

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
Houston Division

HOUSTON INDUSTRIES INCORPORATED,)

Plaintiff—Cross-Respondent,)

vs.)

No. 95-CV-5237

DANIEL C. KAUFMAN, *et al.*,)

Defendants—Cross-Petitioner.)

**CROSS-PETITION FOR ENFORCEMENT OF CIVIL
INVESTIGATIVE DEMAND NO. 13591 AND ANSWER
TO PETITION TO SET ASIDE OR MODIFY**

An investigative subpoena, Civil Investigative Demand No. 13591 (the "CID"), was served on Houston Industries Incorporated ("HII") on October 25, 1995. HII failed to produce any documentary material or interrogatory answers on the return date set forth in the CID. HII instead filed, out of time, a petition to set aside or modify the CID. In this pleading, the United States of America (1) cross-petitions for an order enforcing the CID and (2) answers the petition filed by HII to set aside or modify the CID.

CROSS-PETITION FOR ENFORCEMENT

1. In enacting and amending the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§1311 *et seq.* (1994), Congress provided the Government with broad pre-complaint discovery powers to investigate possible violations of the federal antitrust laws. More specifically, ACPA Section 3(a), 15 U.S.C. §1312(a) (1994), empowers the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice to issue a civil investigative demand to any person who they have reason to believe "may be in possession, custody, or control of any documentary material, or may have information, relevant to a civil antitrust investigation." Such a civil investigative demand may require the recipient "to produce such documentary material for inspection and copying or

reproduction, to answer in writing written interrogatories, to give oral testimony ..., or to furnish any combination of such material, answers or testimony."

2. The Antitrust Division of the United States Department of Justice is currently conducting a civil investigation to ascertain whether electric utility companies in Texas have violated the Sherman Act, 15 U.S.C. §§ 1 & 2 (1994). In the course of that investigation, a number of civil investigative demands were issued and served.

3. As alleged in paragraph 1 of its petition, HII is a corporation organized and existing under the laws of the State of Texas, with its principal place of business at 4400 Post Oak Parkway, Houston, Texas, which is within this judicial district and division. This Court accordingly has jurisdiction over this cross-petition and venue is properly laid in this Court under ACPA Section 5(a), 15 U.S.C. §1314(a) (1994).

4. HII is a publicly-traded holding company involved through its subsidiaries in the electric utility business within the United States and abroad. Its principal operating subsidiary is Houston Lighting and Power Company ("HL&P"), a vertically integrated firm engaged in the generation, transmission and distribution of electric energy in a 5,000 square mile area in southeastern Texas. HL&P is the second largest electric utility in Texas with annual revenues of about \$4 billion. Another HII subsidiary, Houston Industries Energy, Inc. ("HEI") participates in power generation projects, among other activities.

5. HL&P and HEI are each wholly-owned subsidiaries of HII, each with executive officers and directors in common with HII. As parent, HII has custody and control of documentary material and information in the possession, custody or control of its wholly-owned subsidiaries HL&P and HEI.

6. On October 24, 1995, Joel I. Klein, Acting Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, duly issued the CID (reproduced as Exhibit A to HII's petition). The CID requires HII to provide

information and documentary materials relevant to the antitrust investigation described in paragraph 2 of this cross-petition, at 10:00 a.m. on November 14, 1995. The CID was served on October 25, 1995, in accordance with 15 U.S.C. §1312(e)(1)(C) (1994), by depositing it in the United States mails, by certified mail, return receipt requested, duly addressed to HII at its principal place of business. By telephone call on the same day, the Antitrust Division notified Baker & Botts L.L.P., the law firm representing HII, that a civil investigative demand had been issued to the firm's client and a representative from the firm's District of Columbia office picked up a copy of the CID.

