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' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION

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UNITED STATES' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION

The United States respectfully files this memorandum in support of its motion for summary judgment. The United States sued to enjoin the City of Stilwell and its Area Development Authority ("defendants") from refusing to provide sewer and water services to a customer unless the customer also agreed to purchase city-supplied electric service -- the defendants' "all-or-none" utility policy. During discovery, defendants admitted that they conditioned the provision of sewer and water services on the customer's agreement to purchase electricity supplied by the city.

This admitted "tie" of sewer and water service, on the one hand, to electricity service, on the other hand, is a *per se* violation of the antitrust laws. Like other *per se* violations, tying arrangements like this have long and consistently been condemned by the Supreme Court and this Circuit as inevitably harmful to

consumers. Accordingly, summary judgment should be granted to the United States under section 1 of the Sherman Act.

Summary judgment should also be granted under section 2 of the Sherman Act because, through the same all-or-none policy, the City monopolized the sale of electricity in newly annexed areas. A grant of summary judgment under either section will dispose of this case and avoid an unnecessary trial.[1]

I. STATEMENT OF UNDISPUTED FACTS[2]

A. The Parties

Defendant City of Stilwell is a municipality located in Adair County, Oklahoma. Defendant City of Stilwell sells sewer and water service through the defendant Area Development Authority ("ADA"). Stilwell sells electric service through its Utility Department ("UD"). SOF at ¶¶ 1-3. Stilwell generally sells sewer, water and electricity services only within Stilwell's corporate boundaries. Since the early 1960's, Stilwell has annexed additional territory into the City, thereby adding new customers and the potential for substantial new revenues for its municipal services. SOF at ¶¶ 2-3, 31 & 55.

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[1] Defendants have come forward with only two defenses for their conduct: (1) that the state of Oklahoma has immunized their conduct from the antitrust laws and (2) that this action is moot because defendants have decided to discontinue the all-or-none policy. The inapplicability of those defenses was explained in the Government's Motion for Partial Judgment on the Pleadings, filed August 28, 1996, and is not discussed further here.

[2] This memorandum cites to the United States' detailed and numbered Statement of Material Facts as to Which There is No Genuine Dispute ("SOF"), which is submitted in compliance with Local Rule 56.1. The SOF cites to the documents, deposition transcripts, and interrogatory responses supporting each material fact, which are included as exhibits.

Ozarks Rural Electric Cooperative Corporation ("Ozarks") is a rural electric cooperative based in Fayetteville, Arkansas. Roughly one-quarter of Ozarks' customers are in Oklahoma, and the majority of those customers are in Adair County, surrounding Stilwell. Ozarks competes with the Stilwell UD for new customers in annexed portions of Stilwell. SOF at ¶¶ 26 & 30. The City of Stilwell also is surrounded by rural water districts ("RWDs"). Each of these RWDs purchases its water supply from the Stilwell ADA for distribution to its member customers. SOF at ¶ 16.

B. Competition in the Sale of Sewer, Water and Electric Services

Stilwell and the ADA face no meaningful competition in the sale of sewer and water services. First, there are no neighboring sewer systems. SOF at ¶ 10. Second, the only neighboring water systems are the RWDs, which purchase all of their water from defendants. Since the defendants charge the RWDs more for water than they charge their residential and commercial customers, the RWDs cannot economically undersell the defendants when selling the water to those customers. SOF at ¶¶ 14 & 16. Consequently, the RWDs have never competed against defendants in the sale of water, nor could they be reasonably expected to in the future. Indeed, whenever the City has desired to serve new customers in annexed territory, it has taken over the RWD's water lines and customers. SOF at ¶¶ 15 & 17.

