

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. General Electric Co., Allis-Chalmers Manufacturing Co., Kuhlman Electric Co., McGraw-Edison Co., Moloney Electric Co., Wagner Electric Corp., and Westinghouse Electric Corp., U.S. District Court, E.D. Pennsylvania, 1962 Trade Cases ¶70,367, (Jun. 21, 1962)

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United States v. General Electric Co., Allis-Chalmers Manufacturing Co., Kuhlman Electric Co., McGraw-Edison Co., Moloney Electric Co., Wagner Electric Corp., and Westinghouse Electric Corp.

1962 Trade Cases ¶70,367. U.S. District Court, E.D. Pennsylvania. Civil No. 28106. Filed June 21, 1962. Case No. 1526 in the Antitrust Division of the Department of Justice.

Sherman Act

Price Fixing—Collusive Bidding—Affidavit of Non-Collusion—Joint Bids—Sherman Act—Distribution Transformers—Consent Decree.—A manufacturer of distribution transformers was prohibited by a consent decree from entering into any agreement to submit noncompetitive, collusive or rigged bids, or to bid, refrain from bidding, or communicate an intention to bid or refrain from bidding. For a period of time, the manufacturer was required to submit with bids an affidavit to the effect that the bid was not prepared in collusion, and that the terms of the bid had not been communicated to any other seller of distribution transformers. However, the manufacturer could submit a bona fide joint bid in combination with another person under specified conditions.

Allocation of Markets—Patent and Other Rights—Consent Decree.—A manufacturer was prohibited by a consent decree from agreeing to allocate territories, fields, or customers for the manufacture or sale of distribution transformers; however, the decree did not prohibit the manufacturer from accepting or granting, without more, otherwise lawful patent, trade secret, or technical information licenses.

Tying Arrangements—Exception to Prohibition—Consent Decree.—A manufacturer was prohibited from conditioning the sale of a distribution transformer upon the purchase of any other item of electrical equipment; however, the manufacturer could require as a term of sale that the purchaser agree to hold the manufacturer harmless and to give bond to secure such agreement, where the manufacturer reasonably believes that the use to be made of the transformer will expose it to a substantial risk of liability.

Resale Restrictions—Proprietary Design—Consent Decree.—A manufacturer was not prohibited from agreeing not to sell to other persons equipment embodying the proprietary design of, or specially designed for, a purchaser.

Justice Department Enforcement—Consent Decree—Review of Prices—Notice of Judgment to Awarding Authorities.—A manufacturer of distribution transformers was required by a consent decree to independently review and determine its book prices and price rules and to announce such prices and price rules so determined. Also, the manufacturer was required to send a copy of the consent judgment to federal, state or local agencies and any other governmental awarding authorities to which sales were made during a specified period of time.

Justice Department Enforcement—Scope of Consent Decree—Government Damage Action.—The entry of a consent judgment was without prejudice to the government's filing and prosecuting claims for damages resulting from the activities charged in the complaint.

Justice Department Enforcement—Consent Decree—Judgment as to Some Defendants.—A consent decree entered against one of several defendants recited that the court has determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there was no just reason for delay in entering the decree as to all of the government's claims against: the signatory defendant.

For the plaintiff: Lee Loevinger, Assistant Attorney General, W. D. Kilgore, jr., Baddia J. Rashid, Donald G. Balthis, John E. Sarbaugh, and Walter L. Devany, Attorneys, Department of Justice.

For the defendant: Charles I. Thompson, Jr., Philadelphia, Pa., for Kuhlman Electric Co.

Final Judgment (Kuhlman Electric Co.)

[Consent]

GANEY, Circuit Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on May 25, 1960, and the plaintiff and the undersigned defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue, and this Court having determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entering a Final Judgment as to all of plaintiff's claims asserted in said complaint against the defendants signatory hereto,

Now, therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein and upon consent of the parties signatory hereto as aforesaid, the Court hereby determines that the proceeding herein is terminated as to the defendants signatory hereto and directs entry of Final Judgment as to all of plaintiff's claims herein against those defendants (provided that the making and entry of this Final Judgment shall be without prejudice to plaintiff filing and prosecuting claims for damages, if any, resulting from activities alleged in the complaint herein) and as to those defendants it is hereby

Ordered, adjudged and decreed as follows:

I

[Jurisdiction]

The Court has jurisdiction of the subject matter of this action and of the defendants signatory hereto. The complaint states claims upon which relief may be granted against those defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[Definitions]

As used in this Final Judgment:

"Distribution transformer" means any transformer having a rating between 3 KVA and 500 KVA inclusive, but expressly excluding furnace transformers, network transformers and instrument transformers;

"Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity; and

(C) "Manufacturer" means a person who manufactures or assembles, or proposes in good faith to manufacture or assemble within the United States in its own plant regularly maintained for that purpose.