7. HII failed to produce any of the documentary materials and interrogatory answers in response to the CID or to provide the United States with specific information showing that CID compliance would impose an undue burden. Instead, HII filed and served its petition for an order modifying or setting aside the CID, but not within the time allowed by ACPA Section 5(b)(1), 15 U.S.C. §1314(b)(1) (1994), which provides that any such petition must be filed and served "before the return date specified in the demand." Because HII's petition was not filed and served before the return date specified in the CID, the automatic suspension of the time allowed for compliance provided by ACPA Section 5(b)(2), 15 U.S.C. §1314(b)(2) (1994), upon the timely filing of a petition is inapplicable.

8. HII's petition asserts no valid grounds excusing its failure to comply with the CID. The lack of substantive merit in the grounds asserted by HII is pleaded more fully below, in the answer to HII's petition.

9. HII's continuing failure to comply with the CID has impaired the Government's ability to obtain documentary material and information needed to complete in a timely manner the investigation described in paragraph 2 of this cross-petition. An expeditious resolution of this cross-petition will allow the United States to determine whether electric utility

companies in Texas are violating federal antitrust laws to the detriment of consumers, and to remedy those violations by taking appropriate enforcement actions.

10. The Fifth Circuit “has consistently recognized the summary nature of administrative subpoena enforcement proceedings” *Burlington Northern R.R. v. Office of Inspector General*, 983 F.2d 631, 637 (5th Cir. 1993), citing *In re Office of Inspector General*, 933 F.2d 276, 277 (5th Cir. 1993) (“subpoena enforcement actions are designed to be summary and are designed to secure quick judicial review of administrative activities”) and *In re EEOC*, 709 F.2d 392, 397-400 (5th Cir. 1983) (“beyond challenge that ‘the very backbone of an administrative agency’s effectiveness in carrying out its Congressionally mandated duties ... is the rapid exercise of the power to investigate’” (ellipses in original)).

ANSWER TO HII’S PETITION

In accordance with Fed. R. Civ. P. 8(b), the defendants answer HII’s petition as follows:

First Defense

HII’s petition is untimely because HII did not petition the court for relief from the CID “before the return date specified in the demand,” as required by 15 U.S.C. §1314(b)(1) (1994).

Second Defense

Since the activities under investigation do not enjoy a clear exemption from the Sherman Act under the state action and *Noerr-Pennington* doctrines, the investigation is within the federal antitrust law enforcement authority of the Department of Justice.

Third Defense

The documentary material and information required by the CID are not protected from disclosure under the standards applicable to subpoenas issued in aid of grand jury investigations or the standards applicable to discovery requests under the Federal Rules of

Civil Procedure that are appropriate and consistent with the purposes and provisions of ACPA.

Fourth Defense

To the extent that HII has legitimate interests in preserving the confidentiality of documentary material and information required by the CID, those interests are adequately protected by the express restrictions against disclosure embodied in ACPA Sections 4(c)(3) and 5(g), 15 U.S.C. §§1313(c)(3) & 1314(g) (1994).

Fifth Defense

Responding to the numbered paragraphs set forth in HII's petition:

1. Defendants admit the allegations stated in paragraphs 1-4.
2. Paragraph 5 primarily consists of legal conclusions not calling for specific response; to the extent that they are intended as allegations of fact, they are denied, except that defendants admit that the Public Utility Commission of Texas regulates electric utilities in Texas and is currently engaged in rulemaking that involves transmission access.
3. Defendants admit that the CID requires HII to furnish documentary material and information in HII's possession, custody, or control and requires HII to produce "all documents of a particular type and description," as alleged in subparagraph a. Paragraph 6 otherwise recites legal conclusions not calling for specific response; to the extent that they are intended as allegations of fact, they are denied.
4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual averments of paragraph 7.

WHEREFORE, the United States of America asks that the Court grant this cross-petition and enter an order enforcing the CID by directing HII to promptly furnish the documentary material and interrogatory answers specified in the CID and that the Court enter an order dismissing HII's petition to modify or set aside the CID.



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Certificate of Service

The undersigned hereby certifies that true and correct copies of the foregoing document were, on this 11th day of December, 1995, served by telefax (with hard copy by overnight courier) to the counsel of record listed below.

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