UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. CIV 96-196 B

CITY OF STILWELL, OKLAHOMA, ET AL.,

Defendants.

UNITED STATES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's Scheduling Order, dated August 12, 1997, the United States hereby submits the following proposed findings of fact and conclusions of law in advance of trial:

PROPOSED FINDINGS OF FACT

IDENTITY OF DEFENDANTS

1. The City of Stilwell sells electricity to residential, commercial and individual customers inside city limits and surrounding portions of Adair County, Oklahoma through the Stilwell Utility Department ("UD").

2. The City of Stilwell provides water and sewer services to customers within and around its corporate boundaries through the Stilwell Area Development Authority ("ADA").

3. The City of Stilwell is a charter municipality established under the laws of Oklahoma. Its Utility Department was established by § 106 of the City's Charter to provide electricity within and around the City's corporate boundaries. The Utility Department is governed by a Utility Board of five members appointed by the Mayor with approval of City Council, and subject to City Council oversight.

4. The Stilwell Area Development Authority is a public trust established under Oklahoma law to provide water and sewer for compensation within and around the City's corporate boundaries. It is governed by a Board of Trustees, whose membership is identical to the Stilwell Utility Department, and is likewise subject to City Council oversight.

VENUE AND INTERSTATE COMMERCE

5. Venue is proper in this District under 15 U.S.C. §§ 22 and 28 U.S.C. § 1391(c) because defendants transact business and are found here.

6. The City of Stilwell is only nine miles from the Arkansas border.

7. The City of Stilwell purchases electric power from the Grand River Dam Authority ("GRDA") which it sells to its customers. GRDA is part of an integrated electric power network interconnected throughout the Southwest. It is also a member of the Southwest Power Pool, a coordinated electric power interchange system headquartered in Arkansas that consists of multiple members from eight states throughout the Southwest.

8. GRDA sells power to customers located in Oklahoma, Missouri and Arkansas. When GRDA's generating facilities are down, it purchases power from local and out-of-state sources. Because GRDA purchases electricity from out-of-state sources, electricity purchased and resold by Stilwell has been commingled with out-of-state electricity.

8. In one year, defendants' obtained more than $3.2 million from the federal government to build and expand their utility systems.

9. Defendants directly purchased more than $680,000 worth of goods and services between 1995 and the first quarter of 1997 from out-of-state companies.

SEWER, WATER AND ELECTRICITY MARKETS

Sewer

10. The Stilwell ADA has no competitors in the provision of sewage service in and around Stilwell.

11. State and lending regulations may prohibit a customer from using a septic system.

12. It costs at least $2000 to build a septic system in and around Adair County, and may be more expensive if the terrain is rocky. There are

also costs to maintain a septic system. In comparison, to hook up to the City's sewer system, requires only a $150 tap fee, $150 deposit, and minimum bill of $6 per month based upon water usage.

13. About 95% of the residents and businesses in the Stilwell city limits purchase sewer service from the City. The remaining 5% rely on septic systems.

Water

14. The Stilwell ADA is the only entity that has supplied water to new customers within the corporate limits of the City.

15. The defendants do not regard rural water districts ("RWDs") as competitors for water customers.

16. Customers in Adair County do not have a choice of water suppliers.

17. The RWDs surrounding Stilwell -- RWD Nos. 2, 3, 4 and Cherry Tree -- purchase their water requirements from the Stilwell ADA. The Stilwell ADA charges them a higher rate for water than it does to its residential customers.

18. When the City has annexed into areas served by RWDs, it has taken over the RWD water lines and customers.

19. Drilling private wells is not a practical alternative for many developers. Compliance with state and federal regulations make the expense of drilling a well and treating the water uneconomical compared to using municipal water service for developers of federally-financed housing or other public buildings.

20. Even if one chooses to drill a well, there is no guarantee of securing an adequate supply of safe, potable water.

21. The Stilwell ADA provides water service to at least 90 percent of the population within the City's limits, including annexed territory.

