UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

Case No. CIV 96-196 B

UNITED STATES OF AMERICA,

Plaintiff

v.

CITY OF STILWELL, OKLAHOMA, ET AL.,

Defendants

UNITED STATES TRIAL BRIEF

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
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v.	)	Case No. CIV 96-196 B
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CITY OF STILWELL, OKLAHOMA, et al.,	)	
	)	
	)	
Defendants.	)	

UNITED STATES' TRIAL BRIEF

Defendants are charged with violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, by refusing to supply water and sewer services unless the customer also agreed to purchase electricity. The evidence will show that this conduct constitutes a tying arrangement, which is *per se* unlawful under Section 1 of the Sherman Act, and that the Defendants attempted to monopolize and eventually monopolized the market for electric service in newly annexed areas of Stilwell, in violation of Section 2 of the Sherman Act. This memorandum sets out the factual background of the case, discusses various substantive legal rules that apply to the antitrust counts and to affirmative defenses raised by defendants, and discusses the relevant law relating to evidentiary issues that may arise during trial.

I. Statement of the Case

Defendants provide water, sewer, and electric service in and around Stilwell, Oklahoma. The City's Utility Department is the sole provider of electric service within the pre-1961 boundaries of Stilwell. In the areas of Stilwell annexed since that time, the City competes with Ozarks Rural Electric Cooperative for electricity

sales. The Stilwell Area Development Authority[1] ("ADA") has a virtual monopoly on water and sewer service in Stilwell. As the City has annexed new areas, it has assumed operation of the lines of Rural Water Districts in those areas.

Beginning as early as 1985, the Defendants adopted an "all-or-none" utility policy, refusing water and sewer services to any customer who did not agree to purchase electric service from the City. The purpose of the policy was to prevent Ozarks from obtaining the business of new electric customers in the annexed areas. The Utility Department and the ADA formalized the all-or-none policy in 1994, and the Stilwell City Council adopted a measure approving the policy.

In enforcing the all-or-none policy, the City denied water and sewer connections, closed already connected lines, withheld building permits, and otherwise discriminated against those customers in annexed areas who wanted to obtain electric service from Ozarks. The policy and its enforcement by Defendants was effective -- Stilwell garnered virtually all of the new electric sales in the annexed areas, Ozarks almost none.

In 1995, faced with a government antitrust investigation, the Utility Department and the ADA rescinded the all-or-none policy, but the City Council has never formally rescinded its approval. Although the City claims that it has no

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[1] The Area Development Authority is a public trust that is governed by a Board of Trustees, the membership of which is identical to the Stilwell Utility Board. Both the Utility Department Board and the ADA Board report to the Stilwell City Council. For ease of discussion, this brief will refer to the Defendants collectively as "the City."

present intention of renewing its enforcement of an all-or-none policy, it maintains that it has the right to do so if it chooses.

The evidence in this case will clearly show that the all-or-none policy constituted a *per se* unlawful tying arrangement. The evidence will also show that the City used the policy to monopolize the market for electric service in the annexed areas. Accordingly, the Court should find that Defendants' conduct violates Sections 1 and 2 of the Sherman Act.

II. Legal Issues Relating to the Sherman Act § 1 Count

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.

A. Concerted Action

The Complaint alleges that Defendants unlawfully tied the sale of electric service to the sale of water and sewer service. 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).

B. Unreasonable Restraint of Trade

1. The *Per Se* Rule

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*.").

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). 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).

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. 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. As the discussion below demonstrates, Defendants engaged in *per se* illegal tying.

2. Tying Arrangements

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). The evidence in this case will show that the City refused to sell water and sewer service (the tying product) unless a customer also agreed to purchase electricity (the tied product) from the City.

The Tenth Circuit uses a four-part test to determine 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 Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 461-62 (1992). Defendants' use of the all-or-none policy to tie electric service to water and sewer service satisfies each of these elements.

a. Two Separate Products

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 Studies,* 63 F.3d at 1547. Electricity and water/sewer service have entirely different uses, are produced and delivered separately, and are priced differently. As Ozarks' operations show, it is efficient to offer electricity separately from water and sewer services. Defendants in fact have admitted that electricity service and sewer and water services are distinct products. *See* Pretrial Order ¶ IV.16.

b. Conditioning the Sale of the Tying Product on Purchase of the Tied Product

In a tying arrangement the seller uses its control over the tying product "to force the buyer into purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital,* 466 U.S. at 12. 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. In this case the Defendants has an explicit policy that customers could not obtain the tying products that they needed (sewer and water) unless they also purchased the tied product (electricity) from the City. Moreover, the City has enforced the policy, even brazenly cutting off access to the tying product (water and sewer) when one customer refused to purchase City electricity. The conditioning element is thus clearly satisfied in this case.

