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.*	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GOVERNMENT'S MOTION FOR JUDGMENT ON THE PLEADINGS ENFORCING CIVIL INVESTIGATIVE DEMAND AND DISMISSING PETITION TO SET ASIDE OR MODIFY

The instant proceeding arises out of an investigative subpoena, Civil Investigative Demand No. 13591 (the "CID"), which was served on Houston Industries Incorporated ("HII") on October 25, 1995. HII neither produced documentary material and interrogatory answers on the return date set forth in the CID nor offered to the government a factual basis for modification. HII instead filed, out of time, a petition to set aside or modify the CID. Having cross–petitioned for an order enforcing compliance with the CID and answered HII's petition to set aside or modify the CID, the government seeks judgment on the pleadings.

Disposition of this case turns on essentially four questions:

- ♦ May HII interpose the substantive antitrust defenses of state action exemption and *Noerr-Pennington* immunity to resist enforcement of the CID?
- ♦ Has HII established that the documents and information called for by the CID are not relevant to the government's proper investigative purpose?
- ♦ Has HII demonstrated that complying with the CID would impose an unreasonable burden?

- ♦ Has HII shown good cause for a protective order affording extraordinary confidentiality to its documents?

All of these questions must be answered in the negative, requiring judgement in favor of the government enforcing the CID without modification.

INTRODUCTION

The Antitrust Civil Process Act ("ACPA"), *primarily codified at* 15 U.S.C. §§1311 *et seq.* (1994), grants the Government broad powers to obtain information in the course of investigating possible violations of the federal antitrust laws. More specifically, the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice are authorized to issue a civil investigative demand to "any person" 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." 15 U.S.C. §1312(a) (1994). The recipient is obliged "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." *Id*. Congress underscored the importance of this law enforcement tool by imposing criminal penalties on persons obstructing compliance with civil investigative demands issued. *See* 18 U.S.C. §1505 (1994).

Congress originally enacted APCA for the purpose of "enabl[ing] the Department of Justice to obtain documentary evidence during the course of a civil investigation to enforce the antitrust laws." H.R. REP. NO. 1386, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 2567, 2568. ACPA was thereafter amended to broaden the availability of compulsory process in antitrust law enforcement "to provide the Justice Department's Antitrust Division with all the basic investigative tools necessary for effective and expeditious investigations into possible civil violations of the federal antitrust laws." H.R. REP. NO. 1343, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N.

2596. Congress thus granted the Antitrust Division, as the nation's primary antitrust law enforcement agency, compulsory process for its civil investigations comparable to the grand jury subpoenas available for its criminal investigations,[1] and investigative powers similar to those exercised by dozens of important federal law enforcement agencies and many executive-branch and independent regulatory agencies. *See id.* at 2 & 4-6, 1976 U.S.C.C.A.N. at 2596 & 2599-600; H.R. REP. NO. 1386, *supra*, 1962 U.S.C.C.A.N. at 2568-69.

As indicated in the pleadings, the Antitrust Division is currently investigating whether electric utility companies in Texas have violated the Sherman Act, 15 U.S.C. §§1 & 2 (1994), through tying arrangements and other unreasonable denial and conditioning of transmission service. Electric energy consumed in Texas and throughout the country is predominantly generated by vertically-integrated utility companies such as HII's principal subsidiary, Houston Lighting and Power Company ("HL&P"), who own, in addition to their generating plants, extensive high-voltage transmission line systems (also called "networks" or "grids"). Transmission grids are used to move power from those plants to buyers. Smaller utilities, independent power producers (or "IPPs") and industrial concerns capable of producing power on-site (called "self-generators") in the region generate electric energy in competition with HL&P and the other vertically-integrated utility companies, but typically have limited, if any transmission facilities. Accordingly, although numerous competing power producers may own and operate generating units, only the integrated utility with nearby transmission lines is available to receive electric energy produced in the area and transport it for ultimate delivery to

1. Although violations of the Sherman Act, 15 U.S.C. §§1 & 2 (1994), are criminally punishable as felonies, Congress also authorized the government to institute proceedings in equity to prevent and restrain such violations, investing the federal district courts with jurisdiction over such proceedings. *See* 15 U.S.C. §4 (1994).

consumers. For electric energy to be bought and sold, therefore, buyers and sellers must use the transmission grid to effect delivery.

