Supreme Court of the United States

In the Matter of:

Docket No. 776

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.

Appellees.

Place Washington, D. C.

Date April 29, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Utah Public Service Commission, Appellant,	:	
v.	:	No. 776
El Paso Natural Gas Co., et al., Appellees.	:	

Washington, D. C.
Tuesday, April 29, 1969.

The above-entitled matter came on for argument at 10:05 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

VERNON B. ROMNEY, Esq.
Attorney General of Utah
Salt Lake City, Utah
(for appellant Utah Public Service Commission)

LEON PAYNE, Esq.
Houston, Texas
(For appellee El Paso Natural Gas Company)

APPEARANCES (continued)

RICHARD B. HOOPER, Esq.
Seattle, Washington
(for appellees Cascade Natural Gas Corporation and seven others)

JOHN F. SONNETT, Esq.
New York City, New York
(for Colorado Interstate -- the purchaser)

IVER E. SKJEIE, Esq.
Deputy Attorney General of California
Sacramento, California
(for California)

ERWIN N. GRISWOLD, Esq.
Solicitor General of the United States
Department of Justice
Washington, D. C.
(for the United States, at the invitation of the Court)

WILLIAM M. BENNETT, Esq.
Kentfield, California
(for El Paso Natural Gas Company, et al.)

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 776, Utah Public Service Commission, Appellant, versus El Paso Natural Gas Company, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Attorney General Romney.

ORAL ARGUMENT OF VERNON B. ROMNEY, ESQ.

ON BEHALF OF APPELLANT

MR. ROMNEY: Mr. Chief Justice, Justices, if it please the Court.

The Utah Public Service Commission was an intervenor in this case and filed a notice of appeal on September 18 of 1969.

At that time Mr. Phil L. Hanson was the Attorney General of the State of Utah. The appeal was actually handled by Daniel L. Berman a Special Assistant to the Attorney General of the State of Utah.

Upon taking office on January 6 of 1969, as the Attorney General of Utah, I began a careful investigation of the merits of prosecuting the appeal or of dismissing it. This I did in association with the Governor of the State of Utah, Cal Rampton.

We eventually determined that it was in the best interest of the State of Utah to move to dismiss the appeal and thereupon took steps in February to perfect the dismissal

and as stated in our short brief, our reasons were, among others, that we felt no responsibility for the litigation of the Clayton Act, and felt this was the responsibility if, of anyone, that is to appeal of the Justice Department and not of us.

We felt for one thing that would be a tremendous amount of expense to our small State, that we did not have on our legal staff experienced experts in the field that it would be necessary for us to employ them and to reproduce the record and perform many activities and employ many people which would take a considerable amount of our money and that it was a very difficult thing to do.

We thought it would take a lot of time and would prevent the termination of this case which has dragged on I understand for a period of about eleven years.

We determined that the issues which were involved in our jurisdictional statement were those which affected in the main other States a good deal more than they did Utah, and it appeared that the other States were not interested in appealing and took no efforts to perfect their appeals.

We felt no obligation to carry out our appeal in the interests of these other States and other people at our own expense, and in a word we were left to go it alone.

We also felt that there was no evidence that another company than Colorado Interstate Gas Company would do a better

job. We felt the Colorado Interstate Gas Company had great experience, solid background and financial stability to do the orkwwell, and we felt that they were eventually we came to feel that we were getting to know them and they would be a good neighbor with us in Utah, would be very helpful to us.

And after we came to the point of determining that our principal real interests which were of an economic nature in this case would be provided for, that is that they would keep their headquarters in Salt Lake City, that they would keep the employees who worked there, all of them on the job, at the same or increased rates of compensation, that indeed they would employ other people than those presently on the payroll in the El Paso Headquarters -- when all of these things were determined we felt that we would benefit materially from having Colorado Interstate Gas Company upheld as the company to take over the Northwest Pipeline System.

Some allegations have been made that this was an unusual thing, that the Governor of the State of Utah signed the motion before the court to dismiss the appeal but this was done only in the interest of time and the fact that the Governor at that time was a member of the Bar of the Supreme Court of the United States and that Mr. Berman determined that he should do it in this manner, there at no time has been any difference of opinion since I first learned of the Governor's attitude toward the case.

He felt it should be dismissed. I did, and the Public Service Commission of the State of Utah joined me in this belief.

Thank you, sir.

MR. CHIEF JUSTICE WARREN: Mr. Payne.

ORAL ARGUMENT OF LEON PAYNE, ESQ.

ON BEHALF OF APPELLEE

MR. PAYNE: Mr. Chief Justice and members of the Court.

I am counsel for the El Paso Natural Gas Company, and have been serving as such since this court's decision in Cascade.

As I understand the questions which are before the court for discussion this morning, they relate to two questions.

One, should the motion of Utah to dismiss the case be granted or denied, and secondly, should Mr. Bennett's motion for another hearing in the case be granted or denied.

I would argue to you that the motion of Utah should be granted. I think that the rules are clear that an appellant who does not wish to follow an appeal has the right to be relieved.

I would be the last to argue to this Court, however, that the granting of the motion to dismiss filed by Utah is a bar to this Court's ability or power to police its own mandates. I am not arguing that.

I think this Court can police its mandates. I think the question presented, therefore, by the second of the two motions I described is not whether the court can police its mandates but whether it should in this case reopen ---

Q Do you have a brief?

A Yes, sir, we have filed a brief in this case.

Q Is it printed?

A It is typewritten, your Honor. We didn't have time to print it.

Q I will get it.

A The question then really should turn on whether this is the kind of case in which the court should reach down into the District Court proceedings and bring them up and reopen them.

I submit to your Honors that this is not a case in which that remedy should be employed. I would like to just point out that the Court has in other cases reached down and policed its mandate. In those cases, however, and I believe I am correct in all cases where the court has written to the subject, the matter has been properly before it on appeal.

I would suggest to you that this matter is before you on the written papers of three individuals. Just as an example I would like to give you three instances of why I don't think this court should reach down and reopen the decision below.

Running throughout the pleadings filed by Messrs. Bennett, Flynn and Stewart, are lurid allegations that El Paso in some way has profited by the failure to divest these properties, which your Honors ordered us to do in U. S. v. El Paso.

And that this means that corporate crime pays, and that in some way El Paso is pocketing $22,000 a day of ill gotten gains. I would like to set this record straight on that.

As all of us know who were in the court below, the lower court, Judge Chilson, made inquiry whether under the divestiture proposed, El Paso stood to gain or lose by its divestiture of the Northwest properties.

We produced an exhibit, Exhibit 65, which was distributed to all counsel and it was placed in the record and supported by sworn testimony.