III

[Applicability]

The provisions of this Final Judgment applicable to any consenting defendant shall apply also to each of its subsidiaries, successors and assignees, and to their respective officers, directors, agents, servants and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise. Each such defendant is ordered and directed to take such steps as are reasonably appropriate to procure compliance by its subsidiaries, officers, directors, agents, servants and employees with the terms of this Final Judgment. For the purpose of this Final Judgment each consenting defendant and its subsidiaries, officers, directors, agents, servants and employees, or any of them, shall be deemed to be one person. This Final Judgment shall not apply to sales

of distribution transformers for use outside the United States except for sales of such transformers by any consenting defendant to or for the use of the plaintiff or any instrumentality or agency thereof.

IV

[*Price Fixing*]

Each of the consenting defendants is enjoined and restrained from directly or indirectly entering into, adhering to or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of distribution transformers in the United States to:

- (A) Eliminate or suppress unreasonably competition in the manufacture, distribution or sale of distribution transformers;
- (B) Allocate or divide territories, markets, fields or customers for the manufacture or sale of distribution transformers; provided, however, that this subsection (B) shall not prohibit a consenting defendant from accepting or granting, without more, otherwise lawful patent, trade secret or technical information licenses;
- (C) Fix or maintain prices, price rules, pricing methods, or any terms or conditions for the sale of any distribution transformer to any _third person;
- (D) Exchange information concerning prices, price rules, pricing methods or other terms and conditions of sale (other than information released to the trade generally) at or upon which any distribution transformer is to be sold to any third person;
- (E) Submit noncompetitive, collusive or rigged bids or quotations for supplying any distribution transformer to any third person;
- (F) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote or to refrain from bidding or quoting, on any distribution transformer to be sold to any third person;
- (G) Hinder, restrict, limit or prevent any person from purchasing any distribution transformer from any third person (except as may result from any bona fide purchase or sale agreement, without more); or
- (H) Hinder, restrict, limit or prevent any person from selling any distribution transformer to any third person (except as may result from any bona fide purchase or sale agreement, without more).

V

[*Other Practices*]

Each of the consenting defendants is enjoined and restrained from directly or indirectly:

- (A) Communicating to or exchanging with any manufacturer or seller of any distribution transformer any prices applicable to any distribution transformer except with or after the release of such prices to the trade generally, or except in connection with bona fide purchase or sale negotiations;
- (B) Continuing to be a member of or participating in the activities of any association or other organization with knowledge that any of the activities of such association or other organization are being carried on in a manner which, if the association or other organization were a consenting defendant herein, would violate the provisions of this Final Judgment;
- (C) Conditioning the sale to any person of any distribution transformer, as ordinarily sold (except for repair or replacement purposes) by such defendant to other persons in the same commercial class, upon the purchase from such defendant of any other item of electrical equipment; provided, however, in any instance in which such defendant reasonably believes that the use intended to be made of the transformer will expose such defendant to a substantial risk of liability, nothing in this subsection (C) shall be deemed to prohibit such defendant from requiring as a term of sale that the purchaser agree in writing to hold such defendant harmless and to give a reasonably adequate bond (or, at the purchaser's option, to maintain reasonably adequate bond (or, at the

purchaser's option, to maintain reasonably adequate insurance) to secure such agreement insofar as it relates to claims by third persons.

VI

[*Review of Prices—Notice—Affidavits*]

(A) Each of the consenting defendants is ordered and directed, not later than one year following the effective date of this subsection (A),: individually and independently (1) to review and determine its book prices and price rules for distribution transformers based upon lawful considerations, and (2) to announce such prices and price rules determined under (1) above; provided, however, that the price review, determination and announcement referred to above shall not be required with respect to any distribution transformers as to which such defendant, within one year following the effective date of this subsection (A), files with this Court, with a copy sent to the Assistant Attorney General in charge of the Antitrust Division, an affidavit stating that such defendant, prior to the effective date of this subsection (A) and subsequent to May 25, 1960, reviewed, determined and announced the price and price rules of the product in accordance with the requirements of this subsection (A); and provided, further, that nothing contained in this subsection (A) shall prevent any such defendant from deviating from, modifying, or otherwise changing the prices or price rules announced in accordance with this subsection (A).