HL&P, together with most of the other vertically-integrated utilities in the state are members of the Electric Reliability Council of Texas ("ERCOT"), through which their transmission systems are connected with one another to comprise a larger grid known as the ERCOT Interconnection. ERCOT's major members have, by agreement among themselves and without regulatory review, collectively adopted guidelines and practices governing movement of electric energy over the ERCOT Interconnection.

The focus of the investigation is whether HL&P and other vertically-integrated utilities have illegally used their monopoly over transmission in the region to prevent smaller utilities, IPPs and self-generators from effectively selling electric energy in competition with them. Such unlawful use may involve "tying arrangements" where the transmission owner provides transmission service only when "bundled" with its own electric energy, or otherwise refuses transmission access or imposes terms and conditions that thwart sale and delivery of electric energy in competition with the transmission owner. Unreasonable denial of transmission access may violate the Sherman Act when used as a means of unlawfully monopolizing downstream markets. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973). The government is also investigating whether HL&P and other ERCOT members have agreed to limit competition in the generation and sale of electricity by adopting guidelines and practices that add unnecessary costs to power supply transactions undertaken by smaller utilities, IPPs and self-generators. Such conduct would impede more efficient producers from competing with HL&P and other ERCOT members to sell electric energy in Texas, which ultimately raises the cost of electric energy to wholesale buyers and consumers.

HII is a publicly-traded holding company involved through its subsidiaries in the electric utility business within the United States and abroad.[2] Its HL&P subsidiary is engaged in the generation, transmission and distribution of electric energy in a 5,000 square mile area in southeastern Texas.[3] HL&P also purchases electricity from other power generators for resale to its retail customers, sells electric energy to other utilities for resale to their customers and provides transmission service to deliver power sold by other generators. HL&P is ERCOT's second largest member and can, in cooperation with the largest member, control ERCOT. Independent power producers account for substantial generating capacity in the Houston area and HL&P has lost significant sales in recent years to industrial consumers able to more efficiently self-generate. With annual revenues of about $4 billion, HL&P is the second largest electric utility in Texas.

ANALYSIS

This subpoena enforcement proceeding is summary in nature

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 E.E.O.C.*, 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

2. HII attached the Affidavit of Thomas R. Standish as Exhibit D to its supporting memorandum to provide an overview of HII's business. We have reproduced extracts from the current edition of Moody's Public Utility Manual as attachment 1 to this memorandum, as a supplement to that general background concerning HII and its subsidiaries.

3. Another HII subsidiary, Houston Industries Energy, Inc. ("HEI") participates in power generation projects, among other activities.

in original)). A subpoena enforcement proceeding "is limited to two questions: (1) whether the investigation is for a proper statutory purpose and (2) whether the documents the agency seeks are relevant to the investigation." *Sansend Financial Consultants, Ltd. v. Federal Home Loan Bank Board*, 878 F.2d 875, 879 (5th Cir, 1989). The answer to both questions is yes in this case. HII's petition to set aside the CID ignores these well established limitations, improperly inviting this Court to prematurely enmesh itself in a far broader and deeper inquiry.[4]

HII ignores the fundamental nature of the matters appropriately before this Court at this stage of the government's investigation. Contrary to the thrust of HII's theory,

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. . . . [The government] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, make take steps to inform itself as to whether there is probable violation of the law.

United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). *Accord, United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

The state action doctrine is not available as a defense to subpoena enforcement

The essential function of a civil investigative demand is to unearth documents and information "for the purpose of ascertaining whether any person is or has been engaged in . . . any act or omission in violation of" federal antitrust law. 15 U.S.C. §§1311(c) & (d) (1994). Administrative subpoenas were issued to HII and others in connection with an ongoing investigation of the electric utility

4. HII's petition is also subject to dismissal as untimely, since it was not filed "before the return date specified in the [CID]," as required by 15 U.S.C. §1314(b)(1) (1994).

industry in Texas. To date, the Department of Justice has not brought suit to prevent or restrain specific conduct uncovered by that investigation, much less charged any industry participant with violating the Sherman Act. No case or controversy arising under substantive antitrust law, and no defenses to antitrust liability, are properly before this Court. This is hardly surprising, because unlike a trial,

> where a specific offense has been identified and a particular defendant charged, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