Given lending restrictions and state regulations, there are no practical alternatives to a public water/sewer system for developers of multi-family housing, commercial property or industrial property. SOF at ¶¶ 11 & 18. Building and

maintaining a septic tank for waste and drilling a well for water in the annexed territory are cost prohibitive for most customers compared to purchasing such services from the City. SOF at ¶¶ 12, 18 & 48-49. Moreover, drilling a well does not guarantee an adequate supply of potable, safe water. SOF at ¶ 19. Thus, 90-95% of the businesses and residents in the annexed areas of Stilwell purchase sewer and water services from the City (with the remainder relying on wells and/or septic tanks). SOF at ¶¶ 13 & 20.

In contrast, when Stilwell annexes additional territory, it faces competition for new electric service customers from Ozarks. Ozarks' service area surrounds the city on all sides. Oklahoma law authorizes a rural electric cooperative, such as Ozarks, to compete for customers in areas annexed by the City.[3] Ozarks competes with the City by offering substantial economic incentives to the customers. SOF at ¶¶ 30-32 & 37. Through its competitive efforts, Ozarks was initially successful in procuring new customers in annexed areas. SOF at ¶ 41.

C. Defendants' All-or-None Policy

Since at least 1985, defendants Stilwell and ADA had an unwritten policy to tie the service of sewer and water to the service of electricity -- that is, the defendants refused to sell sewer and water (for which there was no meaningful alternative) unless the customer also agreed to buy electricity (for which defendants

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[3] *See* Oklahoma Rural Electric Cooperative Act, *as amended*, OKLA. STAT. ANN., tit. 18 § 437.2(k) (West 1986 & Supp. 1996) (authorizing electrical cooperatives to continue and to extend service to consumers in annexed territories); *see also* Government's Motion for Partial Judgment on the Pleadings, filed August 28, 1996. Once a given customer has selected a supplier, however, Oklahoma law bars the customer from switching suppliers without the incumbent's consent. *See* OKLA. STAT. ANN., tit. 11 § 21-121 (West 1986 & Supp. 1996).

faced significant competition from Ozarks). SOF at ¶ 33. On April 12, 1994, defendants formalized their all-or-none utility policy by vote of their governing boards. At meetings of both the UD and the ADA Boards, defendants recorded their tying policy as:

> No service will be provided, unless all services are used. i.e., No water and sewer service will be provided unless electricity is also used.

SOF at ¶ 34. During the same meeting, the governing boards recommended that the City "give some teeth" to the policy by also denying building permits to residents who planned to buy electricity from Ozarks. The City Council adopted a resolution approving the policy within a matter of weeks. *Id.*[4]

This all-or-none tying policy forced the new customers in annexed areas to purchase their electricity from defendant Stilwell, even where Ozarks offered a better value. For example, ERC Properties, Inc., an Arkansas-based developer, built an apartment complex, called Skywood, in an area annexed by Stilwell. Ozarks approached ERC executive Steve Rucker in mid-1993 with a proposal to provide electricity to the last sixteen units of Skywood. To gain ERC's business, Ozarks offered to pay rebates for each heat pump and water heater in each apartment unit and to place, at Ozarks' expense, the electric power lines underground rather than overhead on unsightly poles. Stilwell, on the other hand,

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[4] As discussed in the section of the Government's Motion for Partial Judgment on the Pleadings relating to the mootness defense, defendant ADA and the UD rescinded their all-or-none utility policy in late August 1995, after they became aware that the Department of Justice was investigating the tying policy. The City Council, however, has never rescinded its approval of the tying policy. *See* SOF at ¶¶ 57-58.

required ERC to bear the expense of digging the trenches for underground lines and offered no rebates. ERC accepted Ozarks' offer. SOF at ¶¶ 35-38.

When defendant ADA's general manager W.S. (Scottie) Adair heard that Ozarks was preparing to provide electric service to the units, Adair told ERC that Stilwell would cancel its sewer and water service to the units if Ozarks supplied the electricity. Defendants then padlocked shut the valve in the water distribution line that connected the units to the city water, leaving the units without any water for drinking, cooking, bathing, or fire prevention. With tenants preparing to move in, ERC relented and agreed to buy the electricity from the City instead of Ozarks. SOF at ¶¶ 39-41.

