Act would adversely affect the public or the utility industry and denies that any state law or policy prohibits the proposed transaction.

32. The first two sentences of this paragraph state legal conclusions as to the content of Louisiana law, and do not require responsive answer. If such answer is required, Stauffer states that it lacks knowledge or information sufficient to form a belief as to the truth of these

allegations. Stauffer denies that the transaction proposed to Gulf States would violate any state regulatory policy or law, and further denies that it would have the precedential and other impacts that are attempted to be alleged in this paragraph.

33. Denies the allegations of this paragraph.

34. Admits the first two sentences of this paragraph except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegation concerning the basis of regulation. The remaining allegations of this paragraph are speculative and argumentative and do not require a responsive answer but, if one is required, Stauffer denies the remaining allegations of this paragraph.

35. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of this paragraph and denies that Gulf States would lose revenue as a consequence of the transaction that has been proposed to it.

36. Denies that any of the speculative consequences alleged in this paragraph would result from the transaction that has been proposed to Gulf States by defendants.

37. Denies that any of the speculative consequences alleged in this paragraph would result from the transaction that has been proposed to Gulf States by defendants.

38. Denies that it would be financially or otherwise feasible, to construct a transmission line between

Plaquemine and Stauffer's plant and denies the remaining allegations of this paragraph except admits that Plaquemine is more than 6 miles from Stauffer's plant.

39. Denies that the proposed transaction would impose upon Gulf States a common carrier duty, and further denies that the proposed transaction would be inconsistent with any of the policies or provisions of the Federal Power Act.

40. Denies that the proposed transaction would be in any way inconsistent with the Public Utility Regulatory Policies Act.

41. Denies the allegations of this paragraph.

42. Denies the allegations of this paragraph and avers that the proposed transaction would result in a more efficient utilization of Gulf States facilities.

43. Denies the allegations of this paragraph

44. Admits that this Court may properly adjudicate the rights and obligations of the parties to this action, denies that Gulf States' rejection of the proposed transaction would be a lawful exercise of Gulf States' monopoly market power in the generation and distribution of electricity, or that it would be reasonable, not anticompetitive, or in conformity with law and public policy, and otherwise denies the allegations of this paragraph.

45. Admits that Count II of the Complaint is what it purports to be.

46. Realleges and restates the matters contained in paragraphs 6 through 44.

47. Denies the allegations of this paragraph and respectfully refers the Court to the state statute alleged for a correct interpretation of the provisions thereof.

48. States that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph, except that it denies that there are any prohibitions in the state statute referred to that would prevent the proposed transaction.

49. Denies the allegations of this paragraph.

50-66. The allegations of these paragraphs do not require responsive answers by Stauffer.

WHEREFORE, Stauffer prays for a declaration that an exercise by Gulf States of its monopoly market power, or its attempt to monopolize, in the circumstances of this case to deny to Stauffer access to electricity at competitive rates would be a violation of federal antitrust law, not immunized by any state statute, and further prays for an award of its costs, including reasonable attorneys fees.

COUNTERCLAIM

1. Counterclaim defendant Gulf States Utilities Company is the plaintiff in this action. ounterclaim plaintiff Stauffer Chemical Company is one of the defendants in this action.

2. Jurisdiction of this counterclaim is based on Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26), and 28 U.S.C. §§ 1331, 1337, 2201, 2202.

3. Gulf States has monopoly market power over the market for generation of electrical power and a complete monopoly of facilities for transmission of electrical power in the relevant geographic area.

4. Stauffer has contracted with the Cities of Lafayette and Plaquemine to purchase electrical power commencing September 1, 1984, which power is substantially less expensive than the power to be offered for sale by Gulf States. Implementation of the contract requires that Gulf States provide wheeling service to transmit the power from Lafayette, and the parties to the contract propose fully to compensate Gulf States for all costs involved in providing such wheeling service. Gulf States' wrongful refusal to provide the wheeling service requested prevents Stauffer from purchasing less expensive power to be wheeled from Lafayette to Plaquemine and, as a consequence, Stauffer will suffer substantial economic losses, including forced closure of its caustic chlorine plant at St. Gabriel, Louisiana.

5. A refusal by Gulf States to provide wheeling services as requested by Stauffer and by the Cities of Lafayette and Plaquemine (i) would constitute an unreasonable and anticompetitive exercise by Gulf States of its

complete monopoly of transmission facilities in the relevant geographic market, (ii) would constitute an unlawful monopolization, or attempt to monopolize, the relevant generation market by unreasonably denying access to Gulf States' monopoly transmission facilities, and (iii) would unlawfully condition Stauffer's access to Gulf States' monopoly transmission facilities to purchases of electric power generated or sold only by Gulf States, and thus would constitute an unreasonable restraint of trade, and an unlawful monopolization, or attempt to monopolize.

WHEREFORE, Stauffer prays the Court for judgment in its favor and against Gulf States, declaring that, in the circumstances of this case, a refusal by Gulf States to provide the requested wheeling service would violate Sections 1 and 2 of the Sherman Act and enjoining Gulf States from so refusing. Stauffer further prays for recovery of its costs, including reasonable attorneys fees.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY	:	CIVIL ACTION FILE NUMBER 84-132
Plaintiff	:	
VERSUS	:	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, AND THE LOUISIANA ELECTRIC POWER AUTHORITY (LOUISIANA ENERGY AND POWER AUTHORITY)	:	
Defendants	:	

NOTICE OF MOTION TO DISMISS COMPLAINT

TO: TAYLOR, PORTER, BROOKS & PHILLIPS
Attn: Tom F. Phillips,
Fredrick R. Tulley
and James L. Ellis
P.O. Drawer 2471
Baton Rouge, LA. 70821-2472

ORGAIN, BELL & TUCKER
Attn: Benny H. Hughes
and Charles K. Kebodeaux
470 New Orleans Street
Beaumont, TX. 77701

WALD, HARKRADER & ROSS
Attn: William W. Ross
1200 Nineteenth Street, N.W.
Washington, D.C. 20036

BRAND & LECKIE
Attn: Mr. Wallace Brand
1901 L. Street NW,
Suite 480
Washington, D.C. 20036

COVINGTON & BURLING
Attn: Mr. John Schafer
1201 Pennsylvania Avenue, NW
Washington, D.C 20036

VOORHIES & LABBE'
Attn: Mr. Gerald Gaudet
P.O. Box 3527
Lafayette, LA. 70502

PLEASE TAKE NOTICE that, upon the Complaint herein, the undersigned will move this Court, at the U.S. Courthouse, 707 Florida

Street, City of Baton Rouge, Louisiana on the 6th day of April, 1984 at 10:00 o'clock a.m. or as soon thereafter as Counsel can be heard for an Order dismissing the Complaint herein on the grounds that the same fails to show the existence of an actual controversy between GULF STATES UTILITIES COMPANY and LOUISIANA ENERGY AND POWER AUTHORITY of the nature required by Article III of the United States Constitution and §2201 of the Judicial Code, Title 28.