(B) Each of the consenting defendants is ordered and directed to send a copy of this Final Judgment not later than one hundred and eighty (180) days following the effective date of this subsection (B) to each of the Federal, State and local agencies and any other governmental awarding authorities to which sales, pursuant to bids submitted by such defendant a record of which is maintained in its headquarters' sales office, of any distribution transformer were made by such defendant between January 1, 1958 and May 25, 1960, provided that some or all of the consenting defendants may arrange collectively to send a single such copy to each such purchaser to which such sales were made by one or more of such defendants.

(C) Each of the consenting defendants is ordered and directed for a period of ten (10) years from the effective date of this subsection (C) annually to notify each Federal, State and local governmental agency to which such defendant has, within the preceding year submitted a successful sealed bid for any distribution transformer, that such defendant has been ordered and each such defendant is hereby so orderers, for such period plus one year, to submit a statement in the form set forth in the Appendix hereto with each sealed bid for a distribution transformer submitted to such agency in response to an invitation to bid which requests such a statement.

VII

[*Exceptions*]

Nothing contained in this Final Judgment shall be deemed to prohibit any of the consenting defendants,

(A) Where in order to sell or offer to sell electrical equipment which includes a distribution transformer any person must have an item or items of electrical equipment (i) which it does not itself manufacture or assemble to combine with items of such equipment which it does itself manufacture, assemble, or purchase from others, (ii) or if it does manufacture or assemble such an item, the item is of such a type or quality that it cannot competitively sell or offer to sell its own item, (iii) or where such person could not singly perform the contract contemplated by such sale or offer to sell:

(1) from formulating or submitting, in combination with any person, a bona fide joint bid or quotation, where such joint bid or quotation is denominated as such or known to the purchaser to be such; or

(2) from conducting bona fide negotiations for or entering into any lawful agreement with any person for a bona fide purchase from or sale to each other, provided, that each party to the transaction is free to sell or offer to sell on terms independently determined by it;

(B) Where required directly or indirectly by a governmental agency, from formulating or submitting in combination with any person a bona fide joint bid or quotation which is denominated as such or known to the purchaser to be such;

(C) From entering into, creating, carrying out or implementing by lawful conduct any otherwise lawful contract, agreement, arrangement, understanding, plan or program with any reseller relating to the sale of any distribution transformer purchased from the defendant; or

(D) From lawfully contracting with any person for the supply to or by such person of any distribution transformer embodying the proprietary design of, or specially designed for, the purchaser upon terms prohibiting the supplier from selling equipment embodying such a design to all others (except that the purchaser may authorize sales for repair or replacement purposes).

VIII

[Inspection and Compliance]

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of under the control of such defendant relating to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

A consenting defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such written reports, under oath if it is requested, with respect to any of the matters contained in this Final Judgment as from time to time may be necessary and requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person except a duly authorized representative of the Executive Branch of the United States except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. If any such information is divulged to a duly authorized representative of the Executive Branch, outside the Department of Justice, such information shall be given after notice to the defendant and on the condition that it will not be revealed to any person outside of such representative's Department or Agency except where required by regulation or statute or pursuant to court process.

IX

[Jurisdiction Retained]

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction of or carrying out of this Final Judgment, or for the modification of any of the provisions thereof, and for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance therewith and the punishment of violations thereof.

X

The provisions of this Final Judgment shall become effective upon entry hereof,

APPENDIX

Affidavit

The undersigned hereby certify to their best knowledge and belief that:

The bid to> (name of recipient of bid) dated> has not been prepared by> (name of defendant) in collusion with any other seller of distribution transformers, and

The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of> (name of defendant), to any seller of distribution transformers and will not be communicated to any such seller prior to the official opening of said bid, in violation of the Final Judgment in Civil No. 28106 entered by the United States District Court for the Eastern District of Pennsylvania on> 1962.

Dated:>

.....>

Signature of person responsible for the preparation of the bid

.....>

Signature of person supervising the above person, where feasible