That exhibit shows that El Paso's total investment in these properties from 1957 on is a matter of some $579 million. When that investment is reduced by the full amount of the investment in West Coast stock and Northwest Production stock which El Paso acquired in the acquisition, but which it is not divesting to the new company here -- when that investment is further reduced by every dollar that El Paso has recouped from its operation of these properties, depreciation, depletion, amortization and importantly, every dollar of income which has been derived from the operation of these properties, that

is the $22,000 a day -- when all of that is subtracted, when the debt that is to be transferred to the new company is subtracted, that El Paso has a net unrecouped investment in these properties of $146 million.

Now stated another way, that means that when we have divested these properties which we have owned and operated for twelve years, we are paid $100 million in the form of stock of the new company, we will have lost over these years of operation of $46 million.

Now someone will be quick to point out that we are retaining the West Coast stock and the Northwest Production stock; both of those are ordered to be divested by the court.

Our investment in those two assets is $75 million. On the market today they will bring approximately $35 million. So that we have an additional $40 million of loss which we face when we divest these two assets that we are retaining.

Therefore, I say to you that this is not a case in which the Supreme Court should be concerned over the questions raised in the pleadings of Messrs. Bennett, Flynn and Stewart, as to whether or not in the Clayton Act divestiture the Court should inquire whether the divesting company has realized a profit or a loss.

This is a question of where the facts are undisputed, that El Paso has realized an enormous loss in the operation and divestiture of these properties.

Two other points. We are told that El Paso has resisted a cash sale. As Mr. Bennett puts it, a clean cash sale without residual complications. Mr. Bennett is correct. We have resisted that form of divestiture since the beginning and the reason is very simple.

We are engaged in a divestiture plan, not El Paso's plan, but the court's plan, in which we will receive $100 million of preferred stock. That exchange of assets for preferred stock will be tax free and we have a ruling from the IRS to that effect.

Were we to follow Mr. Bennett's suggestion and sell the same properties for $100 million of cash, it would generate a tax, unnecessary, in the range of $50 million. That is a residual complication which we consider we are entitled to take into account.

Now, in the minute or so I have left, I would like to comment on the allegations that we have been dilitory in seeking this. El Paso has never fought for delay. El Paso has never taken an appeal to this court. El Paso has never failed to meet a deadline imposed by the court below. We have tried our case, and we stand ready to divest.

Before the court's order was even final, we applied to the Federal Power Commission for the necessary certificates to augment the court's decree. That proceeding has been heard, the record is closed, and the briefs are in, and there has been

no opposition from any party. Messrs. Flynn and Stewart and Bennett were not a party to that proceeding. The Commission stands ready to issue its order authorizing the divestiture of these properties.

El Paso at this moment is ready, able, willing and I may say without any rancor over the last twelve years, we are anxious to divest these properties. We can complete the divestiture in 90 days.

We await only the permission to do so. I strongly urge this court not to reopen these proceedings.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Hooper.

ORAL ARGUMENT OF RICHARD B. HOOPER, ESQ.

ON BEHALF OF APPELLEES
(Cascade Natural Gas Corporation and Seven Others)

MR. HOOPER: Mr. Chief Justice, members of the Court.

I appear here on behalf of the eight intervenors named in the joint motion to affirm the judgment of the District Court or dismiss the appeal of the State of Utah, the brief in support of this motion.

This motion was served upon all parties of record in the lower court proceedings last February, and filed on April 21, after entry of this court's order setting this hearing.

These intervenors are the three State Commissions of Idaho, Oregon and Washington, and in addition the principal gas distributors serving those States.

All gas so distributed and regulated is obtained from El Paso Natural Gas Company. Upon completion of this divestiture it will then be obtained solely from the successful acquirer of El Paso's Pacific Northwest Division.

Differing responsibilities and interests of these several parties have occasioned the full individual participation by all three Commissions and most of these distributors in the District Court proceedings held during 57 days of trial over many months.

These parties conducted cross-examination of witnesses for all nine applicants, and presentation of the affirmative evidence. For the purpose of simplifying the pleadings and record on this appeal, these efforts have been united now by their strong common interest in promptly finalizing a judgment which will end the long period of adversity to which they have been innocently subjected as a result of this litigation.

We urge the granting of Utah's motion to dismiss its appeal. In so doing, I speak not only for the four Commissions and distribution company counsel who are present today, but also for those who were unable to be present in stating to you that these intervenors agree, first, that the District Court's decision fully complies with your mandate in Cascade, et al., versus El Paso.

And, second, that the District Court selected the most highly qualified applicant to achieve the objectives of

such mandate in the shortest possible time.

Like Mr. Payne, we do not question this Court's authority to re-examine its mandate and compliance with it. We do urge, however, that your review be confined to the question whether the mandate has been carried out upon the record before this court.

The allegations of so-called facts contained in the all too recent pleadings of the self-styled protector of the public, an amicus curiae, who have not seen fit to comply with the rules of practice, must not be permitted a status equal to the findings of a judge who was carefully hand-picked, if you will, to hear this case.

The findings based on a record of some 15,000 pages, which was compiled by responsible counsel and their witnesses representing 33 parties, and applicants.

We are highly concerned over the prospect that such findings could be upset by these presumptuous and tardy challenges, founded only upon contentions contained in Utah's jurisdictional statement and as these persons have stated themselves, a glance at a map of the west.

Far from being spokesman for the public, which Mr. Bennett emphatically is not, as to any Pacific Northwest gas consumers, Mr. Bennett seeks to prolong indefinitely a cause whose continuance can only reap further injury on those directly dependent on El Paso's Pacific Northwest Division.

We can only conjecture as to his reasons for this, but it is noteworthy that he did not present evidence on the record below to support his belated contentions. Where was he, we may ask, while the several intervenors and others were busy in court examining into possible conflicts of interest, possible anti-trust implications, the extent of independence from El Paso of the proposed acquirer, and other pertinent factors bearing on the relative qualifications of the applicants.

Likewise, we can only conjecture as to his contentions concerning our position in support of the judgment below. We do state, however, that any implications that these intervenors were bought off are wholly without foundation in fact.

If we had any doubt about the propriety of the lower court's decision we would not in view of our complete dependence upon an urgent need for adequate and increasing gas supplies, which only a fully qualified applicant can furnish us, be here urging the finality of the selection of CIG.

Your guidelines have been met. The District Court selected the most viable, available entity capable of serving the existing and potential customers in the Pacific Northwest and at the same time presenting a practical threat of competition in California.

Conjecture as to some remote possibility of curtailment of localized competition has no place in the present proceedings. An adequate remedy exists when and as such may

in the future be proven, not just surmised by persons not participants in the hearings below.

As a practical matter, no competition has ever been provided or threatened by CIG in the Pacific Northwest or California. Likewise, as a practical matter, CIG by reason of its size, financial condition and experience will pose after acquisition of the Pacific Northwest assets, a threat to the giant triumvirate of El Paso, Pacific Gas Transmission Company and Trans-Western Pipeline Company.