R. Enterprises, *supra*, 498 U.S. at 297 (citation omitted). Unless conduct under investigation is clearly exempt from the antitrust laws, asserting substantive defenses at the investigatory stage is premature.HII contends that the state action doctrine exempts regulated electric utilities from investigation by the Antitrust Division. No caselaw has been, or can be, cited for this sweeping assertion. For more than half a century, courts have consistently barred broad jurisdictional challenges to investigatory subpoenas. *E.g.*, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214-16 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1943); *F.T.C. v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972). Applying that established principle, then circuit judge Breyer held state action immunity questions to be outside the scope of administrative subpoena enforcement proceedings. *F.T.C. v. Monahan*, 832 F.2d 688 (1st Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

Subpoena enforcement proceedings are singularly inappropriate for interposing the state action doctrine. As announced in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the state action exemption requires that (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy to displace competition with

regulation, and (2) the policy must be actively supervised by the State itself. State action immunity is therefore fact specific — it turns on both the precise acts charged as antitrust violations and the particulars of any regulatory review to which those acts are subjected. Accordingly, as *Monahan* emphasized,

> We, like the FTC, must wait to see the results of the investigation before we know whether, or to the extent to which the activity falls within the scope of a "clearly articulated and affirmatively expressed state" policy.
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> . . . . Again, we cannot say, without knowing more facts, whether or not this additional "state supervision" condition will apply.
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> . . . . All depends on precisely what conduct turns out to be at issue, its harms, its justifications, and its relation to the agency's basic statutory mission.
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> This factual uncertainty is precisely why "this sort of dispute" ought not to be
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> > settled in a subpoena enforcement proceeding. An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the [Federal Trade] Commission's regulatory jurisdiction over [respondents] may be clouded but it is not plainly spurious.

832 F.2d. at 689-90 (citations omitted). *See also Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 59 (2d Cir. 1983) (enforcing Antitrust Division's civil investigative demand to ocean carrier regulated by the Federal Maritime Commission because exemptions claimed under Act of State and *Noerr-Pennington* doctrines not clearly established).

As an implied exclusion from the antitrust laws, state action immunity is disfavored and will not be presumed or broadly interpreted. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635-36 (1992); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978). Regulated utilities are not *ipso facto* excused from complying with the Sherman Act. *See, e.g.*, *Cantor v. Detroit*

Edison Co., 428 U.S. 579 (1976); *Otter Tail*, *supra*; *TCA Building Co. v. Northwestern Resources Co.*, 861 F. Supp. 1366, 1382 (S.D. Tex. 1994).[5] As indicated above, the state action doctrine requires both the state legislature's clear articulation and affirmative expression of a policy displacing competition with regulation and the regulatory agency's active supervision of the anticompetitive conduct in suit. The type of conduct under investigation here does not by its nature clearly satisfy these criteria; thus the exemption does not clearly apply and an antitrust investigation is proper.

Even if this Court were inclined consider prematurely the state action issue before the facts are developed by the government's investigation, Texas law makes a state action exemption unlikely to prevail. First, the Texas statutory regime establishes Public Service Commission ("PUC") regulation of electric utilities to complement competition, not to displace it. *See* Public Utility Regulatory Act of 1995, S.B. 319, §§1.001 *et seq*., 74th Leg., R.S. 1995, *as amended*, S.B. 373, §§1 *et seq*., 74th Leg., R.S., 1995 ("PURA 1995").[6] Section 2.001(a) of PURA 1995 accordingly sets the electric utility industry apart from others subject to PUC regulation, embodying legislative findings "that the wholesale electric industry through federal legislative, judicial, and administrative actions is becoming a more competitive industry which does not lend itself to traditional electric utility regulatory rules, policies, and principles." Moreover, section 2.057(a) of PURA 1995 explicitly bars the PUC from promulgating transmission access rules "contrary to federal law, including any

5. Although HL&P and other ERCOT members are subject to PUC regulation, neither ERCOT itself nor its guidelines and practices are regulated.