MOUTON, ROY, CARMOUCHE, BIVINS,
JUDICE & HENKE
200 W. Vermilion
Post Office Drawer Z
Lafayette, Louisiana 70502
(318) 233-7430

By: Ronald J. Judice

Attorneys for LOUISIANA ENERGY AND POWER AUTHORITY

CERTIFICATE

I HEREBY certify that a copy of the above and foregoing Notice has been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 1st day of ~~February~~ March, 1984.

RONALD J. JUDICE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY	:	CIVIL ACTION FILE NUMBER 84-132
Plaintiff	:	
VERSUS	:	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, AND THE LOUISIANA ELECTRIC POWER AUTHORITY (LOUISIANA ENERGY AND POWER AUTHORITY)	:	
Defendants	:	

NOTICE OF MOTION TO DISMISS COMPLAINT

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Washington, D.C 20036

VOORHIES & LABBE'
Attn: Mr. Gerald Gaudet
P.O. Box 3527
Lafayette, LA. 70502

PLEASE TAKE NOTICE that, upon the Complaint herein, the undersigned will move this Court, at the U.S. Courthouse, 707 Florida

Street, City of Baton Rouge, Louisiana on the _____ day of _____, 1984 at _____ o'clock a.m. or as soon thereafter as Counsel can be heard for an Order dismissing the Complaint herein on the grounds that the same fails to show the existence of an actual controversy between GULF STATES UTILITIES COMPANY and LOUISIANA ENERGY AND POWER AUTHORITY of the nature required by Article III of the United States Constitution and §2201 of the Judicial Code, Title 28.

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(318) 233-7430

By: _____
Ronald J. Judice

Attorneys for LOUISIANA ENERGY AND POWER AUTHORITY

CERTIFICATE

I HEREBY certify that a copy of the above and foregoing Notice has been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 27th day of February, 1984.

_____
RONALD J. JUDICE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY	:	CIVIL ACTION FILE NUMBER 84-132
Plaintiff	:	
VERSUS	:	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, AND THE LOUISIANA ELECTRIC POWER AUTHORITY (LOUISIANA ENERGY AND POWER AUTHORITY)	:	
Defendants	:	

MOTION TO DISMISS

1.

Defendant, LOUISIANA ENERGY AND POWER AUTHORITY (erroneously referred to in the Complaint as LOUISIANA ELECTRIC POWER AUTHORITY) moves the Court to dismiss the claim alleged in Count 2 of the Complaint because the Complaint fails to show the existence of an actual controversy between GULF STATES UTILITIES COMPANY and LOUISIANA ENERGY AND POWER AUTHORITY of the nature required by Article III of the United States Constitution and §2201 of the Judicial Code, Title 28.

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(318) 233-7430

By: 
Ronald J. Judice
Attorneys for LOUISIANA ENERGY AND POWER AUTHORITY

CERTIFICATE

I HEREBY certify that a copy of the above and foregoing Motion to Dismiss has been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 27th day of February, 1984.

RONALD J. JUDICE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY	:	CIVIL ACTION FILE NUMBER 84-132
Plaintiff	:	
VERSUS	:	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, AND THE LOUISIANA ELECTRIC POWER AUTHORITY (LOUISIANA ENERGY AND POWER AUTHORITY)	:	
Defendants	:	

WRITTEN STATEMENT OF REASONS IN SUPPORT OF MOTION TO DISMISS FILED ON BEHALF OF LOUISIANA FNERGY AND POWER AUTHORITY

Plaintiff, GULF STATES UTILITIES COMPANY (hereafter - GSU) has filed a four count Complaint against four defendants, namely: THE CITY OF LAFAYETTE, LOUISIANA; THE CITY OF PLAQUEMINE, LOUISIANA; STAUFFER CHEMICAL COMPANY; and THE LOUISIANA ENERGY AND POWER AUTHORITY (hereafter - LAFAYETTE, PLAOUEMINE, STAUFFER and LEPA, respectively).

LEPA is named as a party Defendant in Count Two of the Complaint. It is not named as a party Defendant in Count One, Count Three or in Count Four.

The underlying factual allegations relating to Counts One and Two are completely disconnected from those pertaining to Counts Three and Four. In Counts Three and Four, LAFAYETTE is the sole Defendant.

Although LEPA is made a party Defendant solely with respect to Count Two, the underlying facts with respect to both Counts One and Two are completely interrelated, and hence, in considering LEPA's Motion to Dismiss, a discussion of both Counts One and Two is in order.

The controversy among the parties is particularly described by GSU in Paragraphs 17 through 25 of the Complaint. In essence, STAUFFER is alleged to have advised GSU that it no longer wishes to purchase its electric requirements from GSU, and instead, that it has contracted with PLAQUEMINE to provide for the sale and delivery of bulk electric power to STAUFFER at its plant site for seven years beginning September 1, 1984. The Complaint alleges that under a Contract between PLAQUEMINE and LAFAYETTE, LAFAYETTE shall sell to PLAQUEMINE the power and energy which PLAQUEMINE has contracted to sell to STAUFFER, and that LAFAYETTE and/or PLAQUEMINE have demanded that GSU "wheel" or deliver the power to the STAUFFER site under existing agreements between PLAQUEMINE and GSU and/or LAFAYETTE and GSU providing for the use of GSU's electric transmission facilities.

On this background, GSU brings Count One praying for Judgment in Count One in its favor and against Defendants, PLAQUEMINE, LAFAYETTE and STAUFFER, "...declaring that a refusal by Gulf States to provide the requested wheeling service to the Stauffer delivery point would not be violative of the Federal antitrust laws".

Noteworthy, in the quite extensive and detailed allegations leading to and including Count One of the Complaint, is the fact that

no claim is made by GSU that LEPA has any interest in the LAFAYETTE-PLAQUEMINE contract or that LEPA has any interest in the PLAQUEMINE-STAUFFER contract. Noteworthy also, is the fact that no claim has been made by GSU that LEPA has directly or indirectly requested of GSU that it wheel power to the STAUFFER delivery point pursuant to or in aid of the requests of LAFAYETTE, PLAQUEMINE and/or STAUFFER.

There is indeed no additional claim by GSU that LEPA has had any contact whatsoever with GSU on the whole subject matter of wheeling power to the STAUFFER delivery point or that LEPA has in any way "threatened" GSU with antitrust liability or litigation because of any failure on GSU's part to wheel power to the STAUFFER delivery point in response to the request of LAFAYETTE, PLAQUEMINE, or STAUFFER. Quite correctly, LEPA is not made a party Defendant to Count One.

To put this case in proper perspective before moving into a discussion of Count Two, this Court should delete the reversal of roles which has taken place through GSU's use of the Federal Declaratory Judgment Statute.

By reversing the roles of plaintiff and defendants and putting them in their otherwise "natural" positions, it can be noted that this law suit would normally have been brought by PLAQUEMINE, LAFAYETTE and STAUFFER against GSU for damages sustained by them and/or for injunctive relief, and based upon the alleged anticompetitive conduct of GSU under the scenario described in Count One.

