DEPARTMENT OF JUSTICE

Antitrust Division

United States v. City of Stilwell, et al., Civ. No. 96–196 B, Response of the United States to Public Comments Concerning the Proposed Consent Decree

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), the United States publishes below the written comments received on the proposed Consent Decree in *United States* v. *City of Stilwell, et al.*, Civil Action No. 96–196 B, United States District Court for the Eastern District of Oklahoma, together with its response thereto.

Copies of the written comments and the response are available for inspection and copying in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 Seventh Street, NW, Washington, DC 20530 (telephone 202–514–2481) and at the Office of the Clerk of the United States District Court for the Eastern District of Oklahoma, United States Courthouse, 5th and Okmulgee, Muskogee, Oklahoma.

Rebecca P. Dick,

Deputy Director of Operations.

United States' Response To Public Comments

[Case No. CIV 96–196B]

Pursuant to section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), the United States files this response to a public comment regarding the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

This action began on April 25, 1996, when the United States filed a Complaint charging defendants, City of Stilwell and Stilwell Area Development Authority, with violations of the antitrust laws. The Complaint alleges that in the portions of Stilwell annexed into the City since 1975, the defendants violated the antitrust laws by refusing to sell sewer and water service to customers (services for which defendants had monopoly power) unless the customer would also agree to purchase electricity from defendants (service for which defendants faced competition). The effect of this ''all-or-none'' policy was to eliminate retail electric competition in the annexed areas of Stilwell.

After more than two years of litigation, and with trial scheduled to commence several weeks later, defendants agreed to the entry of a court order enjoining them from continuing such practices. Thus, on July 15, 1998, the United States filed a proposed Final Judgment, a Competitive Impact Statement, and a stipulation signed by defendants for entry of the proposed Final Judgment.

The APPA provides for a 60-day public comment period on the proposed Final Judgment. The 60-day comment period commenced on August 3, 1998, and expired on October 2, 1998. The United States received one comment on the proposed Final Judgment, from the National Rural Electric Cooperative Association (''NRECA''), a not-for-profit national service organization representing approximately 100 rural electric cooperatives. As required by 15 U.S.C. 16(b), NRECA's comment is being filed with this response. (Exhibit A).

NRECA ''applauds'' the United States' suit. NRECA observed that the electric industry is becoming more competitive, but warned that practices like that employed by defendants work to deprive consumers of a choice of electric service providers. NRECA encouraged the Department of Justice ''to continue monitoring and challenging these types of anticompetitive actions to ensure that the evolving electric market is in fact more competitive.'' Finally, NRECA ''thank[ed] the government for its actions'' in this case.

NRECA's comment supports the common sense view that enjoining defendants from continuing to engage in the anticompetitive practices at issue is in the public interest.

The proposed Final Judgment provides all the substantive relief requested in the Complaint against defendants, without the substantial expense of a trial. The relief provided in the decree will eliminate the anticompetitive all-or-none policy. Thus, entry of the proposed Final Judgment is in the public interest.

Respectfully submitted,

John R. Read,

Michele B. Cano,

Michael D. Billiel,

United States Department of Justice, Antitrust Division, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–0468.

October 13, 1998.

Roger W. Fones,

Chief; Transportation, Energy and Agriculture Section, Antitrust Division; United States Department of Justice, 325 Seventh Street, Northwest, Suite 500, Washington, D.C. 20530

Re: Proposed Final Judgment and Competitive Impact Statement; *United States* v. *City of Stilwell, OK, et al.;* 63 Fed. Reg. 41,292 (1998)

Dear Mr. Fones: The National Rural Electric cooperative Association (NRECA) is a not-for-profit national service organization representing approximately 100 rural electric cooperatives (RECs) that provide central station electric service to approximately 30 million consumers in 46 states. Nearly all of NRECA's members meet the definition of ''small entity'' under the Small Business Regulatory Enforcement Fairness Act. Of these rural systems, more than 60 are generation and transmission (G&T) cooperatives, which are owned by and serve nearly 750 of the more than 900 distribution cooperatives. Kilowatt-hour sales by RECs amount to 7.4 percent of total electricity sales in the United States, and produce revenues of over $14 billion. RECs owned approximately 32.8 million kilowatts of installed electric capacity, or 4.5 percent of all capacity in the country. RECs own and maintain more than 2 million miles of power lines to serve their consumers (approximately 44 percent of the total miles of power lines operated by all electric utilities in the United States).