To avoid liability, Defendants have argued that there were exceptions to the application of the all-or-none policy. Defendants Response to U.S. Memorandum in Support of Summary Judgment Motion at 5. But exceptions -- to the extent that they exist -- are irrelevant. Long-standing Supreme Court precedent establishes that 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). What matters is that the Defendants tied two different products together -- which they did -- and that the other elements of the *per se* test are met -- which they are.

c. Sufficient Economic Power in the Tying Product

The question under this 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. The evidence will show that defendants' market shares in the tying products (sewer and water) is between 90 and 100 percent, levels that courts have found more than adequate to establish sufficient economic power in the tying product. *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). Because water and sewer services are essential utilities, the City's monopoly position gives it particularly great economic power, which it can use to force customers to accept its electricity.

d. Substantial Volume of Commerce Affected

The Supreme Court has held that to meet the substantial volume 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). The appropriate measure is the absolute dollar volume of

commerce affected rather than whether the tie affects a substantial share of the market. *Fortner,* 394 U.S. at 501. In this case, the tie easily affects tens of thousands of dollars of commerce, an amount that other courts have found to be much more than *de minimis. 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).

The City's all-or-none policy is clearly an unlawful tying arrangement that is a *per se* violation of the Sherman Act.

3. Rule of Reason

Even if the City's conduct did not satisfy all of the elements of a *per se* violation (*e.g.,* if the plaintiff fails to prove sufficient economic power in the tying product (sewer or water)), it would still be a violation of Section 1 under a "Rule of Reason" analysis. 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. Defendants will be unable to show any procompetitive justification for

their conduct. Moreover, the evidence will show that the tying arrangement substantially affected competition by preventing Ozarks, the City's only competitor, from effectively competing for electricity sales in the annexed areas.

C. Interstate Commerce

Conduct challenged under Section 1 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. The defendants' challenged activities must have only a "not insubstantial effect" on interstate commerce. *McLain,* 444 U.S. at 246; *Anesthesia Advantage,* 912 F.2d at 401. Moreover, the analysis need not be elaborate -- showing a "logical connection as a matter of practical economics between the unlawful conduct and interstate commerce" suffices. *McLain,* 444 U.S. at 246; *Anesthesia Advantage,* 912 F.2d at 401.[2]

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

[2] The plaintiff need not show that the flow of commerce has been diminished; it is sufficient to show that interstate commerce is affected in more than a *de minimis* way. *McLain,* 444 U.S. at 243; *Anesthesia Advantage,* 912 F.2d at 401.

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). 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).

The market that is at the center of this case -- electricity sales in the annexed areas of Stilwell -- is clearly "in the flow" of interstate commerce because both the City and Ozarks regularly sell electricity that is generated outside Oklahoma. In addition, the City's all-or-none policy was aimed at and directly affected electricity sales by Ozarks, an Arkansas company. Furthermore, the City's activity "substantially affected" interstate commerce through significant interstate purchases and the receipt of federal grants.

III. Legal Issues Relating to the Sherman Act § 2 Count

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part" of interstate or foreign commerce. 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). 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). In this case Defendants attempted to monopolize and ultimately monopolized the market for the provision of electric service to new customers in the post-1961 annexed areas of the City of Stilwell.[3]

A. Monopolization

1. Monopoly Power in the Relevant Market

a. The Relevant Market

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). 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). Courts have routinely held that electric service is a relevant product market. *See, e.g., City of*

[3] Section 2 also requires a showing that the defendants' conduct was in the flow of or substantially affected interstate commerce. The legal issues relevant to the interstate commerce element are discussed in Part II, above.

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).

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). As with product market, 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, 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).

b. Monopoly Power

The Tenth Circuit defines monopoly power as 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). 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.

The City here has obtained a market share of nearly 100% -- a monopoly. Furthermore, the City has the power to set electricity rates in the annexed areas and it is virtually impossible for new competitors to enter the market. The evidence here thus establishes that Defendants have monopoly power in the relevant market.

2. Willful Acquisition or Maintenance of Monopoly Power

To violate Section 2, the acquisition of monopoly power must be willful, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Grinnell,* 384 U.S. at 570-71. If monopoly power was acquired through anticompetitive conduct that violates Section 1 of the Sherman Act, the willful acquisition or maintenance element is met. *See Multistate Legal Studies,* 63 F.3d at 1550 (unlawful tying arrangements are "anticompetitive conduct" for Section 2 purposes). 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). Here, Defendants implemented an unlawful tying

arrangement to establish and maintain their monopoly over electric service in the annexed areas. Such conduct satisfies the willfulness element of Section 2.

