

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

HOUSTON INDUSTRIES INCORPORATED,)	
)	
<i>Plaintiff—Cross—Respondent,</i>)	
)	
vs.)	No. 95-CV-5237
)	
DANIEL C. KAUFMAN, <i>et al.</i> ,)	
)	
<i>Defendants—Cross—Petitioner.)</i>)	

**GOVERNMENT’S MOTION FOR JUDGMENT ON THE PLEADINGS ENFORCING
CIVIL INVESTIGATIVE DEMAND AND DISMISSING PETITION TO SET ASIDE OR
MODIFY**

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the United States of America respectfully moves this Court to enter judgment on the pleadings enforcing Civil Investigative Demand No. 13591 (the “CID”) served upon Houston Industries Incorporated (“HII”) and dismissing HII’s petition to set aside or modify the CID. As shown more fully in the accompanying memorandum of points and authorities:

1. The CID is an investigatory subpoena, duly issued by the Acting Attorney General in charge of the Antitrust Division of the Department of Justice pursuant to the authority conferred by the Antitrust Civil Process Act, *as amended*, 15 U.S.C. §§1311 *et seq.* (1994). It requires HII to furnish documentary material and information relevant to an ongoing antitrust investigation to determine whether electric utility companies in Texas have violated the Sherman Act, 15 U.S.C. §§1

& 2 (1994). Rather than complying with the CID, HII filed an untimely and legally insufficient petition for relief in this Court.

2. Law enforcement agencies have been granted investigatory subpoena power in order “to get information from those who best can give it and who are most interested in not doing so . . . , analogous to the Grand Jury.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

3. The Fifth Circuit “has consistently recognized the summary nature of administrative subpoena enforcement proceedings,” which “are designed to secure quick judicial review of administrative activities.” *Burlington Northern R.R. v. Office of Inspector General*, 983 F.2d 631, 637 (5th Cir. 1993); *In re Office of Inspector General*, 933 F.2d 276, 277 (5th Cir. 1993). Judicial inquiry “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).

4. The conduct and parties under investigation are not clearly exempt from the Sherman Act. The state action and *Noerr-Pennington* defenses interposed by HII are not ripe at the investigatory stage. See *F.T.C. v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.), *cert. denied*, 485 U.S. 987 (1988); *Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 58-59 (2d Cir. 1983); *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52-53 (4th Cir. 1981). For more than half a century, courts have consistently turned aside broad jurisdictional defenses to subpoena enforcement. *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).

5. “So long as the material requested ‘touches a matter under investigation,’ an administrative subpoena will survive a challenge that the material is not relevant.” *Sansend*

Financial Consultants, supra, 878 F.2d at 880. HII's overbreadth claims cannot be sustained under this standard.

6. HII's generalized assertion of hardship provides no basis for circumscribing the government's investigation; a respondent is obliged to establish the magnitude and cost of compliance as a predicate for relief. *See Morton Salt, supra*, 338 U.S. at 653. HII has fallen far short of satisfying the obligation it owes this Court and the government to provide the facts needed to objectively assess and balance its burden against legitimate law enforcement needs.

7. The Antitrust Civil Process Act explicitly restricts government disclosure of any documents and answers provided in compliance with the CID. HII has failed to demonstrate good cause for a protective order conferring additional safeguards. *See United States v. GAF Corp.*, 596 F.2d 10, 16 n. 10 (2d Cir. 1979).

WHEREFORE, the Court should enter an order enforcing the CID without modification and dismissing HII's petition. A proposed order to that effect accompanies this motion in accordance with Local Rule 6(A)(3).

Respectfully submitted,

Daniel C. Kaufman
D.C. Bar No. 118422
U.S. Department of Justice, Antitrust Division
Transportation, Energy & Agriculture Section
555 Fourth Street, N.W. — Room 9104
Washington, D.C. 20001
(202) 307-6627
(202) 307-2784 (fax)