To now select and substitute an embryonic entity in CIG's stead, as these persons suggest, is to delay indefinitely if not to extinguish any hope of practical competition in California.

For any such entity must first develop and build an organization to serve the Pacific Northwest, and to negotiate from a position of strength for additional gas reserves. Such organization and power we submit GIG already possesses.

The needs of our customers were amply documented on the record below. They should not now be further jeopardized. For 14 years the Pacific Northwest has sought a permanent certification for gas, whereas California alreadyy has three permanent certificates.

Without protracted further hearings, which can only be detrimental to the interests of both the Pacific Northwest and California, there can be no assurance contrary to what

Mr. Bennett blithely contends, that as fully qualified an applicant as CIG is can be selected.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Sonnett.

ORAL ARGUMENT OF JOHN F. SONNETT, ESQ.

ON BEHALF OF COLORADO INTERSTATE -- THE PURCHASER

MR. SONNETT: Mr. Chief Justice, if it please the Court, I think I would be remiss in not noting on behalf of the Bar our regret that this -- we are told this is the last session of this court over which you, Mr. Chief Justice, will preside. We shall miss you.

In terms of California Interstate Gas, I have in my main argument several points only to make. The first is, we are not, we have not been a potential competitor.

In 1965 when the Cascade case was before you, in the record in that proceeding, your Honors had proposed findings which had been submitted by the Government to the Trial Court, Judge Ritter.

I would like to summarize briefly two findings which the Government had proposed at that time, over 14 years ago, but which Judge Ritter never passed upon.

The first was proposed Government Finding 60, which said for several months Colorado Interstate has attempted to discuss with El Paso a purchase of the properties to be divested, but has been rebuffed in its attempts.

The second proposed finding, Proposed Finding 61, was that Colorado Interstate would be interested in using the facilities to be divested as the basis for a project to enter and serve the California market.

It is improbable that Colorado INterstate would by itself and without those facilities be in a position to enter the California market.

Now your Honors, what was true in 1965, as the Government stated it in its proposed findings, was true in the long hearing subsequent to your remand, and in the proceedings before Judge Chilson.

Despite the fact that there were some six months of heargins, that there were 26 parties, that two senior executives of Colorado Interstate testified, and were cross-examined at length by everyone, including the Government, there is nothing in the record before this court to cast the slightest doubt on the validity of the proposed finding which the Government itself tendered to Judge Ritter in 1965.

The fact of the matter is that Colorado was not and is not interested nor capable of competing in the California market without the facilities which it proposes here to acquire.

I don't think that your Honors will find a word of evidence in the record suggesting the contrary. Those are certainly the findings of Judge Chilson. They are meticulous findings, as you suggested should be made. And he has made them.

There is nothing that I am aware of in the record to cast the slightest factual doubt about it.

The mounting competition to California, as your Honor's opinions have pointed out, in this industry, is a very expensive and difficult project, because obviously what we are competing for is the incremental demand.

Pursuant to the decision below we are already at work competing. We are already at work competing to the extent that we can for the California market. We have, pursuant to the contract with California, a copy of which we submitted to your Honors, engaged in negotiations with purchasers in California.

We are making market studies. We are conducting feasibility studies. We are making engineering studies. We are trying to get ourselves into a position where we will have assurance of sufficient business in California that would warrant us in acquiring the very great reserves of gas wthat will be required and in spending some $250 million to build a pipeline to get that gas to California.

Now your Honors have in mind, of course, that the California market is a very different thing today from what it was ten years ago. Today California Interstate in attempting to go into competition in California, faces entrenched strong competition from three companies, the smallest of which is twice our size.

But we are doing our best to go ahead. If this

court sees fit to grant the motion of Utah to dismiss its appeal, we shall progress this summer with our work and hopefully be in a position to reach some final conclusion that we are able to go ahead, because we have the business, and we are working on the acquisition of the reserves, and we are fortunately in a position to contemplate a substantial financing program.

So, your Honors, we are hard at work. So far as the suggestion that we might have competed in the present markets of Northwest, there is nothing whatsoever in the record to support that suggestion.

I say to your Honors, we were not and we are not potential competitors with Northwest. We have never in fact been competitors, and the only way that this court is going to get competition, the additional competition which it desired in California was as Judge Chilson found here below, after a full hearing, that we can bring our strength to bear with the facilities of Northwest and take the risk of hundreds of millions of dollars of expense to go into that market.

That we propose to do and we shall if the court will allow us.

MR. CHIEF JUSTICE WARREN: Mr. Skjeie.

ORAL ARGUMENT OF IVER E. SKJEIE, ESQ.

ON BEHALF OF CALIFORNIA

MR. SKJEIE: Mr. Chief Justice, may it please the Court.

The people of the State of California wish to make two points today.

First, what is California's position to the two motions which are pending, and second, what is the basis on which we arrived at that position?

First, as to California's position on the motions, it supports the District Court's divestiture decree. That means that California urges that Utah's motion to dismiss should be granted forthwith, and secondly that Mr. Bennett's motion for a hearing should likewise be acted upon forthwith and denied.

While our use of the word forthwith twice involves a redundancy, this is intentional. For it emphasizes what we believe is a vital facet of this proceeding. As I will amplify shortly, we believe and we are convinced that achievement of this court's objective, restoration of competition for the sale of natural gas in California is a now perhaps or a probably never matter.

If divestiture is not completed in the very immediate future, then it appears to us that the chances of achieving the court's objective and California's objective will be so materially depreciated that such objective will not be possible of achievement by anyone, Colorado Interstate Gas or any of the other applicants in the foreseeable future.

Turning to the basis of California's position, at

the District Court's initial hearing following the Cascade decision, the pretrail conference of June 9, 1967, it was indicated that the would be purchasers were or had been in the oil, gas and pipeline business and could contribute their knowledge and experience and that such would be a real value in the divestiture proceeding.

This, California found to be very true.

Amongst other things, the trial proceedings and the evidence elicited by these purchasers and from them through cross-examination of them, showed several things.

First, it showed that the chances of restoring the divestee to be named to a position where it could and hopefully to our point of view at least would compete in the California market were decreasing as each day passed.

For example, it showed that uncommitted gas supplies were becoming more scarce all of the time. Those recently developed were proven as for example in the Permian Basis, the evidence showed, were being bought up and diverted to Midwestern and Texas and non-California markets.

Secondly, the evidence made clear that for a purchaser to in fact be able to compete under today's conditions would require substantial strength or muscle, for breaking into an established gas market is a major, a very risky and uncertain and an extremely costly venture.