22. All residents of Adair County already have water service available. Since the infrastructure needed to build water and sewer systems is capital intensive and there are regulatory barriers, it is unlikely that a new competitor will enter and begin to provide water and sewer services in Adair County.

23. Water and sewer services are basic needs for the health and welfare of any community.

Electricity

24. The Stilwell UD has for many years operated as the only municipal electric company providing service to the City of Stilwell within its pre-1961 city limits.

25. The demand for electricity is inelastic, meaning as the price increases, the amount that purchasers are willing to purchase stays roughly the same or increases. Moreover, the City of Stilwell has the power to set its own electricity rates, without any other regulatory approval.

26. Electricity and water/sewer are distinct products.

27. The retail sale of electricity to new customers in the annexed areas of Stilwell is a relevant market.

OZARKS RURAL ELECTRIC COOPERATIVE

28. Ozarks Rural Electric Cooperative Corporation ("Ozarks") is a rural electric cooperative headquartered in Fayetteville, Arkansas. Roughly 25 percent of Ozarks' customers (members) are located in Oklahoma, the majority of which are in Adair County.

29. Ozarks purchases the electric power it distributes to its members from KAMO Electric Cooperative, Inc. ("KAMO"), a non-profit rural generation and transmission cooperative. KAMO provides wholesale electric service to 17 distribution cooperatives that have 285,000 members in northeast Oklahoma and southwest Missouri.

30. KAMO, like GRDA, is part of an integrated electric power network interconnected throughout the Southwest. It is also a member of the Southwest Power Pool.

31. KAMO purchases some of its electricity from Associated Electric located in Springfield, Missouri. Because KAMO's electric utility generating units and transmission lines interconnect with generating units and transmission lines outside Oklahoma, electricity purchased and resold by Ozarks is generated or commingled with electricity generated outside of Oklahoma.

32. Ozarks directly purchases goods and services used to supply electricity to its customers from out-of-state companies.

33. The Stilwell Utility Department competes with Ozarks for new customers in areas of Adair County annexed or proposed for annexation into the City after 1961.

34. Through annexation, the City's boundaries have expanded to include a significant portion of the area previously served by Ozarks.

35. To compete for new customers, Ozarks sometimes offers substantial economic incentives and other services, including rebates on water heaters and heat pumps, a special economic development rate through its supplier KAMO and placement (at its own expense) of the distribution facilities underground instead of on overhead poles.

ALL-OR-NONE UTILITY POLICY

36. Stilwell adopted an all-or-none utility policy, meaning for some customers they denied water and sewer connections unless the customer also agreed to take City-supplied electricity.

37. The all-or-none policy was unwritten until spring of 1994, when it was formally adopted by the Stilwell UD and ADA governing boards, and the City Council. The Stilwell UD and ADA governing boards also recommended that the all-or-none policy be enforced through the building permit process, and that the City Council and Mayor "give some teeth" to it.

The City Council obliged at its May 2, 1994 meeting, by adopting a resolution approving the policy.

Skywood Episode

38. ERC Properties, Inc. ("ERC") is an Arkansas-based property development and management construction firm that obtains funding for some of its housing projects from the Rural Economic and Community Development Service (formerly Farmers Home Administration).

39. In August of 1993, Ozarks approached Steve Rucker of ERC offering to supply electricity to the final Skywood apartment complex, which consisted of 16 units located in an area annexed into the City of Stilwell.

40. Ozarks offered to provide ERC with rebates for each heat pump and water heater installed in each unit and to place, at its own expense, the electrical wires underground rather than on overhead poles. ERC accepted this proposal.

41. In contrast, Stilwell offered no rebates and required the developer to dig the trenches and pay for the underground lines.

42. When Walter S. (Scottie) Adair, then Stilwell UD's general manager, heard that Ozarks was preparing to dig trenches to provide electric service to Skywood, he called Rucker and told him that Stilwell would not provide water or sewer service if ERC chose Ozarks to supply the electricity.

43. Stilwell then turned off and padlocked a valve in the water distribution line connection at Skywood. This left some nearly finished buildings without water, even for fire protection.