Continuing with the reversal of roles, we would note that GSU, as a party defendant vis-a-vis LAFAYETTE, PLAQUEMINE and STAUFFER, would

have a right to claim "defenses" or "exceptions" to what might otherwise be held to be anticompetitive action on its part in violation of the Federal antitrust laws (refusal to wheel power per request, etc.).

Without commenting on its validity or whether it properly applies to the present set of facts, one "defense" which GSU might claim in response to an action brought against it by LAFAYETTE, PLAQUEMINE and STAUFFER might be the "state action immunity" enunciated in Parker v. Brown, 317 US 341 (1943) and its progeny.

In Count Two, GSU, in fact, raises the "state action immunity" defense to what would be the main action demands of LAFAYETTE, PLAQUEMINE and STAUFFER absent the role reversal effect of the request for declaratory judgment. Stated otherwise, GSU is saying that if GSU loses on Count One to LAFAYETTE, PLAQUEMINE and STAUFFER, and LAFAYETTE, PLAQUEMINE and STAUFFER would otherwise be entitled to damages and/or injunctive relief because of GSU's anticompetitive actions, that GSU nonetheless escapes Sherman and Clayton Act liability under the "state action immunity." Hence, argues GSU, LAFAYETTE, PLAQUEMINE and STAUFFER obtain no damages or injunctive relief on their "main demand" to compel "wheeling" in this case.

If, in fact, declaratory relief is available to GSU under Count One of the Complaint, then in all probability, the adjudication of the "state action immunity" defense brought forward in Count Two would be appropriate as to those parties included in the Count One controversy.

However, adjudication of the "state action immunity" defense in an action between GSU on the one hand and LAFAYETTE, PLAQUMINE and

STAUFFER on the other hand, does not require the presence or participation of LEPA.

Assuming for the purposes of argument that LEPA, under some hypothetical circumstance, should have a cause of action for damages and/or injunctive relief against GSU for GSU's violation of the Sherman and Clayton Acts, then the appropriate time and place for the adjudication of any alleged "state action immunity" defense to such a violation would be in the forum and at the time that such action is brought by LEPA against GSU, and not as a collateral issue in an antitrust action brought by LAFAYETTE, PLAQUEMINE and STAUFFER against GSU.

GSU has not claimed that there is any actual case or controversy existing between itself and LEPA in Count One. That being the case, the lack of actual case or controversy flows through into Count Two, alleging the "state action immunity" defense to Count One violations.

The jurisdiction of this Court is limited by Article III of the United States Constitution and by 28 U.S.C.A. §2201 to cases of actual controversy between parties.

At §7493 of West's Federal Practice Manual, Revised Second Edition, Volume 6A, Page 266, the limitations to jurisdiction imposed under Article III as to matters which do not constitute a case or controversy are reviewed:

> "A good statement of the meaning of the word 'controversy' is contained in Aetna Life Company v. Haworth, [300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937), reh. denied 300 U.S. 687, 57 S.Ct. 667, 81 L.Ed. 889.] in which the court, after reviewing the authorities, summarized the matter as follows:

'A "controversy" in this sense must be one that is appropriate for judicial determination....A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot....The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests....It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be under a hypothetical state of facts....Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.'"

Plaintiff's Complaint does not "admit of specific relief" as between GSU and LEPA. The Court is not asked to decide whether LEPA can recover treble damages or secure injunctive relief against GSU for its failure to wheel power to the STAUFFER site under the circumstances cited here.

The matter to be adjudicated under Count One is the injury LAFAYETTE, PLAQUEMINE and STAUFFER may be faced with by reason of GSU's anticompetitive activities, and whether LAFAYETTE, PLAQUEMINE and STAUFFER may recover damages and/or secure injunctive relief against GSU under the circumstances.

Count Two, in effect, states that taking the activities of GSU as normally exposing GSU to liability to LAFAYETTE, PLAQUEMINE and STAUFFER, is GSU, nonetheless immunized from such exposure and liability to LAFAYETTE, PLAQUEMINE and STAUFFER by reason of a "state action immunity."

It is conceivable that GSU could present a real and substantial

controversy between itself and LEPA which would require this or another Court to determine whether LEPA is entitled to a judgment for damages or injunctive relief against GSU for its violation of the Federal antitrust laws. That controversy has not been put before this Court for determination and it may never be put before this Court.

For these reasons, LEPA's Motion should be granted, and it should be dismissed from these proceedings.

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(318) 233-7430

By: Ronald J. Judice
Ronald J. Judice

Attorneys for LOUISIANA ENERGY AND
POWER AUTHORITY

CERTIFICATE

I HEREBY certify that a copy of the above and foregoing has been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 27th day of February, 1984.

Ronald J. Judice
RONALD J. JUDICE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY, Plaintiff, v. THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, AND THE LOUISIANA ENERGY AND POWER AUTHORITY, Defendants.	Civil Action No. 84-132-B

ANSWER

As its Answer to the Complaint of Gulf States Utilities Company (hereinafter "Gulf States"), the City of Plaquemine, Louisiana, (hereinafter "Plaquemine") states as follows:

1.

Plaquemine admits the allegations contained in ¶1.

2.

2a. Plaquemine admits the allegations contained in ¶2(a), except to the extent that they imply that Lafayette is not engaged in the transmission of electricity, which is denied.

2b. Plaquemine admits that it is a municipal corporation organized under the laws of Louisiana, that it owns an electric generating and distribution system, that it presently engages in the distribution and sale of electricity within its city limits and elsewhere and admits that its generating plant is not presently used as its principal source of energy but avers that its generating plant is currently being operated as its principal source of reserve or standby for its present purchase of non-firm power from Lafayette. To the extent not admitted, the allegations of ¶2(b) are denied.

2c. Plaquemine admits that Stauffer owns and operates a caustic chlorine plant in St. Gabriel, Louisiana within the Middle District of Louisiana. Plaquemine is without knowledge sufficient to form a belief as to the truth of the remaining allegations of ¶2(c).

2d. Plaquemine admits that LEPA is a public power authority created pursuant to La. Rev. Stat. §33:4545.1, et seq., that LEPA owns and controls the output of a portion of the Rodemacher #2 generating unit which is dispatched for it by Lafayette, that power from said unit is transmitted to some of the members of LEPA, and that both Lafayette and Plaquemine are members of LEPA. To the extent that the allegations of ¶2(d) are not admitted they are denied.

Plaquemine admits that Plaquemine is engaged in trade or commerce in interstate commerce within the meaning of Section

2 of the Sherman Act. Plaquemine is without information sufficient to form a belief as to the truth of the remaining allegations of ¶2.

3.

Plaquemine admits that counts 1 and 2 present a case of actual controversy within the jurisdiction and venue of this Court. Plaquemine is without information sufficient to form a belief as to whether counts 3 and 4 present such a case.

4.

Paragraph 4 states a legal conclusion which Plaquemine believes does not require an answer but if required to answer Plaquemine would neither admit nor deny the allegations of ¶4 because it has no knowledge of them.

5.