6. The legislature there abandoned statutory language evidencing an intent that PUC regulation serve as a complete substitute for competition. *See* former TEX. REV. CIV. STAT. ANN., art. 1446c, §2 (Vernon 1995). The Texas regulatory landscape is thus radically different from that considered in the case principally relied on by HII, *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 605 (5th Cir.), *cert. denied*, 114 S.Ct. 183 (1993), *prior appeal from denial of preliminary injunction reported at* 901 F.2d 1267 (5th Cir. 1990).

applicable policy statement, decision, or rule of a federal regulatory agency, having jurisdiction."[7] The legislature thus directed that any PUC regulation in this area be consistent with the Sherman Act and other federal law. Finally, the PUC was ordered to biennially

> report to the legislature on the scope of competition in electric markets and the impact of competition and industry restructuring on customers in both competitive and noncompetitive markets . . . , includ[ing] recommendations to the legislature for further legislation that the commission finds appropriate to promote the public interest in the context of a partially competitive electric market.

PURA 1995 §2.003. The Texas legislature thus evidenced no intention to insulate PUC-regulated electric utilities from federal antitrust enforcement as a matter of state policy.

Second, HII cannot demonstrate at this juncture that the PUC actively supervises the conduct under investigation. *Midcal*'s active supervision requirement "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies, which necessarily "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). It is not enough for HII to show that the state has established and staffed a regulatory agency and placed utilities under its jurisdiction, which represents "[t]he mere potential for state supervision." *See Ticor, supra*, 504 U.S. at 637-38. Accordingly, Texas law empowering the PUC to establish and review utility rates and practices and providing a forum to hear and determine complaints against

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7. The Texas legislature accordingly recognizes, and directs the PUC to follow, the federal actions that have brought ever increasing competition to the electric power industry. This includes the Public Utility Regulatory Policies Act of 1978, passed in part to remove impediments faced by IPPs and cogenerators seeking to sell electric energy to fully integrated utilities. *See American Paper Institute v. American Electric Service Corp.*, 461 U.S. 402 (1983); *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982); *Environmental Action*, *supra*. That legislation contributed to the development of dozens of cogeneration facilities in the Houston area, equivalent to more than a third of HL&P's generating capacity, and cost HL&P significant industrial load lost to self-generation. More recently, Congress passed the Energy Policy Act of 1992, which established a new class of unregulated power producers to compete in wholesale markets and expanded the Federal Energy Regulatory Commission's authority to issue orders forcing integrated utility companies such as HL&P to make interconnections to their transmission systems and to provide transmission services. The 1992 Act explicitly provides that mandatory interconnection and transmission orders supplement, rather than supplant, antitrust remedies. *See* 16 U.S.C. §824k(e) (1994).

utilities "does not satisfy the second prong of the *Midcal* test." *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 606 (5th Cir.), *cert. denied*, 114 S.Ct. 183 (1993), *prior appeal from denial of preliminary injunction reported at* 901 F.2d 1267 (5th Cir. 1990).[8]

At this juncture, neither this Court nor the Antitrust Division can predict what specific conduct by ERCOT and its members (if any) the government may ultimately charge as Sherman Act violations. At the subpoena enforcement stage, it is neither known nor knowable whether such conduct was even presented to the PUC, much less whether the PUC reviewed that specific conduct and approved it as consistent with state policy.

The *Noerr-Pennington* doctrine offers no defense at the investigatory stage of antitrust law enforcement.

HII asks this Court to quash the CID on the basis of the *Noerr-Pennington* doctrine, which qualifiedly exempts HL&P from antitrust liability on account of activities undertaken to influence the Texas legislature and the PUC.[9] Like its state action theory, HII's *Noerr-Pennington* claim is asserted prematurely, turning as it does on the facts to be investigated.

Only Specifications 8 and 9 of the CID facially relate to activities undertaken for the purpose of influencing legislative or administrative action. Even when limited to those specifications, the law is clear that HII must produce the requested information. *See Associated Container Transportation, supra*, 705 F.2d at 58-59 (*Noerr-Pennington* doctrine no bar to ACPA civil investigative demand enforcement); *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52-53 (4th Cir. 1981) (*Noerr-Pennington* doctrine no basis for objection to discovery in civil antitrust case).

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8. HII's reliance on *DFW Metro Line* to establish the proposition that, as a matter of law, the PUC actively supervises all conduct of utility companies in Texas is clearly misplaced. First, as noted above, the Texas regulatory scheme considered by the court in *DFW Metro Line* is quite different than that applied here. Second, *DFW Metro Line* was a private action, and the Fifth Circuit highlighted evidence of a PUC proceeding brought by the antitrust plaintiff to adjudicate the very conduct complained of as central to its ruling. *See id.* at 606-07.