44. With the Skywood units virtually ready for occupancy, Rucker agreed to take the City's electricity.

Candle Ridge Episode

45. Stilwell also told ERC that Stilwell would not issue building permits for a similar 24-unit housing project for senior citizens called Candle

Ridge, located in an area annexed into the City of Stilwell, unless and until ERC committed in writing to obtain all utility services for the project from Stilwell.

46. Ozarks had offered to provide electric service to Candle Ridge.

47. ERC needed the defendants' sewer and water, and ultimately agreed to use only city-supplied utilities for any projects in Stilwell.

Oklahoma Department of Human Services

47. A landowner named Kenneth Davidson planned to construct an office building and lease it to the Oklahoma Department of Human Services ("DHS").

48. Davidson preferred purchasing the electricity from Ozarks because Ozarks agreed to install the electric distribution system underground. The City had refused to install the wires underground, and Davidson did not want unsightly poles all over the property.

49. The Stilwell UD told Davidson that in order to use the City's sewer and water, he would have to, *inter alia*, purchase the City's electricity.

50. No RWD would provide water to Davidson's planned DHS Building.

51. For Davidson, drilling a well was neither a practical nor economic option compared to using the City's water. The school where Davidson is the administrator uses a well for water, but sulphur has contaminated the water supply. Since the school is a public building, the water has to be sampled each month by the Health Department, and the school had to put in a holding tank and change sand filters every six months in order to remove sulphur smell. In addition to the capital costs of the equipment, there are periodic operating and maintenance costs, which make a well an undesirable option for a public facility.

52. Davidson understood that in order to comply with state requirements, he would have to extend lateral sewer lines to a septic field across the street onto more of his property, which was going to be expensive.

53. Davidson finally agreed to take all three utilities from the City.

Results of Defendants' All-or-None Policy

54. Since the all-or-none policy began, Ozarks obtained only two new customers in the annexed territory -- the Fellowship Baptist Church and the Tyson/Petit Jean account -- for which defendants decided not to condition the sale of sewer and water services on the sale of electric service.

56. Ozarks secured the Tyson/Petit Jean account because the City Council passed a resolution to "allow" Ozarks to serve it instead of applying the all-or-none policy to prevent it.

55. Since the all-or-none policy began, defendants' market share in the provision of electric service to new customers in the annexed territory approaches 100 percent.

55. The annual electric revenues are at least $10,000 per project and $30,000 per year for the Candle Ridge, DHS building, and final Skywood projects.

56. If Ozarks had obtained more customers in the annexed areas of Stilwell, it would have bought more equipment (*i.e.*, poles, transformers, meters, cable, etc.) from suppliers located outside of Oklahoma.

EVENTS SINCE THE DEPT. OF JUSTICE INVESTIGATION BEGAN

57. Although when faced with the Justice Department's investigation the Stilwell UD and ADA Boards rescinded their all-or-none policy and adopted a new policy of notifying prospective customers that they have a choice of electric suppliers, the City Council never formally rescinded the all-or-none policy.

58. The City of Stilwell anticipates more growth and annexation in the future.

59. Ozarks intends to continue to compete and solicit new customers in the annexed areas.

60. The City of Stilwell intends to continue to grow and solicit new customers in the annexed areas.

COMPETITIVE HARM VERSUS PROCOMPETITIVE JUSTIFICATION

61. There are no procompetitive justifications to defendants' all-or-none policy.

62. The competitive harm of the all-or-none policy outweighs any procompetitive benefit.

INTENT AND LIKELIHOOD OF SUCCESS

63. Defendants intended to obtain the power to set the retail price of electricity in the annexed areas and to exclude Ozarks from selling electricity in the annexed areas.

64. Through its conduct, defendants had a dangerous probability of achieving the power to set the retail price of electricity in the annexed areas and to exclude Ozarks from selling electricity in the annexed territories.

CONCLUSIONS OF LAW

SECTION ONE -- TYING

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, makes illegal "[e]very contract, combination... or conspiracy" that unreasonably restrains trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911). To establish a violation of Section 1, plaintiff must show: (1) concerted action by two or more independent entities that (2) unreasonably restrains trade, and (3) is in the flow of or substantially affects interstate or foreign commence.