B. Attempt to Monopolize

Even if Defendants are found not to have achieved an electric monopoly in the annexed areas, their conduct clearly constitutes to an attempt to monopolize. The elements of an attempt to monopolize are, in some ways, similar to those for monopolization, they are "(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). 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). Here that conduct is Defendants' tying of water/sewer service to electricity purchases. The Tenth Circuit has expressly held that proof of a unlawful tying satisfies this element of attempt to monopolize. *Multistate Legal Studies,* 63 F.3d at 1550. In considering whether there is a dangerous probability of success, courts look to the same factors as in assessing whether the defendant has monopoly power -- market shares, barriers to entry, number and strength of other competitors, and market trends. *Id.* at 1554. A market share approaching 100%, such as the Defendants had here, easily satisfies the dangerous probability test. *E.g., American Tobacco Co. v. United States,* 328 U.S. 781, 797 (1946) (66% market share).

To establish an attempt to monopolize, it is necessary to show that the defendant had a "specific intent to destroy competition or build monopoly." *Times-Picayune,* 345 U.S. at 626. Specific intent may be inferred from evidence of anticompetitive conduct. *See Shoppin' Bag,* 783 F.2d at 163. As discussed above, Defendants adopted the all-or-none policy, a *per se* unlawful tying arrangement, and discriminated against customers who intended to buy Ozarks' power, all to prevent Ozarks from successfully competing for electric customers. Defendants' conduct thus clearly satisfies the elements of an attempt to monopolize.

IV. Legal Issues Relating to Affirmative Defenses

A. State Action

Defendants allege that their conduct is exempt from the antitrust laws under the state action doctrine. *See Parker v. Brown,* 317 U.S. 341 (1943). Under *Parker*, the federal antitrust laws do not apply where a state "as sovereign, imposed the restraint as an act of government." *Id.* at 352. The conduct of local governmental entities, in contrast, is exempt only 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). Thus, 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).

In applying these principles, the Tenth Circuit has adopted a two-part test for immunity for local governmental entities, requiring the defendant to demonstrate that the state legislature both (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). Defendants have not and cannot meet their burden.

Oklahoma state law expressly provides that cooperative electric systems (such as Ozarks) that operate in areas that are annexed by a city may continue to service and compete for new customers "without obtaining the consent, franchise, license, permit or other authority of any such city." OKLA. STAT. ANN. tit. 18, § 437.2(k). The Oklahoma Supreme Court has upheld this statute on the grounds that allowing competition between utilities in annexed areas was a policy matter subject to the will of the legislature. *Oklahoma Gas & Electric v. Oklahoma Electric Coop.,* 517 P.2d 1127 (Okla. 1973).

While state law authorizes a municipality to expropriate a cooperative's facilities in annexed areas upon payment of just compensation for the taking, OKLA. STAT. ANN. tit. 18, § 437.2(k), it does not authorize municipalities to use other means to foreclose competition in annexed areas. Indeed, the state intends that if its municipalities wish to become monopoly providers of electricity in annexed areas, they must pay for that status, presumably on the expectation that

they will achieve operating efficiencies as a result. As the Supreme Court has held, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly power in a manner not contemplated by its authorization." *City of Lafayette,* 435 U.S. at 417 (citation omitted). In fact, the Attorney General of Oklahoma has stated that "absent a sufficient legal reason to tie one municipal utility service to another service, a municipality may not lawfully condition the receipt of one utility service on the customer's acceptance and payment for other utility services which the city may offer." Opinion No. 82-50, 14 Okla. Op. A.G. 125, 130 (1982).

Defendants' conduct was in no way authorized by the state legislature, and Defendants' state action defense therefore fails.

B. Mootness

Defendants have argued that this case is mooted by their recision of the all-or-none policy. Voluntary cessation of allegedly illegal conduct, however, 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). Similarly, 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). Were the rule otherwise, defendants would always be free to stop their unlawful conduct during or in anticipation of litigation, thereby mooting the violation, and then, once the case had ended, to return to their old ways. *See Concentrated Phosphate Export Ass'n,*

393 U.S. at 203. The public has a vital interest in having the legality of the challenged practices authoritatively settled, *see United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309-10 (1897), and 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.

The case is likewise not mooted by the City's condemnation action against Ozarks. First, that action deals only with currently annexed areas. Ozarks will continue to operate in areas adjacent to Stilwell that may be annexed at some point in the future, and, absent injunctive relief, there would be nothing to stop the City from using tying to prevent future competition in those areas. Second, the condemnation proceeding is not completed, and the City could still abandon the action -- if, for example, the compensation was set at a level the City was unwilling to pay or if Stilwell elected new officials who changed the City's policy on condemnation.