It was in the light of this type of situation that

California sought divestiture of not merely the assets proposed by El Paso, but additional assets and benefits which would have afforded the divestee the strength to be aggressive and to give it incentive to attempt a California project.

When the District Court indicated its tentative choice of CIG, an applicant that we at the outset did not choose because of its lack of past aggressive expansion, and because of the possibility which had been suggested that there might be a new Section 7 violation involved, we objected.

However, because of CIG's strength and other qualifying attributes, and because of the critical need for a strong divestiture now, and not months in the future, we were not close minded when Colorado Interstate Gas offered a written committment to attempt a California project.

At this point, as is indicated in the response, the typewritten response we filed last wee, at pages 5 and 6, we gave thorough detailed and intensive consideration to the course of action which would best fill this court's mandate and further the interests of California at the same time.

Our Attorney General and his two top assistants personally, and I also, had at least nine separate meetings with four of the five largest California gas users, with representatives of our California Public Utilities Commission, and also with three prospective purchasers, including Colorado Interstate Gas.

It was in light of the views expressed in these meetings and our consideration of the fact that divestiture now of a strong divestee was an absolute essential that we proposed and by we I mean the California Attorney General, and spearheaded negotiation of the agreement which is Exhibit A to our response.

And, thereafter, when the agreement was signed by four of the five largest gas users in California, that we withdrew the protective notice of appeal previously filed by us.

I should like to note two things concerning the agreement. First it is patterned on the step program contract which Southern California Edison, an intervenor in the proceedings proposed be accepted in the proceeding by purchasers.

Second, will the exhibit appended to California's response does not itself show it was signed, that is due to the lack of time we had in preparing our brief. It was signed by the four that we have noted.

It was in light of this situation, a situation where the possibility of recreating competition in California was fast disappearing, and with CIG a strong and experienced gas pipline operator willing to undertake the major program involved in trying to come to California, that we dismissed our appeal.

We are extremely concerned that should the District

Court's decree not be sustained and not be implemented now, there will be no chance left to restore competition.

The competition which this court and California both sought and seek.

Accordingly, it is our position and we urge the court to sustain Judge Chilson's decree by granting Utah's motion and denying Mr. Bennett's.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF THE UNITED STATES
AT THE INVITATION OF THE COURT

MR. GRISWOLD: Mr. Chief Justice and may it please the Court.

In response to the Court's invitation, I have filed a memorandum on behalf of the United States in which we say that we have no objection to the dismissal of Utah's appeal.

In developing the reasons which lay behind the position of the United States, it seems to me that it may be helpful to summarize the process by which they were determined.

In this case, the judgment of the District Court was rendered on August 29, 1968. At that time I knew nothing about the case. It is not a part of the responsibility of the Solicitor General to try cases in the District Court. The trial in this case had in fact begun before I had taken public office.

The case was in charge of the anti-trust division which was the appropriate place for it to be handled, in the Department of Justice.

Under the statute and rules, the notice of appeal must be filed within 60 days after the judgment was entered. That expired on October 28, 1968, and on that day a notice of appeal was filed.

I knew nothing about that, made no authorization of it. This is in accordance with regular departmental practice. It is not a situation that I particularly like, but neither I nor my predecessors have been able to change it effectively.

The practice is that a notice of appeal is more or less automatically filed and eventually a recommendation comes to the Solicitor General. If he decides that the appeal should not be taken, then the appeal is not perfected.

Under the statute, the time for docketing the appeal expired 90 days after the judgment was entered. That would have been November 28, 1968. On November 15, 1968, before the ten-day period specified in the rules of this court, and this was the first time that I heard about the case, an application was presented to the Chief Justice to extend the time for docketing the case.

Actually, our application asked for an extention until January 31st, which was based upon the September 3 date when the judgment was entered in the court's records, but the

decision of the Court was on August 29, and the Chief Justice in granting the extension granted it to and including January 26, 1969, which was the 90 days plus 60 days after August 29, and was the maximum extension that could be obtained. There was no authority to grant any further extension.

As a result of this application for an extension, of time, I became aware of the case. I had talks with members of my staff. I read the prior decisions of this Court in the El Paso case, and the Cascade case. I was thoroughly familiar with what might be called the traumatic experience of the Department of Justice in the Cascade case, and knew how carefully this must be handled.

I was aware, too, of the interest of a newspaper columnist in the matter. It would have been an easy way out for me simply to have said, "Oh, well, of course, we must take this appeal."

In due course, there came through from the Anti-Trust Division the recommendations with respect to the case. Mr. Zimmerman, the Assistant Attorney General, was disqualified. The recommendation came from the deputy Assistant Attorney General. It was received in my office on January 3rd, 1969.

By that time I not only was aware of the case, but I was aware of the time problem involved in the case in connection with the change of Administration, which occurred on January 20th.

If we were to file a jurisdictional statement, it had

to be filed by January 26th. If a jurisdictional statement is filed, it not only has to be decided upon, it has to be written and then printed.

It became perfectly apparent that there was no prospect that such a decision could properly be made by the Administration after January 20th. It became apparent to me, and I concluded that the decision would have to be made before January 20th.

The recommendation which came from the Anti-Trust Division was comprehensive. It occupies 31 pages, discusses the case in full, including its difficulties, and the recommendation is "I recommend no direct appeal."

It then went to a member of my staff who had been familiar with the case and who followed it, and who wrote a memorandum on January 9th, which begins somewhat reluctantly, "I concur in the recommendation of anti-trust that we do not appeal this case to the Supreme Court."

On the following day, January 10th, a supplemental memorandum was received from the Deputy Attorney General in which he further supported the recommendation that no appeal be taken, and on the same day there was prepared by the senior member of my staff a recommendation, "I recommend no appeal."

I took all of these memoranda, I studied them carefully, and I found the question a very difficult one. All of my instincts, may I say, from the beginning were that

we should take the appeal. But as I looked into the matter, I found more and more difficulties.

In the process, I assigned the member of my staff who had said somewhat reluctantly I concur in the recommendation for no appeal.

I said, "You make a skeleton, an outline, a summary of what a jurisdictional statement would look like," and he did that and he presented it to me, and it then became apparent to me that our position was an extremely difficult one.

In the process I examined the briefs which the Department of Justice had filed in the District Court in this case, the main brief, the Department said, "It has not been our role in these proceedings or others to nominate a purchaser. It is not our intent now to intrude in any way upon the exercise of the broad discretion of this equity court or to enter upon any area which has traditionally been the court's prerogative. It is within that limitation that we offer the comments which follow."

And then again on page 32 of that brief, the Government had said, "We do not think, however, that CIG should be automatically excluded from consideration here, because it is now a potential competitor for the California market.

If the combination of CIG and the new company were to create a considerably stronger competitor for the California market than either one could possibly be alone, the Court could

validly conclude that such a combination is pro-competitive rather than anti-competitive, and entirely consistent with the mandate of the Supreme Court.