Plaquemine admits that counts 1 and 2 of the Complaint involve contracts performable in this District and that at least two of the defendants are found in this District. The remainder of ¶5 states legal conclusions that Plaquemine is not required to answer, but if required to answer, Plaquemine would admit these allegations as to counts 1 and 2. Plaquemine would neither admit nor deny these allegations with respect to counts 3 and 4 because it is without information sufficient to form a belief as to their truth.

6.

Plaquemine admits that Gulf States is an electric public utility company owned and operated by a private corporation owning and operating over 6000 MW of installed generating capacity, high voltage transmission and subtransmission facilities and distribution facilities in portions of Texas and Louisiana and that Gulf States operates a 500 kV transmission line as part of its backbone transmission system. Plaquemine is without knowledge sufficient to form a belief as to the truth of the allegations concerning the extent of the service area of Gulf States and therefore neither admits nor denies the remaining allegations of ¶6.

7.

Plaquemine admits that Gulf States sells electricity at retail to residential, commercial, and industrial customers. Plaquemine also admits that Gulf States sells electricity at wholesale to municipalities and other utilities and performs bulk transmission service. Plaquemine is without knowledge sufficient to form a belief as to whether rates for such services have been approved by any regulatory authority. To the extent not admitted the allegations contained in ¶7 are denied.

8.

Plaquemine admits that Gulf States is also a party to various interconnection agreements with other electric utility systems in or adjacent to its service area, entered into by the other participating utility for the purposes of coordination of generation, economy interchange of energy, to increase the reliability of service, and to permit the efficient, economic use of generating capacity but denies that such purposes were the only purposes of Gulf States in entering into some of such agreements. Plaquemine denies that the FERC has jurisdiction over such agreements that is relevant to any issue raised by the Complaint. To the extent not admitted the allegations contained in ¶8 are denied.

9.

Plaquemine admits the allegations contained in the first sentence of ¶9. Plaquemine is without knowledge sufficient to form a belief as to the truth of the allegations contained in the second sentence of ¶9. Plaquemine denies the allegations contained in the third sentence of ¶9.

10.

Plaquemine admits that Gulf States presently provides service to Stauffer's St. Gabriel chloralkali facility over a 138 kV high voltage transmission loop and that service is provided to Stauffer through an electric substation located on

Stauffer's plant site, which substation is owned, operated and maintained by Gulf States. To the extent not admitted, the allegations of ¶10 are denied.

11.

Plaquemine has insufficient knowledge to form a belief as to the truth of the allegations of ¶11, and they are neither admitted nor denied.

12.

Plaquemine admits that Lafayette sells electricity at retail inside its city limits but has insufficient knowledge to form a belief as to whether Lafayette sells electricity at retail outside its city limits and therefore neither admits nor denies said allegation. Plaquemine also admits that Lafayette sells and offers for sale electric power at wholesale to other electric power systems in Louisiana. Plaquemine denies that Lafayette's retail and wholesale rates are unregulated and avers that those rates have been approved by the duly elected City Council of the City of Lafayette.

13.

Plaquemine admits that Lafayette owns gas-fired generating units located within its city limits and owns a substantial portion of the Rodemacher #2 coal-fired generating unit located near Alexandria, Louisiana. Plaquemine admits that

Lafayette owns and operates transmission and distribution facilities but has insufficient knowledge to form a belief as to whether Lafayette's transmission facilities are located solely within the areas in which Lafayette presently serves at retail. Plaquemine admits that Lafayette does not own transmission facilities connecting its Rodemacher #2 generating resource to its retail distribution facilities or to its wholesale customers and therefore is dependent on others to provide that service. Plaquemine is without knowledge sufficient to form a belief as to whether Lafayette's transmission service agreements have been approved by the FERC. To the extent not admitted, the allegations of ¶13 are denied.

14.

Plaquemine admits that Lafayette is also a member of LEPA and that it sells power to LEPA. Plaquemine has insufficient knowledge to form a belief as to whether Lafayette exchanges power with LEPA, and, therefore, it neither admits nor denies that allegation. Plaquemine admits that Lafayette sells power to some members of LEPA. Plaquemine admits Gulf States has an interconnection agreement with LEPA, containing transmission service schedules. Plaquemine denies such agreement provides for any transmission service for LEPA's members.

Plaquemine admits that LEPA owns no high voltage transmission lines for the transmission of power generated at its Rodemacher #2 generating resource, a unit which it co-owns with

Lafayette and Central Louisiana Electric Company. Plaquemine admits that LEPA is not engaged in the business of the distribution of power at retail and therefore does not own any facilities for the distribution of power. To the extent not admitted, the allegations of ¶14 are denied.

15.

Plaquemine admits that it owns its electric generating facilities and that its generating plant has been operated infrequently for the last several years to provide energy to its customers. Plaquemine denies that its generating plant is not presently a source of power for its customers, and avers that it employs 13 persons to operate and maintain the plant in standby condition, but admits that during a period of less than three years, when it purchased firm power rrom Gulf States, its generating plant was not a source of power except during emergencies which disconnected it from Gulf States' transmission system. Plaquemine admits that it owns a distribution system serving customers within and without its city limits and that about one third of all its retail sales are outside the city limits at varying distances. To the extent not admitted the allegations of ¶15 are denied.

16.

Plaquemine admits that from 1980 until July, 1983, Plaquemine purchased all of its electric power requirements from

Gulf States at wholesale under a contract which also contemplated that Gulf States would purchase Plaquemine's generating capacity for the use of Gulf States. Plaquemine has insufficient knowledge to form a belief as to whether rates under that contract were approved by the FERC and therefore neither admits nor denies that allegation. After notification by Gulf States that it declined to purchase Plaquemine's generating capacity, in April 1983, Plaquemine entered into a contract with Lafayette to purchase surplus power and energy backed up by Plaquemine's generating capacity. Gulf States refused to transmit that power under its contract with Lafayette and insisted on the transmission being carried out under LEPA's contract. This required the negotiation of a new three-party contract executed on July 14, 1983, in which Lafayette would sell to LEPA, LEPA would sell and Plaquemine would purchase surplus power and energy, serving as a pretext for Gulf States thereafter to contend that it could invoke La. Rev. Stat. §33:4545.36 in its sole discretion to attempt to restrain retail sales by Plaquemine outside its municipal limits in areas located more than 300 feet from its distribution facilities as of April, 1979. Plaquemine denies that no notice has been given to Gulf States to terminate the transmission service under the existing Gulf States/LEPA interconnection agreement. To the extent not admitted the allegations of ¶16 are denied.

17.

Plaquemine is without knowledge sufficient to form a belief as to the truth of the allegations contained in ¶17 and, therefore, neither admits nor denies them.