2. Where the existence of a tying arrangement is proven, the concerted action necessary under Section 1 lies in the buyer's agreement (voluntary or not) to purchase both of the products. *See Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1138 (10th Cir. 1997) (*en banc*) (concerted action element is satisfied because "the seller coerces a buyer's acquiescence in the tying arrangement"); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 463 n.8 (1992) (conditioning sale

of parts on sale of service is not unilateral conduct outside the scope of Section 1).

Per Se Rule in General

3. Certain types of conduct that are always or almost always anticompetitive and have little or no possible procompetitive benefit are deemed *per se* illegal under the antitrust laws. Such practices "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958); *see also State Oil Co. v. Kahn*, _ U.S. _, 1997 WL 679424, slip op. at 5 (U.S. Nov. 4, 1997) (conduct with "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit . . . are deemed unlawful *per se*.").

4. Where the conduct at issue is *per se* illegal, the defendant's motives, proffered business justifications, or the specific market context in which the conduct is found are all irrelevant. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940) (once a *per se* agreement is proved, defendants are not allowed to present any evidence of the justification for or reasonableness of the agreement).

5. The *per se* test allows a court "to avoid a burdensome inquiry into actual market conditions," because "the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15-16 n.25 (1984).

6. Conduct that has been found to be *per se* unlawful includes price-fixing, bid-rigging, and customer or market allocation agreements among competitors. *See Northern Pacific Ry.*, 356 U.S. at 5.

7. Tying arrangements have long been held *per se* unlawful where the defendant has market power in the tying product. *Jefferson Parish*, 466 U.S. at 15-18.

8. Tying is "an agreement by one party to sell one product -- the 'tying product' -- only on the condition that the buyer also purchase a second product -- the 'tied product' -- or at least agree not to buy that product from another supplier." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 702 (1996).

Test for a Per Se Tie

9. The following four-part test determines whether a tying arrangement is a *per se* violation of the antitrust laws:

> The elements, then, of a *per se* violation, are (1) two separate products, (2) a tie -- or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market.

Multistate Legal Studies, 63 F.3d at 1546; *see also Eastman Kodak*, 504 U.S. 451, 461-62 (1992).

10. In determining whether electric service is a separate product from water and sewer service, the question is whether there are "two distinct markets for products that were distinguishable in the eyes of buyers." *Jefferson Parish Hospital*, 466 U.S. at 19. If there is sufficient demand that it is efficient to offer the tied product separately from the tying product, the two products are separate. *Id.* at 21-22; *Eastman Kodak*, 504 U.S. at 462; *Multistate Legal Services*, 63 F.3d at 1547.

11. It is not necessary that the conditioning involve any coercion beyond offering a bundled product and refusing to give customers the choice of buying the products separately. *See Multistate Legal Studies*, 63 F.3d at 1548.

12. Tying arrangements are *per se* illegal even if not always applied or enforced. *See International Salt Co. v. United States*, 332 U.S. 392, 398 (1947); *see also Detroit City Dairy, Inc. v. Kowalski Sausage Co.*, 393 F. Supp. 453, 466 (E.D. Mich. 1975) (listing cases where an exception to a tying arrangement did not prevent application of the *per se* rule).

13. The question under the third prong of the *per se* test is not whether the defendant has a monopoly or near monopoly, but rather whether the defendant "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1,6 (1958). Sufficient economic power over the tying product can be shown by a high market share or some unique attribute of the product that competitors are unable to provide. *Jefferson Parish Hospital*, 466 U.S. at 16-17.

14. Market shares between 90 and 100 percent in the tying products are adequate to establish sufficient economic power. *E.g., Standard Oil Co. v. United States*, 337 U.S. 293, 295 (1949); *Parts and Electric Motors, Inc.*, 826 F.2d 712, 720 (7th Cir. 1987); *Betaseed v. U&I, Inc.*, 681 F.2d 1203, 1221 n.34 (9th Cir. 1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1128 (6th Cir. 1981).