Then later following the preliminary decision of the Court, the Department of Justice had filed a final memorandum in which they took some exception to the fact that the Court's findings were not adequate, but said "While we do not flatly oppose the Court's selection of CIG, we do submit here that the Court has not yet made findings of fact and conclusions of law adequate to support its choice."

Thus, I was confronted with a situation where I would have to ---

Q Who wrote that memorandum, General? Who is that from?

A That is from the Department of Justice, of the United States.

Q The Anti-Trust Division?

A The Anti-Trust Division, yes, Mr. Justice. I was confronted with a situation where I would have to file a jurisdictional statement saying that the District Court erred because it had decided in ways which the Department of Justice did not oppose.

Now, at first I found myself somewhat concerned about this. The more I thought about it, the more it seemed to me that maybe the handling of the case in the District Court

had been entirely sound.

The more I thought about it, the more it seemed to me that the District Court was probably correct in saying that CIG was the only one of the applicants who had any prospect of producing an effective competitor in California out of this situation.

There was further the question whether this wasn't anti-competitive in that there might have been two competitors if Pacific Northwest was transferred to another company, and CIG was left to its own resources.

It seemed tome tolerably clear that there was no prospect that CIG by itself would become a competitor for California. There was little prospect that Pacific Northwest transferred to another new company would become a competitor for California.

There has been reference this morning to the embryonic nature of these other companies. It seemed apparent that all or nearly all of them were speculative ventures which were organized for the purpose of hoping to be able to get these assets and then on them being able to realize enough money to develop some kind of a structure which could effectively operatein the gas area, but these other companies did not have the background or the manpower or the plans to operate and it became more and more apparent that the best prospect of effective competition for gas in California, the most likely

way to carry out the mandate of this court, was that which the District judge had hit upon after the extensive trial, and that it may well have been that the most helpful thing that the Department of Justice could do with respect to the District judge was to raise before him as it did, the varying factors which bore upon the question whether Colorado Interstate or one of the other companies would be the, provide the most effective competition.

There were extensive discussions between me and my associates. The then Attorney General was aware of the situation, and understood that the decision was going to be made before January 20. We were aware that California had not appealed and that the California Gas Companies had filed a motion to dismiss, and the anti-trust interest was essentially in California.

We received strong representation from the States and Public Utility Commissions in the Northwest that it would gravely hamper their interests if there were further delay, and that an appeal was taken.

And finally on the afternoon of Friday, January 17th, and I now find that I not only dated it January 17th, I wrote 5:30 p.m. after it, and I aisnged a slip and wrote a brief memorandum in which i said "No appeal."

I should mention, too, that the Deputy Clerk of the Court had issued an order in December providing that our time

for filing for a motion to dismiss or affirm with respect to any appeal that might be taken should extend for a period of 30 days from the filing of a jurisdictional statement by the United States, or from notice by the United States that their appeal will not be perfected.

Since this action was taken late on Friday afternoon, there was no opportunity to give notice then, Monday was a holiday, and no notice was given, we were rather anxious to keep that 30-day period open as long as possible in order that the new Assistant Attorney General might have an opportunity to consider what position should be taken with respect to a motion to affirm.

There has been some suggestion that a caller in my office on Tuesday morning, January 21st, said that I didn't tell him that we had decided not to take an appeal. He was an appropriate person to be notified. He was not a party or counsel in the case.

I left for Chicago for the meeting of the American Bar Assocation on the afternoon of Tuesday, January 21st, and on January 23rd in accordance with my instructions, Mr. Friedman, the Deputy Solicitor General, sent notice to all counsel in the case that the Government would not perfect its appeal.

We then undertook consideration as to what position we would take with respect to the appeal taken by Utah. I may say that I had not taken Utah's appeal very seriously into

account in determining whether we would perfect our appeal or not. It was plain that Utah had no interest with respect to California. That its interest was a perfectly legitimate public interest but a very narrow one as far as we were concerned.

I felt no obligation to support that.

We worked with the Anti-Trust Division on the draft of a motion which we concluded should be a motion to affirm. This was approved by Mr. McLaren, the new Assistant Attorney General.

In its final draft I approved it and marked it to go to the printer, and it was on that day that the motion to dismiss the Utah appeal was filed.

We understood from the Clerk's office that a motion to affirm would not be received, and we put our draft in our file and did not file it.

When the Court's order of a week ago yesterday was issued, we brought it out and we caused it to be printed without any change and without bringing it down to date. It seemed to me that it was in itself a document of record, so to speak, and we have filed that as an appendix to the response which we have made.

In summary then, my position is that the best prospect, the most likely way to carry out this Court's mandate in the Cascade Gas Case is the one which has been adopted by the District Court in its decision in this case,

allocating these assets to the Colorado Interstate Company. There seems to be a considerable likelihood that this may actually develop important competition with respect to gas in California.

It also seems to me that this was not anti-competitive, that neither Colorado Interstate nor the Pacific Northwest assets in the hands of a new inexperienced company were likely competitors in California.

In my view, the best way to carry out the decision of this court in Cascade is to dismiss the appeal of Utah and let the decision of the District Court go into effect.

Q Mr. Solicitor General, on page 12 of your brief, or your memorandum, you state that the divestiture to CIG creates a strong new competitive force in the California market.

Is that quite accurate? Isn't it more the likelihood or the possibility or the probability? I may have misunderstood Mr. Sonnett's argument.

A You are suggesting, Mr. Justice, that restores is too strong a word?

Q The first full paragraph, the first sentence, page 12, the divestiture, CIG, creates a strong new competitive force for the California market. Isn't that all in futuro?

A Yes, Mr. Justice, that is in futuro, but it is

a force for the ---

Q A year from now CIG may theoretically not be there at all.

A That is perfectly true, Mr. Justice. I cannot guarantee that.

Q So wouldn't it be more accurate to say that it creates a possibility or a probability or a likelihood.

A It creates a strong likelihood of a new competitive force for the California market I think might be more accurate.

Q Yes.

A It seems to me a greater likelihood than any other prospect that was available to the District Court.

MR. CHIEF JUSTICE WARREN: Mr. Bennett.

ORAL ARGUMENT OF WILLIAM M. BENNETT, ESQ.

ON BEHALF OF EL PASO NATURAL GAS COMPANY

MR. BENNETT: Mr. Chief Justice and members of this Court.

I think it would be refreshing and helpful and novel here today to speak for the first time of the facts of the case, the Clayton Act, the Sherman Act, and your decisions and to judge the award in that light and not so much an ad hominem argument.

To understand this case and to know how your mandate has been frustrated, it is necessary to go back to the

beginning which was 1956, when there was the possibility, the reality as you found in El Paso, of competition to California from the Northwest.