Ozarks also tried to provide electricity to a similar 24-unit project, called Candle Ridge, which ERC was about to build in another annexed area of Stilwell. But because ERC needed the City's sewer and water services, ERC agreed to purchase the electricity from Stilwell. SOF at ¶¶ 42-43.

Additionally, Kenneth Davidson planned to construct an office building and to lease it to the Oklahoma Department of Human Services. Davidson wanted to purchase the electricity from Ozarks because Ozarks had agreed to lay the electrical cables underground rather than place them on overhead poles. The defendants told Davidson, however, that he would have to buy all his utility services from the City, if he wanted any. Davidson initially resisted, posturing that he would take water service from an RWD and install his own waste treatment facilities on-site. However, the RWD would not distribute water to Davidson, and installing his own sewage system was going to be very costly since he would have had to run the sewer

lines across the street in order to meet Oklahoma Department of Health regulations. SOF at ¶¶ 44-49. Consequently, Davidson soon relented and agreed to buy the electricity from defendant Stilwell. SOF at ¶ 50.

The annual electric power revenue for these three projects (final phase of Skywood, Candle Ridge, and the Department of Human Services Building) affected by the defendants' all-or-none policy exceeds thirty thousand dollars. Moreover, the electric revenues captured by defendants from other significant projects built in the annexed areas since they instituted their all-or-none policy is roughly three hundred and fifty thousand dollars per year. SOF at ¶¶ 52 & 54-55.[5]

II. ARGUMENT

A. The Summary Judgment Standard

Because there is no genuine issue as to any material fact in this case, Rule 56 of the Federal Rules of Civil Procedure authorizes this Court to grant judgment as a matter of law.[6] The United States' burden here is simply to establish that no genuine issue remains for trial as to any material fact, even when the evidence is

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[5] Within the last year, Stilwell has condemned most of Ozarks' distribution facilities in the territory annexed between the 1950s and 1990s. However, there continues to be opportunity for the City to annex additional areas, as the community grows and attracts new businesses to the area. SOF at ¶¶ 61-62. Unless and until the City condemns Ozarks' property, the customers in the areas of annexation benefit from competition between the City and Ozarks in the provision of electric service.

[6] A fact is "material" if it may affect the outcome of a case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" only if a reasonable jury could find the fact in favor of the party opposing the motion. *Id.*; *Universal Money Centers, Inc. v. American Telephone & Telegraph*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994).

viewed in the light most favorable to the defendants. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Universal Money Centers,* 22 F.3d at 1529.

While summary disposition is not appropriate for all cases, summary judgment is not disfavored in antitrust cases.[7] Rather, summary judgment "remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation" to prevent needlessly costly litigation. *Capital Imaging*, 996 F.2d at 541. As a result, summary judgment has been granted in antitrust cases for many years.[8] Summary disposition is especially appropriate here because defendants have admitted to the relevant conduct at issue and the law concerning such conduct is well-established.

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[7] *Capital Imaging Assoc. v. Mohawk Valley Medical Assoc., Inc.*, 996 F.2d 537, 541 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993); *Miller v. Indiana Hospital*, 843 F.2d 139, 143 (3d Cir.) ("The summary judgment standard is no different in antitrust litigation than in any other."), *cert. denied*, 488 U.S. 870 (1988); *Comet Mechanical Contractors, Inc. v. E.A. Cowen Construction, Inc.*, 609 F.2d 404, 405 (10th Cir. 1980) ("[T]he Rules of Civil Procedure apply in antitrust cases and summary judgment is available to avoid needless trials, which may entail a heavy burden of expense and effort for both litigants and the judicial system").

Courts have been reluctant to grant summary judgment in the antitrust context only where the antitrust defendant moves against the antitrust plaintiff and the proof of any violation is largely in the hands of the movant defendant. *Comet Mechanical Contractors*, 609 F.2d 405 n.1; *Umdenstock v. American Mortgage & Investment Co. of Oklahoma City*, 495 F.2d 589, 592 (10th Cir. 1974). That is the opposite of the case here.