In the August 3, 1998 *Federal Register*, the Antitrust division of the United States Department of Justice published a proposed final judgment in *United States of America* v. *City of Stilwell, Oklahoma and Stilwell Area Development Authority*, United States District Court for the Eastern District of Oklahoma Case No. CIV 96–196–B. Proposed Final Judgment and Competitive Impact Statement; *United States* v. *City of Stilwell, OK, et al.*, 63 Fed. Reg. 41,292 (1998).

As explained in the proposed final judgment, the City of Stilwell, Oklahoma and the Stilwell Area Development Authority (''Defendants'') are the sole suppliers of water and sewer service to customers within Stilwell's city limits. Through an all-or-none utility policy, Defendants denied water or sewer service to any customer who did not also purchase electric power from Defendants (''Policy''). In areas of Stilwell annexed after 1961, Defendants compete with Ozarks Rural Electric Cooperative (''Ozarks''), an NRECA member, in selling electric power to new customers. Alleging restraint of trade or commerce, monopolization, and attempts to monopolize, the United States of America sued Defendants for violating section 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2.

In general, the proposed final judgment enjoins Defendants from enforcing the Policy, requires Defendants to include appropriate disclaimers on certain written materials, orders Defendants to maintain an antitrust compliance program, and grants the United States certain enforcement rights. The proposed final judgment, however, expires ten years from the date of entry.

As specified in the August 3, 1998 **Federal Register**, and pursuant to 15 U.S.C.A. § 16 (1997), NRECA comments upon the proposed final judgment.

NRECA applauds the challenge of the Defendants' Policy. Congress enacted federal antitrust laws to prevent actions that thwart competition authorized under state law. Under existing state law, certain Stilwell residents may choose their electrtic power provider. Because Defendants' Policy prevents these Stilwell residents from choosing an electric power provider other than Defendants, Defendants' Policy violates sections 1 and 2 of the Sherman Act.

There is an underlying programmatic concern to NRECA, its members, and all consumers of electricity. The electric utility industry is becoming more competitive. In this atmosphere of heightened competition, the role of antitrust laws as guardians of competition becomes even more critical.

NRECA is concerned that other municipal entities may operate, formally or informally, under all-or-none utility policies similar to Defendants' Policy. Many NRECA members, such as Ozarks, are located near these municipalities, and have the lawful right to provide electric power to qualified municipal residents who choose them. Policies similar to Defendants' Policy deprive these consumers of choosing an electric power provider. NRECA encourages the Department of Justice to continue monitoring and challenging these types of anti-competitive additions to ensure that the evolving electric market is in fact more competitive.

NRECA appreciates the opportunity to comment upon the proposed final judgment, and again thanks the government for its actions regarding Defendants' Policy. If you have any questions regarding these comments, please call me or Tyrus H. Thompson, NRECA Corporate Counsel, at 703–907–5855.

Sincerely,

Wallace F. Tillman,

Chief Counsel.

WFT/ks

Cc: Larry Watkins
Charles Cosby

[FR Doc. 98–28731 Filed 10–26–98; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

International Competition Policy Advisory Committee: Request For Papers

This represents a request for papers by the International Competition Policy Advisory Committee (Advisory Committee). The following is an illustrative list of topics and issues under consideration by the Advisory Committee in its three core areas of focus: multijurisdictional mergers; trade and competition policy interface matters; and enforcement cooperation. The intention of this list is to identify a wide range of key issues where written submissions from U.S. or foreign economists, lawyers, business executives or other experts would be particularly welcome. Interested parties also are invited to submit papers on other topics of their particular expertise if relevant to the three core areas identified above.