Because of that threat of competition, El Paso acquired the common stock of Pacific.

Now, what is relevant to these proceedings today is that there was a meeting between El Paso and the Attorney General of the United States in 1957, in which they were told that there were grave anti-trust consequences in their action. The Securities and Exchange Commission by formal letter inquiry pointed out the anti-trust difficulties.

As if that were not enough, on July 7, 1957, the Attorney General of the United States filed a complaint entitled, "USA versus El Paso," charging that this stock acquisition was in violation of Section 7 of the Clayton Act.

Thereafter on August 22, 1957, the El Paso went to the Power Commission, filed an application there for asset acquisition and approval, seeking to offset the effect of the action in the District Court in Utah.

And all of this began, by the way, with an opinion from counsel which is set forth in a prospectus on file with the Securities and Exchange Commission in 1956, saying in what has to be possibly the monumental error of the decade, "Counsel concludes that while the matter is not entirely free from doubt, it is their opinion that the proposed transaction

is not in violation of the anti-trust laws."

Thereafter, commenced proceedings before the Power Commission in which I participated for approximately eight weeks, and in that proceeding in September of 1958, on behalf of the Attorney General of the State of California, I filed a motion to stay those administrative proceedings, pointing out that it was fraught with danger to the consumers of the West, to the shareholders of El Paso, in the event the District Court should find this transaction violated Section 7 of the Clayton Act, which it did.

I point this out to you today because of the discussion I will make of the remedy I request in light of alleged hardship or lack of notice or surprise on the part of El Paso.

They were on notice as you stated in El Paso almost from the very beginning.

From the determination by the Power Commission that this merger was lawful, there commenced a series of appeals taken by California, myself having the honor to represent that State. In the United States Court of Appeals for the District of Columbua, Solicitor General Lee Rankin supported our cause and told that court in oral argument and in brief that this merger approval by the Power Commission was improper so long as there was a pending charge in the District Court in Utah.

Thereafter came the appeal to this court, in which

the new Solicitor General, Mr. Cox, upheld that FPC approval, and argued against California, but you found that the Federal Power Commission could not approve that merger so long as there was a charge pending in Utah.

Now it is significant to note that Justice Douglas in California versus the Federal Power Commission had this to say, about the approval of this merger by that Administrative Agency.

"There are practical reasons why it should have held its hand until the courts had acted. One is that if the Commission approves a transaction and the courts in the anti-trust suit later hold it to be illegal, an unscrambling is necessary. Thus, a needless waste of time and money may be involved, and also these unscrambling processes often raise complicated and perplexing problems on tax matters and otherwise."

And that is where we are today.

Following that determination in California versus the Power Commission, we tried the matter before Judge Ritter in Utah, who held there was no violation of the Clayton Act. There came then the appeal to thiscourt, and I might add after great pleading and persuasion, to the Department of Justice to perfect its appeal which they finally did, almost, upon a request made on bended knee, so to speak, in that case Justice Douglas pointed out, having found a violation of

Section 7 again "Since appellees have been on notice of the anti-trust charge from almost the beginning, indeed before it El Paso sought Commission approval of the merger, we not only reversed the judgment below but directed the District Court to order divestiture without delay."

We went back to Utah, and we had the proceedings before Judge Ritter in which I participated briefly, and that decree there in my judgment did not comply with your mandate and we came back here in Cascade, and now we are in February of 1967.

In Cascade you said, "It is now nearly three years later and as we shall see, no divestiture in any meaningful sense has been directed."

And you said again, "That mandate in the context of the opinion, plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market."

Following cascade, we went back to Salt Lake City, and ultimately Denver before Judge Chilson. I participated most briefly. I was a member of the Public Utilities Commission of the State of California. My primary responsibility was there, and not my unpaid special counsel role before Judge Chilson.

We had a rash of rate increases in California, and still have, because of certain changes which have occurred in

my native State, and my presence in behalf of my consumers of California was sorely needed there.

The proceedings before Judge Chilson lasted from October of 1967 to March 21, 1968. There were nine applicants for acquisition. The Department of Justice presented no testimony, no witnesses, no showing whatsoever.

It did take a position. Its position was quite clear for the most part. It opposed Colorado Interstate Gas Company as an applicant, and as I have pointed out in my brief, quoting the brief for the Government, it said it would lead to anti-competitive consequences.

In oral argument following the award to CIG, the Department of Justice through Mr. Doherty criticized that award quite clearly. The State of Utah strongly criticized that award in a brief of some 35 pages, in which it details its objections, and the State of California in oral argument before Judge Chilson concurred in the Utah criticism.

I have the transcript here in which the California Attorney General said, "With respect to the written objections filed by Utah, I would like to advise the court that we are convinced that they are well taken and we second it."

Utah's position was quite blunt. They said in writing in that brief and orally, "The award to CIG violates the monopoly laws."

Thereafter in support of those objections made to

Judge Chilson, Utah, the United States of America, and the State of California filed appeals.

California dismissed first, and then the United States, and Utah is asking to dismiss.

Now so far as Utah is concerned, you should bear in mind that Utah in its jurisdictional statement has told you that the questions presented are so substantial as to require plenary consideration, and in the brief itself submitted by Utah, following the argument under that topic entitled the question is substantial, Utah again tells you that questions presented are substantial and are entitled to plenary consideration.

And plenary consideration is opposed to some reconsideration and it means that you have before you under your Rule 15 the complete right to give a complete review and a complete position since Utah has represented to you as a sovereign state that they want a full complete review of the matter below.

That is why they told you that questions are substantial.

Now you should also bear in mind in reviewing Utah's request to dismiss, the consideration for the dismissal of the appeals by Utah. I have appended in the brief I have submitted to you, the contract between the Governor of Utah, its Attorney General, its regulatory Public Service Commission,

and the Colorado Interstate Gas Company.

It is quite plain in stating that the appeal as dismissed in consideration of substantial bank accounts in the State of Utah, a prominent member of the Utah community on the Board of Directors, and a promise to purchase steel from the steel mill of U. S. Steel at Provo, Utah.

I suggest to you that that agreement is void as against public policy. I can't conceive of myself as a California Commissioner entering into this type of contract with El Paso Natural Gas Company.

I submit that the agreement to purchase steel but from one mill is in restraint of trade, and as to the directorship all I can say about that is that there is no discernible benefit to the citizens of Utah so far as that is concerned.

But your Honors, you have before you an appeal by a sovereign state not lightly taken. If there were other reasons for dismissal, we might not be here today, but the clear stated reason advanced by the State of Utah for dismissing is that contract whereby these type of dubious considerations are forthcoming.

I suggest to you that this court is being used so far as Utah is concerned, that review is being sought to be denied you, not for proper public causes but because of a contract of this nature.