[8] *See, e.g.*, *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Associated Press v. United States*, 326 U.S. 1 (1945); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.), *cert denied*, 474 U.S. 823 (1985); *Comet Mechanical Contractors*, 609 F.2d 404; *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497 (10th Cir. 1978).

B. The Defendants' All-or-None Policy Is a Tying Arrangement and a *Per Se* Violation of the Antitrust Laws.

1. Tying Arrangements are Illegal *Per Se*

The Supreme Court reaffirmed just two weeks ago that certain agreements or practices have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil Co. v. Khan*, __ U.S. __, 1997 WL 679424, *slip op.* at 5 (U.S. Nov. 4, 1997). In other words, such agreements and 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*, 356 U.S. at 5. By using the *per se* rule, courts avoid wasting resources analyzing proffered business justifications, the defendants' motives, or the market context in which the agreement or conduct is found. Thus, the *per se* test enables 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*, 466 U.S. at 15-16 n.25.

Tying arrangements have long been classified as a *per se* violation of Section 1 of the Sherman Act.[9] The Courts and Congress have long "expressed great

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[9] Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." Thus, a plaintiff alleging a violation of section 1 must establish concerted action in the form of a contract, combination or conspiracy. *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1139 (10th Cir. 1997) (*en banc*). In *Systemcare,* the Tenth Circuit recently clarified that "where the seller coerces a buyer's acquiescence in a tying arrangement" the concerted action requirement is satisfied. *Systemcare*, 117 F.3d

concern about the anticompetitive character of tying arrangements." *Jefferson Parish*, 466 U.S. at 10. Indeed, the Supreme Court specifically stated, "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Id.* at 9.[10] And, the Tenth Circuit recently noted that:

> "By their very nature, tying arrangements also limit the power of a buyer to pursue its individual self-interest. The buyer can no longer make its purchase decision based upon the relative merits of the tied product, but is coerced into purchasing the tied product from the producer because of the producer's market power in the tying product."

Systemcare, 117 F.3d at 1144.

2. Defendants' All-or-None Utility Policy Is a Tying Arrangement

The Tenth Circuit defines a tying arrangement as "an agreement by a 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

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at 1138; *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). Therefore, the concerted action requirement is established in a tying arrangement such as this.

[10] *See Jefferson Parish,* 466 U.S. at 9 (citing *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 619-21 (1977); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 498-99 (1969); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962); *United States v. Loew's Inc.*, 371 U.S. 38 (1962), *Northern Pacific,* 356 U.S. at 5; *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 25 (1957); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947)).

product from another supplier."[11] A tying arrangement is *per se* illegal if "the seller has appreciable economic power in the tying product market" and "the arrangement affects a substantial volume of commerce in the tied product market."[12] Thus, the Tenth Circuit uses the following four-part test for a *per se* tying violation:

> 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.[13]

As shown below, uncontested facts establish that all four elements of the test are met by defendants' tying arrangement.

a. *Two Separate Products*

There can be no doubt that electricity service is separate from the sewer and water service to which it was tied. Electricity serves an entirely different and unrelated function from sewer or water, powering everything from lights to appliances to heat pumps. Electricity is delivered over copper wires as opposed to pipes. Its price or rates are determined under a different formula than sewer and

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[11] *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1546 (1995), *cert. denied*, 116 S.Ct. 702 (1996); *see also Northern Pacific Railway*, 356 U.S. at 5-6; *Systemcare*, 117 F.3d at 1139.

[12] *Multistate Legal Studies*, 63 F.3d at 1546; *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992); *Systemcare*, 117 F.3d at 1139.