15. To meet the substantial volume part of the test, the volume of commerce involved must be not "insubstantial" or "*de minimis*." *Northern Pacific*, 356 U.S. at 11; *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

16. Courts have found tens of thousands of dollars of tied commerce to be much more than *de minimis* and to meet the fourth part of the test. *See, e.g., DataGate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1424-26 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1344 (1996) ($100,000); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991), *cert. denied*, 506 U.S. 903 (1992) ($30,000-$70,000); *Tic-X-Press, Inc. v. Omni Productions Co.*, 815 F.2d 1407, 1419 (11th Cir. 1987) ($10,091).

17. Defendants' all-or-none policy meets the standards for a *per se* unlawful tying arrangement.

Application of the Rule of Reason

18. An agreement is unlawful under the Rule of Reason if, on balance, the practice is one that "suppresses competition" rather than "promotes competition." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). Thus, to defeat liability, defendants must show sufficient procompetitive justifications, such as lowering production costs or increasing interbrand competition, to outweigh the competitive harm. Justifications unrelated to competition, such as providing alternative funding for other City services, are irrelevant.

19. Defendants' all-or-none policy is unlawful under the Rule of Reason because the harm to competition outweighs any procompetitive benefits.

Interstate Commerce

20. Conduct challenged under Sections 1 and 2 must be "in the flow of" or "substantially affect" interstate commerce. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); *Anesthesia Advantage, Inc. v. Metz Group*, 912 F.2d 397, 400 (10th Cir. 1990); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 720 (10th Cir. 1980). To establish interstate commerce, the Tenth Circuit requires that the plaintiff (1) identify a 'relevant' aspect of interstate commerce, and (2) specify its relationship to the defendant's illegal activities. *Anesthesia Advantage*, 912 F.2d at 401; *Crane*, 637 F.2d at 723.

21. An activity is in the flow of interstate commerce if it occurs in a market involving the sale of goods or services that cross state lines or if the conduct involves an activity that is part of a larger interstate transaction. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-85 (1975); *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905).

22. An entirely local activity may substantially affect interstate commerce through a defendant's purchases of goods and services from vendors in other states or through federal funding of a defendants' activities. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743-46

(1976) (hospital purchased supplies from out-of-state sellers and received revenues from out-of-state insurers).

23. Defendants' conduct in implementing the all-or-none policy is in the flow of and substantially affects interstate commerce.

SECTION 2 -- MONOPOLIZATION

24. Monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Relevant Market

25. A relevant market consists of both a product market (*e.g.*, electricity) and a geographic market (*e.g.*, the annexed territory). *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

26. The key to product market definition is determining which products are "reasonably interchangeable." *United States v. E.I. du Pont de Nemours*, 351 U.S. 377, 395 (1956). Two products are reasonably interchangeable, and hence in the same product market, if customers would switch between them in response to an increase or decrease in the price of one of the products. If relatively few customers would switch, the products are not in the same market. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 (1953).

27. Courts have routinely held that electric service is a relevant product market. *See, e.g., City of Malden v. Union Electric Co.*, 887 F.2d 157, 162 (8th Cir. 1989); *Ray v. Indiana & Michigan Electric Co.*, 606 F.2d 757, 776 (N.D. Ind. 1984), *aff'd*, 758 F.2d 1148 (7th Cir. 1985); *Otter Tail Power Co. v. United States*, 331 F. Supp. 54, 58 (D. Minn. 1971), *affirmed in part, vacated in part*, 410 U.S. 366 (1973).

28. The geographic market is the "area of effective competition...in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Geographic market definition centers on identifying where a customer can turn for alternate supplies if faced with a price increase. Because customers for electric service can typically turn only to utilities

serving the area where their home or business is located, it has been held that a utility's service area is a relevant geographic market. *Otter Tail Power v. United States*, 410 U.S. 366, 369-70 (1973); *City of Chanute v. Kansas Gas & Electric*, 564 F. Supp. 1416, 1421 (D. Kan. 1983), *aff'd*, 754 F.2d 310 (10th Cir. 1985); *Town of Concord v. Boston Edison Co.*, 721 F. Supp. 1456, 1459 (D. Mass. 1989), *rev'd on other grounds*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 449 U.S. 931 (1991).