If nothing else, because of the language you set

forth in Dixon Yates, this should be condemned for what it is, an abuse of your process, a contract against public policy, and something which should not be tolerated.

You said in Dixon Yates "A democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

So far as the California appeal is concerned, that was dismissed by an agreement between the California utilities and Colorado Interstate Gas Company.

I have read it and it is before you. It is a collection of dubious, illusory, unenforceible promises. We gave up something for nothing. And I might ask this: If the decree of Judge Chilson is so sound, why must it be implemented and why must the public be protected by a contract. Isn't a judgment of the United States District Court adequate so far as that is concerned?

Apparently not.

Now, there is another thought about the California contract. If that contract is a binding contract, we have then an agreement by the major California utilities to buy the next block of gas from one pipeline, one bidder, and one competitor.

And possibly that itself might be void as against

public policy or some kind of an illegal combination or restraint of trade.

Now, so far as the award of Judge Chilson is concerned, it would be very helpful to discuss it in terms of the Clayton Act and the Sherman Act.

What you have is an award to one monopoly of another monopoly. Colorado Interstate Gas Company by law and fact is a regulated natural gas company, a monopoly. Pacific Northwest Pipeline, our new company, is a regulated natural gas company and in law and in fact a monopoly.

This award gives to one monopoly another monopoly, and so far as I am concerned under your cases of the language of Clayton and Sherman, is a per se violation of the monopoly laws. There is no escaping it. It is as though to break up General Motors and possibly the Justice Department by way of example might be looking at them, we were to give General Motors to Chrysler to compete with Ford. Per se that would be wrong.

Or to give Southern Pacific to Union Pacific to compete with Santa Fe. That would be wrong, and so it is here.

Your language in El Paso quite clearly covers the award of Pacific Northwest to CIG, because just as it was wrong to give Pacific Northwest Pipeline Company to El Paso in 1959, so also is it wrong in 1969 to give to Colorado Interstate Gas company, Pacific Northwest Pipeline.

When Judge Ritter announced his plan of divestiture previously, he was quite candid in what he was doing. In speaking of the proposal which he had authorized, he said quite clearly, "You see what this plan proposes is a division of the market, a division of the resources, one area to a new company and another area to El Paso. That is what the root of this plan is."

And you condemned that as being a division of the markets. Now, Judge Chilson has done exactly the same thing, only he has failed to characterize it, but this award gives to the Colorado Interstate Gas Company the Northwest portion of the United States, and it gives to El Paso the Southwest portion of the United States.

It is literally a divison of the market. It cannot stand under any of the cases which this court has decided recently. Under U.S.A. versus El Paso, under Cascade, under Von's Grocery Company. In the Von's Grocery Company, a mere 7 percent of market domination was condemned.

This gives to Colorado Interstate 100 percent of the pipeline capacity to Northwest -- not 7 percent, but 100 percent.

Under the DuPont case, that stock ownership, not 100 percent, was struck down. Here you have 100 percent stock ownership and I suggest to you that under all of your precedents, under Clayton from a literal reading, and under

Sherman itself, this is an unlawful award on its face -- on its face.

Now let us assume that otherwise the award to Colorado Interstate would be valid. That award is still deficient in this respect: You said repeatedly that divestiture should be without delay.

The Colorado plan contains delay, simply because it is not a cash sale. The fact of a cash sale was not remote even to the trial judge because in his findings which are set forth on page 102 of Utah's statement we find the Court saying this: The alternative methods or means of divestiture available to the court are, one, cash sale -- not two or three or four but cash sale. The first thing that occurred to Judge Chilson.

Then he says, "Although a sale of assets to be divested for cash or a transfer of the assets to a new company and the sale of all of the new company common stock for each would effectively accomplish the insulation of El Paso from control of the divested property, El Paso would suffer adverse tax consequences."

Now how familiar that is in these divestiture proceedings, that is what you were told in DuPont. Justice Brennan wasn't persuaded by that, nor was this court. That is what you were told in the Crescent case. That is what you have been told time and time again from Continental on forward.

And as the Solicitor General of the United States said to you in his brief in DuPont, "It is not for the courts to be concerned about the national tax policy. You are not to devise remedies to avoid tax consequences." And really and quite bluntly, what we are talking about in terms of hardship because there has been an appreciation in assets and El Paso just as the rest of us must, must pay a capital gains tax, and the public interest must be deferred to that consideration.

The payment of taxes, onerous as though they may be, are the obligation of all of us, including pipeline corporations. You made it quite plain that where the choice is between hardship and private injury, and the public interest and relief and complete divestiture, you resolve it in favor of the public interest and the tax consequences must be suffered by the private interests, and so it is here.

And that is why I say to this court, since you meant without delay we must view this quite simply. If I am compelled to divest myself o my house and home and my acreage and promptly, the only way in law in our economic system I know to accomplish that is outright sale, not a lien, not a mortgage, and not some type of security incumbrance, but an outright transfer of title for cash consideration.

There is nothing in the laws of the United States or of Texas or the Rocky Mountain States which prohibits or inhibits a sale by a pipeline company of its properties to a

willing third party purchaser, and there are applicants in this case who offered cash, a cash sale.

You were so impressed by the cash sale proposition that in Cascade you mentioned the fact that there were two willing cash buyers. You referred to the fact in cascade that at that time the Department of Justice recommended the advisability of a cash sale, and it seemed to me in that language in Cascade you were telling the lower court, Judge Chilson, to divest promptly and do it by a cash sale.

Your Honors, there is no other way a divestiture may be accomplished without delays, especially this one, after 11 long years, unless it is an outright cash sale.

And Pacific Western in this case, an applicant, offered a cash sale, and Paradox Production properties offered a cash sale. An outright purchase of the equity now and a transfer of the title to the assets immediately. That would be without delay. It is not the plan of Colorado Interstate Gas Company.

Other things must be said so far as Colorado Interstate is concerned. For 40 years they have been in business in the Rocky Mountain area as a pipeline corporation, and never, ever once attempted to compete for the great golden gas market which is California.

It is almost a natural thing so to do in the pipeline business, but never once did Colorado look west to California.

No record whatsoever of competition.

Now, so far as remedy is concerned, your Honors, I have pointed out that the public interest is paramount and the private interest is secondary. And I have emphasized to you that El Paso has known even before formal proceedings going back as far as 1956 and 1957, that there would be a day of reckoning.

The only way in which there can be meaning to the anti-trust laws, the only way the integrity of your mandate may be respected, is by a divestiture at once without delay and so far as I am concerned by a cash sale.

Now, counsel for El Paso presented a case of corporate hardship in terms of the terrible burdens it has had to endure by virtue of acquiring the unlawful assets.