[13] *Multistate Legal Studies*, 63 F.3d at 1546; *see also Eastman Kodak*, 504 U.S. at 461-62. Even if this *per se* test is not met, plaintiff may still prove that the tie is on balance an unreasonable restraint of trade. This weighing of competitive harms and benefits is known as "rule of reason" analysis. Since the *per se* test is met here, however, we do not address rule of reason analysis in this motion.

water. And, the demand for electricity is different than the demand for sewer or water.[14] Thus, it is no surprise that defendants conceded during discovery that electricity, sewer, and water services are all separate products. SOF at ¶ 25.

b. *Conditioning the Sale of One Product on the Purchase of Another*

It is also undisputed that defendants refused to supply sewer or water to customers unless those customers agreed to purchase electricity from them. The defendants made this conditioning public by a vote of the board and by publishing their policy. Further, defendant ADA asked the City Council to put additional "teeth" in the all-or-none policy by denying building permits to any customer who chose Ozarks as its power supplier. Then the defendants acted on their words by cutting off the water supply of the final sixteen Skywood units (thus increasing the fire risk to the property and making the units uninhabitable) until the developer agreed to buy electricity from the City. SOF at ¶¶ 34 & 40-41.

c. *Sufficient Economic Power in the Tying Product*

This prong of the *per se* test simply asks whether defendants have enough economic power to impose "burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner Enterprises*, 394 U.S. at 504. Sufficient economic power can be shown if the tying product is important or unique or if the defendant has a large market share in the tying product.[15] Here,

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[14] *See Eastman Kodak*, 504 U.S. at 462; *Jefferson Parish,* 466 U.S. at 19 (different demand characteristics establish separate products).

[15] *Jefferson Parish,* 466 U.S. at 17; *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962) (even absent a showing of "market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from

there can be no doubt that defendants, with their virtual monopoly over water and sewer services have more than enough economic power, to satisfy this element.[16]

Defendants admit that adequate sewer and safe water are essential services for any industrial, commercial and residential customer. SOF at ¶ 22. In Stilwell, no other company provides sewer services, and no company competes with defendants in the sale of water. Industrial, commercial and residential customers, therefore, have no supplier, other than defendants, to which they can turn for water and sewer services. As a result, defendants have sufficient economic power to require that their customers also buy electricity from them. Thus, when ERC had its water to the Skywood apartments cut off and when Davidson was told he could not get City sewer and water, they bought the City's electrical power, even though they preferred Ozarks'. SOF at ¶¶ 10, 14-15, 40-41 & 50.

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uniqueness in its attributes").

[16] In the City of Stilwell, defendants' market share of sewer and water service is between 90 and 100 percent. This is well above the market shares that courts have found adequate to establish economic power in the tying product. *E.g.*, *Standard Oil,* 337 U.S. at 295; *Parts and Electric Motors, Inc. v. Sterling Electric, 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); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 838 & 841 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); *AAMCO Automatic Transmissions Inc. v. Tayloe*, 407 F. Supp. 430, 436-37 (E.D. Pa. 1976) (stating that sufficient power is established by the fact that defendants engaged in a tying arrangement); *cf. Jefferson Parish*, 466 U.S. 2 (finding 30% market share insufficient).

d. *Substantial Volume of Commerce Affected in the Tied Product*

Finally, the volume of electricity that was tied to sewer and water service is substantial. The Supreme Court has stated that this "substantial volume" prong of the *per se* test is met as long as the volume is not "insubstantial" or *"de minimis*."[17] Courts have therefore held that this element is satisfied when the volume of tied commerce amounted to as little as $27,264 or even $10,091.[18]

Here, the volume of tied commerce is clearly not "insubstantial" or *"de minimis*" and far exceeds that found sufficient in other cases. Since defendants initiated their policy in 1985, developers have built a number of industrial, commercial and residential projects in areas annexed by the City. They include: the Henningsen Cold Storage facility (an industrial food freezer/storage building), the Wilma P. Mankiller Health Center (a health clinic run by the Cherokee Nation),

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[17] *Northern Pacific*, 356 U.S. at 11; *Fortner*, 394 U.S. at 501; *see also, DataGate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1424-25 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1344 (1996); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1419 (11th Cir. 1987).