18

Plaquemine admits that it has entered into a contract with Stauffer in which it has agreed to sell electric power to Stauffer for five years and eight months commencing September 1, 1984. Plaquemine admits that Stauffer has a right to terminate the contract on thirteen months' notice that it will shut down its St. Gabriel facility, that it will sell the plant to a third party, or that the cost of electric power has become a primary cause of Stauffer's inability to be competitive in the relevant marketplace in the manufacture and sale ot chloraikali from the facility. Plaquemine admits that the power that it proposes to sell to Stauffer will be a portion of the power it purchases from Lafayette. Plaquemine admits that it has conditioned its contract with Stauffer on obtaining the agreement of Gulf States to transmit power from Lafayette to a new delivery point requested by Plaquemine which would make the transaction feasible. Plaquemine admits that it proposed to have the wheeling carried out under Lafayette's interconnection agreement with Gulf States or under the interconnection agreement between Plaquemine and Gulf States. To the extent not admitted the allegations of ¶18 are denied.

19.

Plaquemine admits that under its present interconnection agreement with Gulf States the rating of the interconnection is presently 25MW but denies that its present agreement obligates Gulf States to transmit 25MW. Plaquemine admits that there is at present but one delivery point for Plaquemine. Plaquemine admits that its interconnection agreement with Gulf States contains language in Section 1.2 stating the purpose of the contract, that Section 1.1 of Service Schedule LTS appended thereto also contains language stating the purpose of the wheeling schedule, and that both refer to coordination of generation, but Plaquemine denies that this was the sole purpose of the contract or of the provision of transmission service by Gulf States. Similiarly, Plaquemine admits that Lafayette's interconnection contract with Gulf States contains language in Section 1.2 stating the purpose of the contract, that Section 1.1 of Service Schedule LTS appended thereto also contains language stating the purpose of the wheeling schedule, and that both refer to coordination of generation, but Plaquemine denies that this was the sole purpose of that contract or of the provision of transmission service by Gulf States to Lafayette. Plaquemine admits that the Lafayette-Gulf States interconnection agreement conditions such wheeling upon the existence of an interconnection agreement between Gulf States and "such other entity." To the extent not admitted, the allegations of ¶19 are denied.

20.

Plaquemine denies the allegations contained in the first sentence of ¶20. Plaquemine specifically denies that LEPA is presently wheeling power to Plaquemine. Plaquemine admits that it has been proposed by Plaquemine that Gulf States lease its substation located at the Stauffer plant to Plaquemine, and that then the substation at Stauffer -- across the Mississippi River from Plaquemine and slightly downstream -- would constitute a second Plaquemine delivery point under Gulf States' existing interconnection agreement with Plaquemine or a revised agreement. To the extent not admitted, the allegations of ¶20 are denied.

21.

Plaquemine admits that under the proposal there would be two Plaquemine delivery points; there would be a total maximum load of approximately 92 MW (i.e, not in excess of the 100 MW permitted by the Lafayette-Gulf States interconnection agreement which Plaquemine and Lafayette both have requested be the vehicle for carrying out the transmission service). Plaquemine denies each and every remaining allegation contained in ¶21.

22.

Plaquemine denies the allegations of ¶22.

23.

Plaquemine admits that Gulf States has transmitted or wheeled some power to Plaquemine. Plaquemine admits that its present request would be different from the transaction presently being carried out by Gulf States for Lafayette, Plaquemine and LEPA in that Plaquemine would not be required to purchase power from LEPA, would have two delivery points instead of one (thus saving Gulf States the substantial and unnecessary expense of improving facilities on its system near the Irion substation in order to permit Gulf States to supply increased amounts of power to Plaquemine, and the substantial and unnecessary expense to Plaquemine of erecting an unnecessary, expensive and wasteful river crossing of the Mississippi River at one of its widest points), would obtain delivery of additional amounts of power to meet its growth in load, and would reduce the adverse impact on Gulf States' other customers that would otherwise result if the Stauffer plant were shut down. Plaquemine admits that Gulf States has considered the impact of providing the requested wheeling service but denies that such consideration has been reasonable or in good faith. Plaquemine denies that it threatened Gulf States with legal action. Plaquemine denies that Gulf States will be required by regulation to provide wheeling services to other customers for the purpose of remedying discrimination. Plaquemine denies that such service would have an adverse effect on the general consuming public, Gulf States' customers, Gulf States' generation, transmission and distribution

system, and the operation and reliability thereof, and denies that it would adversely affect Gulf States' ability to render adequate service to its customers and denies that it would be contrary to the public interest and to public policy of either the State of Louisiana or the United States of America. Plaquemine denies that the "reasons" set forth by Gulf States' accurately reflect the consequences of the proposed transaction. Plaquemine denies that Gulf States is proposing to refuse to wheel for any proper reason. To the extent not admitted, the allegations of ¶23 are denied.

24.

Plaquemine admits that Plaquemine contends that a refusal by Gulf States to wheel to St. Gabriel would be a violation of Section 2 of the Sherman Act under the rationale of Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Plaquemine denies that it contends that a refusal by Gulf States to lease or sell its substation facilities at St. Gabriel would constitute a violation of Sherman Act Section 2. Plaquemine admits that Gulf States denies these allegations and that Gulf States seeks declaratory relief as stated in ¶24. To the extent not admitted, the allegations of ¶24 are denied.

25.

Plaquemine admits the existence of an actual case in controversy. Plaquemine admits that it has agreed with Stauffer

that they will pursue legal remedies available to them in the event that Gulf States refuses to wheel if they are advised that such remedies are available to them. To the extent not admitted, the allegations of ¶25 are denied.

COUNT ONE

26.

Plaquemine believes that ¶26 states a legal conclusion that it is not required to answer, but if it is required to answer it would admit that Count One is a claim for declaratory judgment against Lafayette, Plaquemine and Stauffer as requested by Gulf States, but it would deny that it is a good claim. To the extent not admitted, the allegations of ¶26 are denied.

27.

Plaquemine admits that it contends that Gulf States has a monopoly over the transmission of electric power over high voltage transmission lines in a relevant geographic market, and that a refusal by Gulf States to wheel power to permit Plaquemine to serve Stauffer, under all the circumstances herein present, would constitute an abuse of that monopoly power in violation of Section 2 of the Sherman Act. Plaquemine has insufficient knowledge to form a belief as to what other defendants will

contend, so it neither admits nor denies Gulf States' allegations as to their contentions. To the extent not admitted, the allegations of ¶27 are denied.

28.

Plaquemine admits that Gulf States makes the denials made by it in the first sentence of ¶28 of the Complaint. Plaquemine denies that either federal or state public policy compels Gulf States to refuse to perform the requested service. To the extent not admitted, the allegations of ¶28 are denied.

29.

Plaquemine admits that the electric utility industry is capital intensive but has insufficient knowledge to form a belief as to whether it is the most capital intensive industry in the country today and therefore neither admits nor denies that it is the most capital intensive. Plaquemine admits that Gulf States has a large industrial load and that it must invest in generating plant to serve that load. Plaquemine admits that Gulf States in planning its generating facilities attempts to meet the needs of its forecasted load but denies that any specific generating plant is committed or dedicated in any way to any specific load. To the best of Plaquemine's information and belief, Gulf States refuses to serve industrial customers without their having first executed a contract for a term of years, as it has required of Stauffer (which particular contract will expire pursuant to its

terms on September 1, 1984). Plaquemine admits that there is a substantial lead time for generation but denies that it is normally eight to 15 years. Plaquemine admits that Gulf States must invest in new generation in advance of significant added demand if it wishes to add the new business promptly. Plaquemine admits that Gulf States must also enter into long term fuel contracts to assure its customers of a reliable supply of electric energy when these new units are put on line. To the extent not admitted, the allegations of ¶29 are denied.