9. The doctrine invoked by HII derives from *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

Associated Container Transportation and *Carolina Power & Light* hold that the distinction between liability and inquiry is a pivotal one. First, *Pennington* itself teaches that protected activities are not stripped of their evidentiary significance:

> It would of course be within the province of the trial judge to admit this evidence . . . , under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit may nonetheless be introduced to show the purpose and character of the particular transactions under scrutiny."

Pennington, *supra*, 381 U.S. at 670 n. 3 (citations omitted). Potentially admissible evidence is, perforce, discoverable. *See Associated Container Transportation* at 59-60; *Carolina Power & Light* at 53. Second, *Noerr-Pennington* does not protect abuses of the judicial, legislative or regulatory process, for example by making misrepresentations or asserting baseless claims. *See Associated Container Transportation* at 59. This Court cannot predict that the government's investigation will uncover no involvement by HL&P and others in such abuse. *See id.* Third, even if the Antitrust Division ultimately concludes that HL&P did not abuse the governmental process, documents prepared in the course of that process "might alert the authorities to other evidence revealing [antitrust violations] entirely unrelated to [HL&P]'s legitimate activities before the [Texas legislature or PUC]." *See id*.

HII attempts to bolster its *Noerr-Pennington* challenge by raising blanket attorney-client and attorney work-product privilege questions. However, neither ACPA nor the CID anywhere purport to compel production of privileged material. Indeed, CID Instruction 10 explicitly provides the procedures to be followed in the event that HII wishes to assert and support privilege as the basis for withholding documents from production. HII's principal authority — *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) — thus stands as no obstacle to enforcement. The *Burlington Northern* panel was addressing whether the crime/fraud exception to privilege applied, and distinguished *Associated Container Transportation* and *Carolina Power & Light* as follows:

> In those cases, however, no claim of attorney/client privilege was asserted and the sole question was whether *Noerr-Pennington* alone barred discovery. The issue here is whether the attorney/client privilege bars discovery in the face of a claim that the communications relate to a crime or fraud. *Noerr-Pennington* is relevant only to the extent it determines whether a crime or fraud has been shown.
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> 822 F.2d at 523.

Finally, HII's argument that compliance might "chill" participation in protected activities has been squarely rejected in other cases — *Associated Container Transportation, supra*, 705 F.2d at 60; *Carolina Power & Light, supra*, 666 F.2d at 53 — and HII offers no reason for a different outcome here. Although HL&P executive Standish identifies the arguably protected activities, he fails to even allege in conclusory fashion that CID enforcement portends a "chilling effect" on HL&P's activities in the future, much less particularize the harm that would befall HL&P once the Antitrust Division is privy to the requested documents. *See Dole v. Local Union 375, Plumbers International Union*, 921 F.2d 969, 972 (9th Cir. 1990); *United States v. Grayson County Bank*, 656 F.2d 1070, 1074 (5th Cir. 1981). Thus, the more likely and salutary effect of disclosure is that HL&P representatives will pay "more attention to the possible antitrust implications of their activities." *Associated Container Transportation, supra* at 60.

In short, the *Noerr-Pennington* doctrine is at best a potential defense, anticipating charges that have yet to be brought. It offers no shield from investigation.

The information and documents sought by the CID are well within the applicable relevance standard

ACPA's legislative history teaches that the Antitrust Division is "to be given wide latitude" when issuing civil investigative demands and their scope is preferably governed by the "less stringent [than civil discovery] grand jury subpoena standard, 'tailored as it is to reflect the broader scope and less precise nature of investigations.'" *Associated Container Transportation, supra*, 705 F.2d at 58. In evaluating challenges based on asserted lack of relevance, "the motion to quash must be denied unless the district court determines there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's

investigation." *R. Enterprises*, *supra*, 498 U.S. at 301. *Accord*, *Sansend Financial*, *supra*, 878 F.2d at 880 ("So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant."). The CID, which requires HII to provide documents and information that will enable the government to ascertain the extent to which integrated utility members of ERCOT have restricted access to the transmission grid and assess the competitive impact of such restrictions, easily passes muster under this standard.