[18] *Tic-X-Press,* 815 F.2d at 1419 ($10,091); *Microbyte Corp. v. New Jersey State Golf Ass'n*, 1986-2 Trade Cas. (CCH) ¶ 67, 228, at 61, 163 (D. N.J. 1986) ($27,264).

The Supreme, appellate and trial courts have also found the following volumes of commerce to be substantial enough to meet the fourth prong of the *per se* test: *Fortner*, 394 U.S. at 502 (Supreme Court disagrees that $190,000 is paltry or "insubstantial" in the tying context); *DataGate,* 60 F.3d at 1424-26 ($100,000) (1996); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991); ($30,000-$70,000), *cert. denied*, 506 U.S. 903 (1992); *Bell*, 660 F.2d at 1130 & n.8 ($40,000 per year); *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1216 (9th Cir. 1977) ($60,800); *Genna v. Lady Foot Int'l, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,317, at 61,637 (E.D. Pa. 1986) ($100,000); *AAMCO Automatic*, 407 F. Supp. at 436 ($50,000).

Two J's Food Court (a grouping of multiple fast food restaurants), Hogner Heights (an apartment complex), Southern Estates (a housing development), the initial phases of the Skywood Apartments, the local high school, and a Subway sandwich franchise. Together these projects consume almost three hundred and fifty thousand dollars per year of electricity. SOF at ¶¶ 54-55. Additionally, the three projects described in this motion by way of example (final phase of Skywood, Candle Ridge, and the Department of Human Services Building) consume more than thirty thousand dollars per year of electricity. SOF at ¶ 52. Thus, the amount of electricity at issue in the competitive areas is not insubstantial or *de minimis* and the fourth prong of the *per se* tying test is met.

In sum, the undisputed evidence establishes that defendants' all-or-nothing policy meets each of the four elements for finding it to be a *per se* unlawful tying arrangement under section 1 of the Sherman Act. Plaintiff's motion for summary judgment should therefore be granted.

C. Defendants Have Illegally Monopolized Electric Power Service In Violation of § 2 of the Sherman Act

The defendants have also violated section 2 of the Sherman Act. Specifically, they have abused their monopoly power in the provision of water and sewer services to foreclose competition in electric service, thereby monopolizing electric service to new retail customers in annexed areas of Stilwell in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.

Section 2 of the Sherman Act prohibits the monopolization of "any part of the trade or commerce among the States." According to the Supreme Court, monopolization has two elements:

> (1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). Both elements are met here.

1. Monopoly Power in the Relevant Market

a. *The Relevant Market*

The first step in meeting this element of monopolization is to define a relevant market. In the instant case, the relevant market is the provision of electric service to new customers in the post-1961 annexed territory of the City of Stilwell.

A relevant market consists both of a product market (here, electricity) and a geographic market (here, the annexed territory). *Brown Shoe*, 370 U.S. at 324. The relevant product market defines the product boundaries within which competition meaningfully exists. *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964), and includes only those products that are "reasonably interchangeable" by consumers for the same purpose. *United States v. E.I. du Pont de Nemours*, 351 U.S. 377, 395 (1956). The Supreme Court has explained what it means to be "reasonably interchangeable:"

> "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in

> technical terms, products whose 'cross-elasticities of demand' are small."

Times-Picayune, 345 U.S. at 612.