Monopoly Power

29. In the Tenth Circuit, monopoly power is the power to control prices and exclude competition. *See, e.g., Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 966-67 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 164 (10th Cir. 1986).

30. A high market share gives rise to a presumption of monopoly power. *Reazin*, 899 F.2d at 967-68. Another important indicator of monopoly power is the existence of high barriers to entry such as high capital costs or significant regulatory or legal requirements. *Id.* at 968. Other factors include the number and strength of competitors and consumer sensitivity to changes in prices. *Shoppin' Bag*, 783 F.2d at 162.

Willful Acquisition or Maintenance

31. If monopoly power was acquired through anticompetitive conduct that violates Section 1 of the Sherman Act, the willful acquisition or maintenance element of monopolization is met. *See Multistate Legal Services*, 63 F.3d at 1550 (unlawful tying arrangements are "anticompetitive conduct" for Section 2 purposes).

32. Leveraging monopoly power in one market to monopolize a second constitutes willful conduct that satisfies the second element of monopolization. *See, e.g., United States v. Griffith*, 334 U.S. 100, 108 (1948); *Berkeley Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *United States v. Aluminum Co. of America*, 148 F.2d 416, 438 (2d Cir. 1945).

33. Defendants have monopolized the market for electric service in the annexed areas of Stilwell.

SECTION 2 -- ATTEMPTED MONOPOLIZATION

34. To prove an attempt to monopolize, plaintiff must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 465 (1993).

35. The requirement of predatory or anticompetitive conduct is proven by the same type of conduct that shows that monopoly power was willfully acquired or maintained. *See Transamerica Computer Co. v. IBM*, 698 F.2d 1377, 1382 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). The Tenth Circuit has expressly held that proof of an unlawful tying satisfies this element of attempt to monopolize. *Multistate Legal Studies*, 63 F.3d at 1550.

36. Courts look to the following factors in considering whether there is a dangerous probability of success: market shares, barriers to entry, number and strength of other competitors, and market trends. *Multistate Legal Studies*, 63 F.3d at 1554.

37. A market share approaching 100% easily satisfies the dangerous probability test. *E.g., American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (66% market share).

38. The specific intent element may be inferred from evidence of anticompetitive conduct. *See Shoppin' Bag*, 783 F.2d at 163.

39. Defendants have attempted to monopolize the market for electric power in the annexed areas of Stilwell.

State Action

40. The conduct of local governmental entities is only exempt from the antitrust laws where the defendant meets its burden of demonstrating "that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Town of Hallie v. Eau Claire*, 471 U.S. 34, 40 (1985).

41. In considering an immunity claim by a local government, the inquiry is whether "an adequate state mandate for the anticompetitive

activities of cities and other subordinate governmental units is found 'from the authority given a governmental entity to operate in a particular area, [such] that the legislature contemplated the kind of action complained of.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1992) (citation omitted).

42. The Tenth Circuit has adopted a two-part test for immunity for local governmental entities, requiring the defendant to demonstrate that the state legislature (1) authorized the challenged conduct and (2) thereby intended to suppress competition. *Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1506-07 (10th Cir. 1991), *cert. denied*, 502 U.S. 983 (1992).

43. Defendants' conduct is not immune from the antitrust laws.

Mootness

44. Voluntary cessation of allegedly illegal conduct does not moot a government antitrust enforcement action. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47-48 (1960).

45. A defendant's disclaimer of any intention to resume the challenged conduct "does not suffice to make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

46. Unless it is clear that subsequent events beyond a defendant's control have eliminated the potential for repetition of the unlawful behavior, the public is entitled to the protection of a judicial decree. *See Concentrated Phosphate Export Ass'n*, 393 U.S. at 203.

47. This case is not moot.

Dated: February 4, 1998

Respectfully submitted,

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