30.

Plaquemine has no knowledge of the economics of the telecommunications business and therefore can neither admit nor deny the comparison alleged in ¶30.

31.

Plaquemine admits the allegations contained in the first sentence of ¶31. Plaquemine denies the allegations contained in the second and third sentences of ¶31. Plaquemine denies that Louisiana law restrains competition between municipal electric utilities and other electric utilities except competition for those customers bound by contract to purchase from a particular utility for trade during the term of such a contract.

32.

Plaquemine admits the allegations contained in the first sentence of ¶32. Plaquemine denies the allegations contained in the second, third and fourth sentences of ¶32. Plaquemine has insufficient knowlege to form a belief concerning the allegations contained in the fifth sentence of ¶32, and, therefore, it neither admits nor denies them. To the extent not admitted, the allegations of ¶32 are denied.

33.

Plaquemine denies the allegations contained in ¶33.

34.

Plaquemine admits that all of Gulf States' rates for retail service in Louisiana are required to be filed with the Louisiana Public Service Commission and that its wholesale rates are required to be filed with the FERC. Plaquemine admits that the FERC frequently uses cost-of-service as the basis for determining the lawfulness of rates if the parties have not agreed on a settlement and if the rate is contested and goes to hearing. Plaquemine has insufficient knowledge to form a belief as to whether the Louisiana Public Service Commission employs cost-of-service as the standard for judging the lawfulness of rates. Plaquemine has insufficient knowledge to form a belief as to whether Gulf States is required to file with a Texas regulatory agency. Plaquemine has no knowledge of whether all of

Gulf States' retail, wholesale and transmission service rates are based on Gulf States' cost of service, and therefore it neither admits nor denies said allegation. Plaquemine admits that under both federal and Louisiana policy, the rates of electric utilities organized as private, for-profit, corporations are subjected to review of regulatory commissions for the purpose of preventing monopoly profits, but that neither state or federal law requires such review of the rates of electric utilities owned and operated by municipal corporations. Plaquemine denies the allegations contained in the third and fourth sentences of ¶34. To the extent not admitted, the allegations of ¶34 are denied.

35.

Plaquemine has insufficient knowledge to form a belief as to the truth of the allegations contained in the first and second sentences of ¶35 and, therefore, neither admits nor denies such allegations. Plaquemine denies that the speculative loss of 36% of Gulf States' electric revenue to Plaquemine or other municipal electric utilities is the necessary, likely, or even a possible, consequence of Gulf States being advised it will violate the antitrust laws by refusing to wheel power under the circumstances of this case. To the extent not admitted, the remaining allegations of ¶35 are denied.

36.

Plaquemine denies the underlying assumption of ¶36, namely that the speculative loss of 36% of Gulf States' revenue would be a consequence of Gulf States' being required to wheel in this case. Plaquemine denies the remaining allegations of ¶36.

37.

Plaquemine admits that some public utilities base their long term generation planning on projections of their future load including the load of those customers expected to be added to system load, and excluding the load of those customers which plan to leave the system or reduce their demand. Plaquemine denies the remaining allegations of ¶37.

38.

Plaquemine denies the allegations contained in ¶38.

39.

Plaquemine admits that the transmission service requested would be supplied over lines that are part of the interconnected interstate transmission system of Gulf States and avers that whether transmission service over those lines in interstate commerce is subject to the jurisdiction of the FERC under the Federal Power Act is a legal conclusion which Plaquemine is not required to answer, and respectfully refers the Court to the statute.

40.

Plaquemine avers that the allegations contained in ¶40 consist wholly of legal conclusions which Plaguemine believes it is not required to answer, and respectfully refers the Court to the statute.

41.

The allegations contained in ¶41 are denied.

42.

Plaquemine avers that the allegations contained in the first sentence of of ¶42 are legal conclusions which Plaquemine is not required to answer, but that, if required to answer, it would admit them. The remaining allegations of ¶42 are denied.

43.

Plaquemine denies the allegations contained in ¶43.

44.

Plaquemine admits that Gulf States proposes to deny defendants' request. Plaquemine admits that Gulf States is seeking a declaration that the denial of the wheeling requested by defendants would not be anticompetitive but denies that such judgment would be warranted after consideration by the Court of the facts and law in this case. To the extent not admitted, the allegations of ¶44 are denied.

WHEREFORE, Plaquemine prays for a declaration that Gulf States' refusal to transmit power to Plaquemine at the requested St. Gabriel delivery point would violate federal antitrust law and further prays for an award of its costs, including reasonable attorneys' fees.

COUNT TWO

45.

Plaquemine avers that the allegations contained in ¶45 are conclusions of law which Plaquemine is not required to answer, but if required to answer, Plaquemine would respond: Plaquemine admits that Count Two is a claim for a declaratory judgment against Lafayette, Plaquemine, Stauffer and LEPA, as referred to in ¶45, but denies that it states a good claim. To the extent not admitted, the allegations of ¶45 are denied.

46.

Plaquemine repeats all answers to paragraphs 6 through 44.

47.

Plaquemine denies that La. Rev. Stat. §33:4545.36 contains the provision alleged. It further denies that La. Rev. Stat. §33:4545.36 is determinative of any issue in this case.

48.

Plaquemine admits that it has executed a contract with Lafayette and LEPA for the purchase of surplus power and energy. Whether or not Lafayette has executed a contract with LEPA for the "purchase of capacity" within the meaning of La. Rev. Stat. §33:4545.36 is a legal question that Plaquemine is not required to answer, but if required to answer, Plaquemine would deny that Lafayette has executed such a contract. Whether Lafayette and Plaquemine are, or either of them is, subject to the prohibitions contained in the LEPA statute is a question of law which Plaquemine believes it is not required to answer, but if required to answer Plaquemine would deny those allegations. In any event, Plaquemine denies that those prohibitions are inconsistent with Gulf States' obligations under the antitrust laws. Plaquemine admits that Gulf States has not given its consent to Plaquemine's and Lafayette's serving Stauffer, admits that Stauffer is at present a customer of Gulf States, but denies that Stauffer is contractually obligated to purchase power from Gulf States for the period following September 1, 1984. Plaquemine admits that the Plaquemine/LEPA/Lafayette agreement of July, 1983, has not been cancelled. To the extent not admitted, the allegations of ¶48 are denied.

49.

Plaquemine avers that the allegations contained in ¶49 are conclusions of law which do not require an answer, but if

required to answer, Plaquemine would respond: Plaquemine would deny that under Louisiana law Plaquemine and Lafayette may not legally serve Stauffer. Plaquemine would also deny that a refusal by Gulf States to consent to such service would be immunized from the antitrust laws under the principles set forth in Parker v. Brown, 317 U.S. 341 (1943), as interpreted by the Supreme Court and by the United States Court of Appeals for the 5th Circuit in Southern Motor Carriers Rate Conference v. United States, 702 F. 2d 532 (1983), petition for cert. pending, No. 82-1922.