Under this standard, retail electric service is clearly a relevant product market. During discovery, defendants conceded that consumers of electricity have no practical alternatives that would serve the same function. Further, they conceded that the demand for electricity was inelastic, meaning that if the price rises consumers will still purchase about the same quantity of electricity as before. SOF at 24; *see also Times-Picayune*, 345 U.S. at 612 (product market defined as products with small cross-elasticities of demand, *i.e.*, inelastic demand). Thus, the service of electricity is a relevant product market.[19]

The geographic market is the "area of effective competition" in which the seller operates and the purchaser can practicably turn for supplies. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Under Oklahoma law, the area where there is competition for retail electric service is in the annexed areas. As a practical matter, the new customers in the annexed area cannot look for electric service from other cities or counties, but must look for it in the area where their residence or business is located. The competition for new customers in the annexed areas can be vigorous because, once a customer makes a choice of suppliers,

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[19] Moreover, courts have routinely found electric power to be a relevant product market in other cases. *E.g.*, *City of Maudlin v. Union Electric Co.,* 887 F.2d 157, 162 (8th Cir. 1989); *Ray v. Indiana & Michigan Electric Co.,* 606 F.Supp. 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).

Oklahoma law forbids the customer from making a change. Thus, the geographic area is the area annexed by the City of Stilwell.

b. *Monopoly Power*

Once the relevant market is defined, the court must determine if the defendant has monopoly power in it. The Tenth Circuit generally requires proof of power to control prices and power to exclude competition in the target market in order to establish monopoly power.[20]

Here, it is undisputed that defendants have the power to exclude competition and control prices. Since 1985, there has been only one instance of Ozarks winning a new customer in the annexed territory -- the Fellowship Baptist Church -- and there the defendants decided not to impose their tying policy. SOF at ¶ 51. Any other time when Ozarks has, through competitive means, won a customer such as ERC Properties or Mr. Davidson, defendants prevented Ozarks from serving them by forcing the customer to switch to the City in order to get sewer and water services. SOF at ¶¶ 35-50. Moreover, the City has the power to set its own electricity rates, without any other regulatory approval. SOF at ¶ 24.

Even if this direct proof of monopoly power were unavailable, the Court could look to other characteristics of the relevant market to determine whether defendants possess monopoly power. Market share is one of those characteristics that is relevant and a high market share gives rise to a presumption of monopoly

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[20] *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).

power.[21] Here, that presumption should be conclusive because Stilwell's market share approaches 100%. It is a monopolist. In addition, there are substantial barriers to entry, including the high capital costs, regulatory barriers, and licensing requirements that would prevent new firms from entering this electric market. *See, e.g., Reazin,* 899 F.2d at 967-68 (entry barriers an indication of monopoly power). Given all these factors, it is clear that defendants possess the requisite monopoly power.

2. Willful Acquisition or Maintenance of Monopoly Power

The uncontested evidence also shows that defendants' conduct satisfies the second element of the section 2 monopolization test. The use of monopoly power in one market (here sewer and water) to monopolize another market (electric service in the annexed areas) is the type of "willful acquisition" that is prohibited by section 2 of the Sherman Act.[22]

When the defendants were at risk of losing a new electricity customer to Ozarks, they enforced their all-or-none utility policy. The defendants' enforcement of the all-or-none policy limited Ozarks' ability to compete and deprived customers of their first choice of supplier based on cost and service. Through the all-or-none policy, defendants leveraged their monopoly power in the provision of water and

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[21] *E.g., Reazin,* 899 F.2d at 967-68; *Bigelow v. Unilever*, 867 F.2d 102, 108 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989); *Superturf, Inc. v. Monsanto*, 660 F.2d 1275, 1280 n.8 (8th Cir. 1981).

[22] *See Multistate Legal Studies*, 63 F.3d at 1550 (illegal tie-ins are considered "anticompetitive conduct" for section 2 purposes); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (4th ed. 1997) Vol. I, p. 291 n.371; *see generally*, *United States v. Griffith,* 334 U.S. 100, 108 (1948); *United States v. Aluminum Co. of America,* 148 F.2d 416, 438 (2d Cir. 1945).

sewer services to obtain a monopoly in the provision of electric service. Leveraging monopoly power in one market to monopolize a second constitutes willful conduct that satisfies the second element of a Section 2 violation. *E.g., Griffith*, 334 U.S. at 108; *Aluminum Co. of America*, 148 F.2d at 438; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Defendants' electric monopoly in the annexed area is a direct result of their tying conduct, rather than the "consequence of a superior product, business acumen, or historic accident." Indeed, the evidence shows that some purchasers preferred service from Ozarks.[23] SOF at ¶¶ 37 & 45.