HII's principal relevance challenge turns on the assertion that HL&P is the only member of the HII corporate family directly engaged in electric utility activities in Texas. That being so, HII insists that only HL&P is properly subject to the investigation and only HL&P should be required to comply. Although the government undoubtedly could have issued the CID to HL&P alone, Congress did not limit the government to persons suspected of violating the law, but deliberately empowered the Antitrust Division to secure information and documents from third-parties (*e.g.*, suppliers and trade associations) and from persons affiliated with a subject of the investigation (*e.g.*, its officers). *See* H.R. REP. NO. 1343, *supra* at 7, 1976 U.S.C.C.A.N. at 2601-02.

Indeed, HII falls well within ACPA's description of persons to whom the Antitrust Division may issue civil investigative demands — those who "may be in possession, custody or control of any documentary material, or may have any information relevant to a civil antitrust investigation." 15 U.S.C. §1312(a) (1994). First, HII's files are likely to contain documents relating to the activities of its principal subsidiary and HII's executives are likely to have knowledge of such activities. Second, as HL&P's sole shareholder, HII has custody and control over that which is known or physically possessed by HL&P. *See United States v. International Union of Petroleum Workers*, 870 F.2d 1450, 1462 (9th Cir. 1989); *Local No. 1419, General Longshore Workers Union v. Smith*, 301 F.2d 791, 795-96 (5th Cir. 1962); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1144-45 (N.D. Ill. 1979). The government is not required to guess at its peril whether the information and documentary

material sought in the CID are held by HII or by HL&P or by another HII subsidiary, or by each of them. The CID was properly issued to HII.

For its other relevance challenge, HII notes that the focus of the investigation is identified in the CID as tying arrangements and other unreasonable denial or conditioning of transmission service. Building from that observation, HII's insists that interrogatories and document requests related to generation and retail services are beyond the scope of inquiry. That view of relevance is entirely too narrow, ignoring the predominantly integrated nature of the industry and the ability of fully integrated utilities to impair competition in generation, sale and distribution markets. By definition, information about the markets in which the anticompetitive effects of transmission abuse would occur are highly relevant to the investigation. Thus, there is no merit in HII's relevance objections to specific interrogatories and document requests dealing with upstream generation and downstream distribution markets.[10]

The CID does not impose onerous compliance burdens

Law enforcement agencies need compulsory process because persons under investigation have little incentive to provide information voluntarily. Civil investigative demands and other forms of administrative subpoenas are properly issued "to get information from those who best can give it and who are most interested in not doing so." *Morton Salt*, *supra*, 338 U.S. at 642. Unsurprisingly, such an interest in not providing information manifests itself through claims that compliance is too costly and time consuming. However, generalized assertions of burden are insufficient to overcome the government's interest in detecting and remedying violations of the law. *See id*. at 653-54.

HII does not tell this Court — nor had it told the Antitrust Division — just what, in practical terms, the CID will require the company to do and what type of evidence the government stands to lose by less than full compliance. The affidavit of HL&P executive Standish does not even estimate

10. CID Specifications 2, 10(a), 10(b), 11-14, 17, 19-22 and the definition of "relevant product" in CID Instruction 24.

the time and expense entailed in complying with the CID, much less support such a prediction; nor does it describe what relevant information would be held back from the government if HII's modifications are accepted. Absent such a showing, any compliance burden cannot objectively be assessed in light of HII's considerable financial resources (annual operating revenues of about $4 billion and assets in excess of $11 billion). In order to conduct an adequate investigation, the Antitrust Division must obtain information of possible Sherman Act violations from HII. HII's position boils down to the untenable argument that it is too large to be investigated — that it has so many files and employees that any administrative subpoena is *per se* burdensome. As it stands now, HII improperly asks this Court to assume, without offering specifics, that the compliance costs it would incur are unreasonable. A cursory review of but some of HII's many compliance complaints illustrates their lack of specificity and substance.

HII categorically insists that searching more than its so-called "central or departmental files" would be unnecessarily burdensome and, for that reason, seeks to limit the CID to those files. However, no information about HII's management structure and record keeping practices has been offered for this Court or the Antitrust Division to conclude that such a limitation will not compromise the investigation.[11] Indeed, HL&P executive Standish acknowledges at page 3 of his affidavit that "extensive documentation related directly or indirectly to HL&P's provision and conditioning of transmission service exists," but gives this Court no indication of what portion of this clearly relevant "extensive documentation" is likely to be found outside the limited set of files to which HII asks this Court to confine the investigation.