Since Defendants claim the legal right to tie and since, as a practical matter, they could return to their old ways, the legality of the all-or-none policy remains a live issue. It has very important implications for future competition in the provision of electric service in the annexed areas of Stilwell and in areas that may be annexed in the future. (It also has important implications for other Oklahoma communities that may be considering eliminating their electric rivals through their own tying policy.)

V. Evidentiary Issues

A. Admissions by Defendants

The United States will introduce evidence of statements made by employees and former employees of Defendants with responsibility for electric, water and sewer services in the annexed areas. Such statements are admissible and are not hearsay because the statements concerned a matter within the scope of the employees' duties and were made during the existence of the employment relationship. Fed. R. Evid. 801(d)(2)(D); *see generally United States v. Young,* 736 F.2d 565, 567-68 (10th Cir. 1983), *rev'd on other grounds,* 470 U.S. 1 (1985). The United States will also introduce statements made by Defendants in interrogatory answers and other pleadings, which are likewise admissions by a party-opponent under Rule 801.[4]

B. Admissibility of Tapes and Transcripts

The United States intends to introduce audio tapes of meetings of the Stilwell Utility Department Board and the ADA Board. In addition, the United States will introduce transcripts of the tapes. These tapes were made by Defendants and produced to the United States under compulsory process.

The trial court has broad discretion to admit audio tapes upon an adequate showing of accuracy. *United States v. Smith,* 692 F.2d 693, 698 (10th Cir. 1982). In determining whether tapes have been sufficiently authenticated, courts look to the

[4] Defendants' exhibit list includes their own interrogatory responses. A party may not introduce its own out-of-court statements into evidence under Rule 801.

factors set out in *United States v. McKeever,* 169 F.Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds,* 271 F.2d 669 (2d Cir. 1959); *see Smith,* 692 F.2d at 698. These standards are to be applied flexibly with the "paramount purpose" of "ensuring the accuracy of the recording." *Smith,* 698 F.2d at 698, *quoting United States v. Biggins,* 551 F.2d 64, 67 (5th Cir. 1977).

The admission of tapes that are partially inaudible is in the sound discretion of the trial court. *United States v. Mittleider,* 835 F.2d 769, 773 (10th Cir. 1987), *cert. denied,* 485 U.S. 980 (1988); *United States v. Devous,* 764 F.2d 1349, 1353 (10th Cir. 1985). "Unless the unintelligible portions are so substantial as to render untrustworthy the recordings as a whole, the tapes may be admitted." *Mittleider,* 835 F.2d at 835. The court may also admit tapes that have been enhanced to improve audibility if properly authenticated. *United States v. Carbone,* 798 F.2d 21, 24 (1st Cir. 1986); *see also Martin v. Kaiser,* 907 F.2d 931, 934 (10th Cir. 1990).

The Tenth Circuit has held that authenticated transcripts may be used to assist the finder of fact in listening to tape recordings. *Mittleider,* 835 F.2d at 773; *United States v. Watson,* 594 F.2d 1330, 1336 (10th Cir.), *cert. denied,* 444 U.S. 840 (1979).

C. Use of Prior Testimony

The United States may use statements made in depositions in this case and in the investigation leading to this case to impeach witnesses. Prior inconsistent statements made under oath are not hearsay, provided the witness testifies at trial and is subject to cross examination about the statement. Fed. R. Evid. 801(d)(1)(A).

Such statements are admissible as substantive evidence. *United States v. Orr,* 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Smith,* 776 F.2d 892, 897 (10th Cir. 1985). Prior inconsistent statements need not be diametrically opposed to trial testimony, and evasive answers, changes in position, or claimed lack of memory suffice to allow admission. *See United States v. Gravely,* 840 F.2d 1156, 1163 (4th Cir. 1988); *United States v. Bigham,* 812 F.2d 943, 946 (5th Cir. 1987); *United States v. Williams,* 737 F.2d 594, 606-10 (7th Cir. 1984), *cert. denied,* 470 U.S. 1003 (1985). Statements in investigatory depositions qualify for admission under Rule 801. *Cf. Orr,* 864 F.2d at 1509 (statements in grand jury testimony may be used); *United States v. Washita Construction Co.,* 789 F.2d 809, 816 n.10 (10th Cir. 1986) (same).[5]

[5] Defendants list among their exhibits one deposition and two affidavits of potential witnesses. All of three of these witnesses are available to testify, and therefore their prior statements under oath are admissible only if inconsistent with their trial testimony.

VI. CONCLUSION

The United States respectfully submits this Brief in support of its position on the substantive and evidentiary issues of law that may arise during the trial of this case.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing United States' Trial Brief was served by Federal Express on counsel of record for the Defendants:

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