D. Jurisdiction

Jurisdiction under sections 1 and 2 of the Sherman Act is clearly established. This Court's jurisdiction is established with a showing that the defendants' challenged activity "occurr[ed] in the flow of" or "substantially affect[ed]" interstate commerce, even if the activity was ostensibly only local in nature.[24]

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

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[23] Defendants are also guilty of attempted monopolization, but since they meet the test of monopolization under uncontested facts, we do not address that violation in this summary judgment motion.

[24] *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) (*en banc*); *see also McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 242 (1980); *Hospital Bldg. Co. v. Bd. of Trustees of Rex Hosp.,*425 U.S. 738, 743 (1976); *Lease Lights, Inc. v. Public Service Co.*, 701 F.2d 794, 798 (10th Cir. 1983). Defendants do not deny that venue is proper. SOF at ¶ 5.

401; *Crane*, 637 F.2d at 723. The defendants' challenged activities need only have a "not insubstantial effect" on the interstate commerce involved to be sufficient. *McLain*, 444 U.S. at 246; *Anesthesia Advantage,* 912 F.2d at 401. Moreover, this analysis need not be elaborate, but only needs to show a "logical connection as a matter of practical economics between the unlawful conduct and interstate commerce." *McLain*, 444 U.S. at 246; *Anesthesia Advantage,* 912 F.2d at 401. Thus, the United States need not establish that the flow of commerce is actually diminished; it is sufficient to show that such commerce is affected in more than a *de minimis* way. *McLain,* 444 U.S. at 243; *Anesthesia Advantage,* 912 F.2d at 401.

Here, defendants illegal activity substantially affected Arkansas businesses, which is not surprising since the City of Stilwell is less than nine miles from Arkansas. SOF at ¶ 6. For example, ERC Properties, an Arkansas company that builds federally financed housing, lost substantial economic benefits when it was forced to take the defendants' electric service. SOF at ¶¶ 35 & 53. Also, the City's electric competitor, Arkansas-based Ozarks, lost hundreds of thousands of dollars in annual revenues because of defendants' utility policy. SOF at ¶¶ 26, 52, 54-55 & 60.

In addition, defendants' conduct substantially affects interstate commerce in other ways:

- The City and Ozarks purchase their electric power supply from GRDA and KAMO, respectively, both of which are part of an integrated electric power network interconnected throughout the southwest. In addition, GRDA and KAMO are part of the Southwest Power Pool. SOF at ¶¶ 7 & 27-28. Membership in such a multi-state interconnected power pool has alone been enough to establish interstate commerce. *Cincinnati Gas & Electric Co. v. Federal Power*

Comm'n., 376 F.2d 506, 507-08 (6th Cir.), *cert. denied*, 389 U.S. 842 (1967).

- In one year, the federal government provided more than $3.3 million to defendants for the expansion and operation of their utility systems. SOF at ¶ 8.

- Defendants' spent more than $680,000 from 1995 to the first few months of 1997 for out of state equipment supplies and service needed to improve, maintain and operate their utility systems. SOF at ¶ 9.

- Ozarks purchases much of its supplies used in its Oklahoma system from out of state suppliers and manufacturers. SOF at ¶ 29.

III. CONCLUSION

For the foregoing reasons, the United States requests a summary judgment that defendants have violated sections 1 and 2 of the Sherman Act. As demonstrated above, defendant's all or none policy constitutes precisely the sort of illegal tying that has consistently been condemned by the Supreme Court and the rest of the federal judiciary as illegal *per se*. Like other *per se* violations, the defendants' conduct inevitably harms consumers. Judgment should be granted to the United States and defendants' conduct permanently enjoined.

Respectfully submitted,

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