HII also broadly challenges the government's request "for 'all' documents of a particular type or description," but fails to offer, much less justify, a principled basis for limiting the universe of

11. We note that HII could have gone a long way towards avoiding this controversy by expeditiously providing information describing its "system of files and records," as called for by CID Specification 24. Had this been done, the Antitrust Division could have meaningfully assessed and ameliorated any unnecessary burden inadvertently created by the CID.

relevant documents. The government is unwilling to leave to HII the determination of which responsive materials will be turned over. HII's position essentially relegates the government to a reliance on voluntary cooperation that ACPA was enacted to overcome.

At page 16 of its supporting memorandum, HII purportedly "reserves the right to answer any of the questions by referring DOJ to the files in accordance with the Federal Rules of Civil Procedure." However, that option is available only

> [w]here the answer to an interrogatory [(1)] may be derived or ascertained from the business records of the party whom the interrogatory has been served, or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and [(2)] the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

FED. R. CIV. P. 33(d). Given its overriding obligation to provide whatever responsive information it has, HII is not excused from full compliance because its business records provide a partial answer. Nor can HII produce documents in lieu of answers that HII could develop from its own records more easily than the government.[12]

HII concludes with a lengthy specification-by-specification and instruction-by-instruction litany challenging the CID as unduly burdensome, but fails utterly to establish and particularize the grounds on which the government's legitimate investigation supposedly should be circumscribed in its early stages. CID Instruction 30 explicitly stated that the government was prepared to discuss burden-ameliorating modifications — ***after*** HII determined and communicated what documents and information are available, the form in which they are available and the extent of the search required to comply with the CID — but HII spurned that opportunity. On this record, and given that HII has not presented any more facts to the government than it has to this Court, the modifications to

12. As noted by the advisory committee recommending the option in 1970, "[a] respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records." Although HII's pleadings do not specify which of the interrogatories it wishes to answer in this fashion, few of the CID questions appear to call for the kind of information contemplated by FED. R. CIV. P. 33(d).

individual CID specifications and instructions sought by HII should be rejected in their entirety. Ruling on HII's myriad undue burden grievances on the merits in this proceeding would needlessly consume judicial resources, as well as teach subpoenaed parties that they have everything to gain and nothing to lose by end-running law enforcement authorities.

HII's assertedly confidential information is adequately protected by ACPA's explicit restrictions against government disclosure

Documentary material and interrogatory answers produced under compulsion of a civil investigative demand are not thereby opened up to public disclosure. The ACPA generally prohibits their "examination, without the consent of the person who produced [them] by any individual other than a duly authorized official or employee of the Department of Justice" and exempts them from disclosure under the Freedom of Information Act. 15 U.S.C. §§1313(c)(3) & 1314(g) (1994). ACPA does authorize Department of Justice attorneys to make disclosure when they take depositions or appear in court proceedings. *See* 15 U.S.C. §§1313(c)(2) & (d)(1) (1994). HII seeks restrictions against these possible uses of documentary material and interrogatory answers responsive to the CID, citing *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979) and *Aluminum Co. of America v. United States*, 444 F. Supp. 1342, 1346 (D.D.C. 1978).

Protective orders going beyond ACPA's restrictions are not to be entered as a matter of course, but only upon "a demonstration that extraordinary protection should be afforded to designated materials because of their special confidential nature or in other interests of justice." *GAF*, *supra* at 16 n. 10.[13] HII has established no good cause to order greater protection than Congress afforded civil

13. Since *GAF* involved materials produced in discovery in third-party litigation under a protective order, the panel thought that any modification of that order should be considered by the judge who entered it. *See id.* at 16. Likewise, in *Aluminum Co. of America*, the government had initially obtained highly confidential materials from Alcoa with specific assurance of confidentiality, reissuing the demands for the express purpose of using them in depositions. *See* 444 F. Supp. at 1343-44. Even so, the court required Alcoa to designate with particularity the specific categories of documents for which extraordinary protection would be sought and cast upon Alcoa the burden of demonstrating "the confidential nature of the documents and the irreparable competitive injury that would arise as a result" of using them in taking depositions." *Id.* at 1347-48.

investigative demand respondents generally. The government's ability to use CID materials in further investigation or judicial proceedings should not be restricted.

CONCLUSION

The CID is within the authority of Antitrust Division and the information sought is relevant to the investigation. This Court should accordingly enter an order requiring HII to fully comply with the CID and dismissing HII's petition to set aside or modify.

Respectfully submitted,

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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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