WHEREFORE, Plaquemine prays that the Court declare Gulf States is not immune from the antitrust laws for the transaction at issue here as a result of the state action of the state of Louisiana, and further prays for an award of its costs, including reasonable attorneys' fees.

COUNTS THREE AND FOUR

50.-66.

Plaquemine believes that it is not required to answer ¶50-66 of the Complaint. In any event, Plaquemine has insufficient knowledge to form a belief as to the truth of the allegations contained in ¶¶50-66 and therefore neither admits nor denies such allegations.

COUNTERCLAIM

1. Defendant Plaquemine is the plaintiff in this counterclaim in which plaintiff Gulf States is named as counterclaim defendant.

2. Jurisdiction of this counterclaim is based on Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26,) and 28 U.S.C. §§1331, 1337, 2201, 2202.

3. The acts alleged in this counterclaim occurred in (or will occur in) or affected (or will affect) trade or commerce among the states.

4. Gulf States has monopoly power over the sale of electric power and energy in bulk and over the transmission of electric power and energy in bulk in a relevant market in Louisiana.

5. Gulf States' unreasonable refusal to provide the wheeling service requested by Plaquemine referred to in the complaint would constitute monopolization or an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. §1, contrived, in part, by contracts which unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

6. Gulf States has raised unnecessary barriers to competition by using its strategic dominance in transmission to insert clauses in its contract with LEPA so that it could threaten the possible application of La. Rev. Stat. §33:4545.36,

constituting monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. §1, contrived, in part, by contracts which unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

7. Gulf States has used its strategic dominance in transmission to refuse to transmit power from Lafayette to Plaquemine under the Lafayette/GSU power interconnection agreement and to insist that the LEPA contract be used as a vehicle for such transmission for the purpose or with the anticipated effect that by agreeing to such contract Lafayette and Plaquemine would thereafter be bound to refrain from competing with Gulf States in certain territories referred to in La. Rev. Stat. §33:4545.36, in violation of Section 2 of the Sherman Act, 15 U.S.C. §1, contrived, in part, by contracts which unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

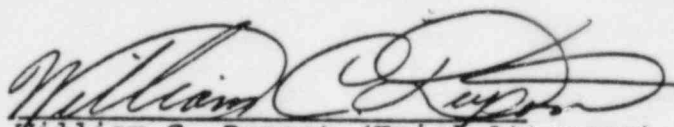
8. The City of Plaquemine is entitled to injunctive relief from the aforementioned violations of the Sherman Act under Section 16 of the Clayton Act, 15 U.S.C. §26, inasmuch as said violations threaten Plaquemine's ability to perform its contractual obligations to Stauffer and to Lafayette and its opportunity to earn the revenue to which it will be entitled for the sale of power and energy to Stauffer and for the sale of standby capacity to Lafayette.

9. The City of Plaquemine is entitled to recover threefold the damages sustained by it as a result of the

aforementioned violations of the Sherman Act under Section 4 of the Clayton Act, 15 U.S.C. §15, inasmuch as said violations have injured Plaquemine in its business and property by causing it to incur substantial transactional costs in negotiating and drafting unnecessary arrangements in order to obtain bulk power furnished by Lafayette through LEPA rather than directly from Lafayette.

WHEREFORE, Plaquemine prays the Court for judgment in its favor and against Gulf States, declaring that, in the circumstances of this case, Gulf States has violated Sections 1 and 2 of the Sherman Act, enjoining Gulf States from refusing the requested wheeling service and awarding Plaquemine threefold the damages sustained by it as a result of Gulf States' violations of the Sherman Act. Plaquemine further prays for such additional relief as may be appropriate and for recovery of its costs, including reasonable attorneys' fees.

Respectfully submitted,



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IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF LOUISIANA

Gulf States Utilities Company, Plaintiff, v. City of Lafayette, et al., Defendants.	Civil Action No. 84-132-B

CERTIFICATE OF SERVICE

I, William C. Dupont, attorney for defendant City of Plaquemine, hereby certify that the foregoing Answer was served on the 27th day of February, 1984, by depositing a copy thereof in the United States mail, postage prepaid and addressed to:

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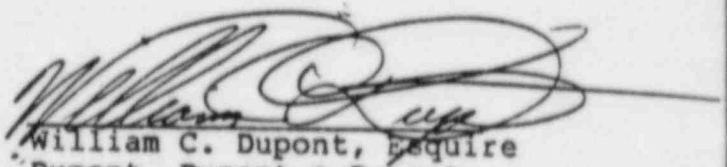

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY Plaintiff	*	CIVIL ACTION NUMBER 84-132
VERSUS	*	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, and THE LOUISIANA ELECTRIC POWER AUTHORITY	*	
Defendants	*	

NOTICE OF
MOTION TO DISMISS
FOR IMPROPER VENUE AND
LACK OF JURISDICTION

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Washington, DC 20036

Please take notice, that on the _____ day of _____, 1984, at _____ o'clock, in the forenoon

or as soon thereafter as counsel can be heard, the undersigned, attorney for the defendant, The City of Lafayette, Louisiana, will move this Court, at Room _____, United States Court House for the Middle District of Louisiana, Baton Rouge, Louisiana, for an order Dismissing plaintiff's complaint for Improper Venue and Lack of Jurisdiction.

VOORHIES & LABBE'
(A Professional Law Corporation)

BY: _____
W. GERALD GAUDET
P. O. Box 3527
Lafayette, LA 70502
(318) 232-9700
Attorneys for The City of
Lafayette, Louisiana

CERTIFICATE

I HEREBY certify that a copy of the above and foregoing pleading has been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this _____ day of _____, 19__.

_____
W. GERALD GAUDET

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY	*	CIVIL ACTION NUMBER 84-132
Plaintiff	*	
VERSUS	*	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, and THE LOUISIANA ELECTRIC POWER AUTHORITY	*	
Defendants	*	

MOTION TO DISMISS
FOR IMPROPER VENUE AND
LACK OF JURISDICTION

The defendant, The City of Lafayette, Louisiana, moves the Court as follows:

1. To dismiss the action on the grounds of improper venue. Jurisdiction alleged in the complaint in this action is based on 15 USC Sec.1&2 (Sherman Act), 15 USC Sec.15& 26 (Clayton Act) and 28 USC Sec.2201-2202; venue is, therefore, based on 15 USC 22 and/or 28 USC 1391. Venue is improper under both sections.

2. To dismiss the action because as appears from the complaint, the court has no jurisdiction for the reason that there is no diversity as required by federal law, and the

action presents for proper determination no question arising under the Constitution or laws of the United States.