In terms of timing, the Advisory Committee intends to conclude its work in the fall of 1999. Thus, we would very much like to have your views before the Advisory Committee by March of 1999. Submissions made after that date also would be considered. However, submissions made prior to March 1999 would be especially timely.

Multijurisdictional Merger Review

A key of objective of the Advisory Committee in this area is to identify the burdens and conflicts stemming from procedural and substantive differences between competition authorities in multijurisdictional merger review, and to devise policy responses that might address these burdens and avoid conflicts while ensuring that antitrust authorities have the tools needed to identify and remedy anticompetitive mergers.

1. A number of explanations have been advanced by experts for the increase in U.S. domestic and cross-border merger activity, among them the following: a robust U.S. economy and stock market; increased globalization; rapid technological change; economic deregulation; and general industry upheaval in particular industries. This paper would explore the principal factors driving international mergers, both outbound and inbound, and provide commercial and economic perspectives on the merger wave of the 1990s. Sectoral, historical and comparative perspectives would be welcome. For example, are there systemic differences between the current wave of translational mergers and earlier periods of robust M&A activity, be that in terms of industries affected, driving factors, concentration levels, or other factors?

2. The Advisory Committee is charged with undertaking a medium-term perspective on international antitrust issues. Accordingly, analysis of likely future developments in international M&M activity could prove instructive, particularly if it identified likely regional, sectoral, industrial and other trends.

3. In the last five years, if your firm has completed an acquisition, merger or joint venture with a U.S. or foreign firm which in turn required antitrust notification to one or more foreign competition authorities, please share your perspectives with respect to the following matters:

Describe the problems, if any, that arose because of underlying differences in oversight by competition authorities at home and abroad. Consider both procedural and substantive factors—e.g., divergent timing and filing requirements, confidentiality concerns, transaction costs, differences in substantive law, agency procedures, politicization, and conflicts in law. If applicable, please also describe how your approach to addressing these issues (in the context of competition policy) differed from your approach to addressing analogous issues caused by differences in oversight in other legal contexts, i.e., securities laws, tax laws, etc.

Please also describe any perceived benefits from differences in oversight, such as the ability to ''arbitrage'' a favorable decision in one jurisdiction vis-a-vis another jurisdiction. Also, what do you see as the positive features of foreign merger regulations, is any—e.g., speed, limited document production, etc.?

4. From your experience as a business executive, lawyer or financial advisor involved in transactions, identify any policy measures that could be undertaken by U.S. antitrust authorities, acting on their own or in cooperation with foreign authorities, that you believe would help to reduce sources of friction, conflict or burden that arise in the context of mergers, joint ventures or acquisitions affecting or requiring antitrust merger notification in more than one jurisdiction. What new arrangements, if any, might be desirable to facilitate resolution of conflicts between U.S. and foreign reviewing authorities?

5. This paper would identify the special problems, if any, arising from (time-consuming) multiple merger review processes faced by firms in rapidly changing, high-tech industries and, if there are such special problems, identify possible solutions.

6. A number of jurisdictions extend the reach of their antitrust merger control laws to transactions that arguably have only a tenuous nexus to the jurisdiction. This paper would explore whether the exercise of extraterritorial jurisdiction to compel antitrust notification of a proposed transaction with no (or de minimis) potential effect(s) in that jurisdiction conflicts with principles of international law. Further, the paper would consider, *inter alia,* whether an ''effects'' test, similar to that applied in Sherman Act cases or whether limitations on notification requirements, such as the exemptions to the Hart-Scott-Rodino Antitrust Improvements Act for certain transactions involving foreign parties, could serve as a model for other jurisdictions.

7. Regarding premerger notification requirements, jurisdictions differ widely with respect to, *inter alia,* jurisdictional thresholds, timing, information requirements and review period. Some argue that these differences hinder cooperation among antitrust