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W. GERALD GAUDET

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY Plaintiff	*	CIVIL ACTION NUMBER 84-132
VERSUS	*	SECTION "B"
THE CITY OF LAFAYETTE, LOUISIANA, THE CITY OF PLAQUEMINE, LOUISIANA, STAUFFER CHEMICAL COMPANY, and THE LOUISIANA ELECTRIC POWER AUTHORITY Defendants	*	

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS FOR
IMPROPER VENUE AND JURISDICTION

Plaintiff, Gulf States Utilities Company, has filed a Petition with this Court, seeking damages and a declaratory judgment against defendant, The City of Lafayette, Louisiana, under the provisions of the Sherman and Clayton Acts (15 USC 1227). In this Petition, plaintiff has alleged two (2) separate claims against the City of Lafayette. The first claim set forth in Counts I and II involves a refusal of Gulf States Utilities Company to permit use of its electrical facilities and to wheel power to Plaquemine for its service to Stauffer Chemical Company. In this claim, Gulf States Utilities Company has included the City of Plaquemine, Louisiana, and Stauffer Chemical Company as defendants.

VENUE

Both the City of Plaquemine and Stauffer Chemical Company are found in the Middle District of Louisiana, and thus, under 28 USC 1392(A), venue is proper in the Middle District with respect to the City of Lafayette on Counts I and II, even though the City of Lafayette is a municipal corporation found and/or transacting business within the Western District.

However, the second claim in plaintiff's Petition (entitled "Count III" in plaintiff's Petition) is entirely unrelated to the first claim described above. Plaintiff's second claim seeks damages and injunctive relief under the Clayton Act for the City of Lafayette's proposal to buy out some of SLEMCO's customers. The facts which underlie plaintiff's second claim against the City of Lafayette are entirely unrelated to the facts of plaintiff's first claim. Under Federal Rule of Civil Procedure 18(a), a plaintiff may join any number of claims that he may have in a suit against the defendant, but venue must be proper as to each claim. (Federal Practice and Procedure, Wright, Miller, Cooper, Volume 15 Chapter 8 Section 3808). Plaintiff's second claim is asserted only against the City of Lafayette, a municipal corporation residing and/or transacting business only in the Western District. The City of Lafayette does not conduct business in the Middle District. The venue provisions of the

Clayton Act require the plaintiff to file suit against a defendant corporation in the judicial district whereof the corporation is an inhabitant; wherein it may be found; or wherein it transacts business. (15 USCA Section 22) The general venue statutes also require plaintiff to file his petition against a corporation in the district wherein the corporation is licensed to do business or is doing business. (28 USCA 1391) Plaintiff cannot avail himself of 28 USCA 1393(A), since neither the City or Plaquemine nor Stauffer Chemical Company are joined as defendants in the plaintiff's second claim against the City of Lafayette. Thus, venue is improper with respect to plaintiff's second claim (Count III) against the City of Lafayette.

Additionally, defendant objects to venue with regard to plaintiff's Fourth Count asserting a cause of action under 42 USCA 1983. Jurisdiction under the Civil Rights Act is granted to the federal courts pursuant to 28 USCA 1343. No special venue is provided by these statutes; rather, the general venue statutes are applicable. Buhl v. Jeffes, 1977 F.S. 1149. The City of Lafayette is the only defendant against whom plaintiff asserts a cause of action under 42 USCA 1983 and 28 USCA 1343. As stated above, the City of Lafayette is a municipal corporation residing and/or transacting business only in the Western District. By virtue of 28 USCA 1391, a corporation may be sued in any judicial district in which it is

incorporated or licensed to do business or is doing business. Thus, the Middle District is not a proper venue for a claim filed against the City of Lafayette.

Improper venue with respect to Counts III and IV require dismissal of plaintiff's petition against the City of Lafayette.

JURISDICTION

Additionally, there is no "federal question" jurisdiction in this case for Counts I and II of plaintiff's complaint. It is well settled that federal question jurisdiction cannot be created by anticipating defenses based upon federal law in plaintiff's (GSU's) complaint. Metcalf v. City of Watertown, 9 S.Ct. 173, 128 US 586 (1980); Phillips Petroleum Company v. Texaco, Inc., 94 S.Ct. 1002, 415 US 125 (1974). The rule applies with equal force when plaintiff seeks a declaratory judgment: an action for a declaratory judgment is within federal question jurisdiction only if the coercive action that could otherwise have been brought would have been within that jurisdiction. (Federal Practice and Procedure, Wright, Miller, Cooper, Volume 13 Section 3566). The operation of the Declaratory Judgment Act is procedural only; the act merely grants authority to the courts to use an additional remedy in cases in which they would otherwise have jurisdiction. (Federal Practice and Procedure, Wright, Miller, Cooper, Volume 10A, Sections 2555 and 2766.)

Plaintiff (GSU) could not bring a coercive action against the defendant, the City of Lafayette, based upon either the Sherman Act or the Clayton Act under the facts alleged in Counts I and II of plaintiff's petition. Plaintiff has made no complaint to the effect that defendant has violated the Sherman or Clayton Acts in either Count I or Count II of it's complaint. On the contrary, plaintiff's complaint merely anticipates a defense to an action that could be brought by the defendant, Lafayette, for breach of contract under state law. In its petition, plaintiff has merely anticipated its "federal question" defense to defendant's claim that plaintiff breached its contract with Lafayette.

At this time, the City of Lafayette has only requested delivery under its interconnection agreement with Gulf States. The City of Lafayette has made no allegations as to Gulf States' possible violations of the antitrust laws. Gulf States has alleged federal question jurisdiction using an anticipatory complaint based upon the anti-trust laws that the City of Lafayette has never raised.

Specifically, in Counts I and II of the petition, plaintiff actually asserts that, by virtue of state regulation, authorized by the anti-trust laws, (thus presenting a question of federal law), it is immune from possible anti-trust liability should the defendant decide to file suit against it under state law. In Skelly Oil Company v. Phillips Petroleum

Company, 70 S.Ct. 876, 339 US 667 (1950), the Supreme Court clearly rejected the possibility that, under these circumstances, the federal courts have jurisdiction to hear the case. As stated in Skelly, it would "distort the limited procedural purpose of the declaratory judgment act" to permit a party by "artful pleading" to anticipate a defense based on federal law and thus bring within federal jurisdiction, a case that could not otherwise be heard in federal court. Again, in Public Service Commissioner of Utah v. Wycoff Company, 73 S.Ct. 236, 344 US 237 (1952), the court stated:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

In Federal Practice and Procedure, Wright comments on the above case in the following manner:

> Despite the Court's use of such words as "doubtful" and "dubious", it seems clear that this is the law today, ...Therefore, if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.

See also Government Employees Insurance Company v. LeBleu, D.C., La. 1967, 272 F.Supp. 421:

> A plaintiff, if his own claim presents no material and substantial federal question, is now allowed to secure a federal forum by anticipating a federal question in the opposing party's defense...Where a prospective defendant initiates the proceeding by way of a declaratory suit, it ought to be necessary to hold that the prospective plaintiff's claim must contain the federal question, and that a federal question posed by the defense of the declaratory plaintiff (traditional defendant) does not suffice for federal question jurisdiction. (emphasis added)

Since plaintiff's claim against defendant under Counts I and II of plaintiff's petition does not allege a federal question sufficient to confer federal jurisdiction on this court, plaintiff's claim must be dismissed.

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