Let me point this out that El Paso has had the income from the Northwest system ever since its date of acquisition. And more than that, El Paso has had the benefit of no competition because of that acquisition.

The divestiture plan of El Paso filed on August 4, 1967, in Tab 13 thereof, points out from their figures that the net income from the Northwest System for the calendar year 1968 is going to be and was $8,092,000. That is $8 million net income by virtue of having violated the Clayton Act.

In addition to that, there is cash flow from

depreciation, depletion and amortization of $10,123,000. Or, in short, a cash flow of $18 million. And that can hardly be described as a penalty for violating the Clayton Act. It is a bonus.

Now there is a certain debt to the bonus. I assume on it they will have to pay Federal income taxes, but other than that it is free and clear.

So I would say to you that since El Paso has known, ever since California versus FPC in 1962, what might occur to it, and I am sure that they read DuPont and all those other cases, you should make the monopoly laws effective by taking the bonus out of violation, and not only should all of the properties go back, all of them without exception, but as well the income from those properties commencing with California versus the Federal Power Commission.

Now, if that seems too harsh, you then at the very least should begin in the year 1964, I believe it is, when in U.S.A. versus El Paso, you pronounced a clear violation of Section 7 of the Clayton Act.

Certainly as of April 6, 1964, El Paso knew from the Supreme Court of the United States that the continued operation of the Northwest Division was in violation of the Clayton Act.

And we must bear in mind that but for the acquisition of Northwest by El Paso, that same income, would be going

to Pacific Northwest Pipeline, insofar as I am concerned in my judgment with that income that pipeline would be in the California Gas market today.

Now, I do not say this lightly. I ask you to view this case, lasting more than a decade, I ask you to view the deliberate, calculated violation by El Paso.

These are not crimes of passion. These are knowing, calculated acts of corporations through officers indulged in pursuant to legal opinion, meetings, authorizations of directors, and all those myriad of detailed steps which must be gone through before a corporation decides to violate the Clayton Act.

If you fail to do something of this nature, then what you are saying is that the Clayton Act is there, and the divestiture is there, but in terms of taking the profit out of law violation we know of no way to do it.

The reference that I made in the brief, to the article in that publication entitled, "Anti-Trust Law and Economics Review" by a Dr. Kenneth G. Elzinga, has a study therein of the unlawful acquisitions over the past three years, pointing out that in each and every one of them there was a purchase in one year for a certain dollar figure.

There was a divestiture three or four years later, and a great increase in property value, and a great increase in profit to the corporation, as well as the unlawful income

in the interim.

Now, if the monopoly laws are to be meaningful, this is the remedy which must be imposed. It is not harsh, particularly in this case, where they have been on notice as you yourself said, almost from the very beginning.

Now, if your Honors please, there is something which must be discussed here about this case and your mandate, and that is the history of it, the frustrations of it, and the delays of it.

When I come here sometimes, it occurs to me that you only see the top of the iceberg and that we are here simply because we filed the proper pleadings, and I come before you, address you and then leave.

But this case represents an abuse of the economic and therefore the political power of the world's first natural gas pipeline company.

The very appeal I took to you in California versus FPC was made below on the60th and last day. Why? Because of the great influence of El Paso in my State, persuading public officials there should be no appeal.

And but for the perseverance we would never have had California versus FPC, and we wouldnever but for that case have had returned to our State $155 million by way of refund.

The same with USA versus El Paso. Again all of the forces they can bear to persuade public officials not to pursue

proper appeals before this or other courts. The appeal which is symbolized in your decision known as Cascade was preceded by a deliberate, public, calculated attempt by the attorney for El Paso to remove me, a public official, from the case.

And as the record before you shows, they almost succeeded. They did succeed in getting Oregon to drop its appeal. Why?

By telling Oregon, no more gas the other side of the Columbia. And so it is with the case here today.

These appeals of the parties were not dropped. So far as I am concerned for any proper considerations, but for agreements which are highly suspect.

They involve not just California, not just Utah and not the West, but the integrity of Government and of this court itself. This court if it drops the Utah appeal, is being used by the parties and the instrument is that suspect agreement.

Now it seems to me that in view of all I have said about the time, the delay, the contracts, the dubious arrangements, that this is one case in which the court should be quite severe in its judgment, and should be quite prompt in ordering divestiture, and should take the profit out of monopoly law biolation by removing from El Paso all of the profits since the decision of this court in U. S. versus El Paso.

Your Honors, I have another 30 minutes. I have completed my argument. If you have questions, I would be happy to answer them, but other than that I feel that I have completed what I have to say here today.

There is one last thing I would like to say, Mr. Chief Justice, then.

I have been here on many occasions for over a decade and I can only speak for myself, and I think my family, but I think I speak for a great, great many other Americans. We are grateful to the Supreme Court of the United States under Chief Justice Warren, and I think our childæen will long remember all you have done for us, and the greatest honor I have had as a lawyer is to have appeared in the time of the Warren Court to address you.

Thank you.

MR. CHIEF JUSTICE WARREN: Do the other counsel exhausted their time?

MR. SONNETT: We had saved some time for rebuttal. I think the Marshall is advised that we had something like 17 minutes but actually I only need several minutes.

MR. CHIEF JUSTICE WARREN: Very well.

MR. SONNETT: If that meets with your Honor's approval.

REBUTTAL ORAL ARGUMENT OF JOHN F. SONNETT, ESQ.

ON BEHALF OF PARTIES SUPPORTING MOTION TO DISMISS

Q What happens in this case, Mr. Sonnett, if a

year from now it turns out that after all the studies that have been made and the surveys have been made, the economic analysis have been made, the search for gas reserves has been made, and Continental decides it is not going to go to California?

A Well, I think, Mr. Justice, that it will be likely a wonderful operation but the patient died. If it is the fact ---

Q Why should we in view of our mandate, why should we take any action on this appeal until we know what is actually going to happen?

A Because the only way that we can compete is the way we are competing. As you pointed out, competition is for the incremental demand.

Q I am not at that point yet. I am thinking about the order to get into California you have to go out and get some gas reserves? Right?

A First we have to go and get some customers. And we are doing that.

Q But you have to get gas reserves, too.

A We have to do that as well.

Q Does the gas reserves that you have, as I understand the District Court, are sufficient to service only the Northwest properties, is that right?

A Well may I give you a little fuller answer, Mr. Justice, to what we have been doing. Let me say in more

detail why I think that since the decision below, we are competing for California in the only effective way competition can occur in this industry.

What have we done?

Q I have read Article 3 of your contract, and it is a best efforts contract.

A Yes, which is all anyone can do, Mr. Justice. That is all anyone can do, and that we have been doing. We have turned all of our resources to work to make a market study in California. It has been done in depth. It has been done intensively, to see whether there is room in that market to buy gas from us three or four years from now, if we are in a position to deliver it.

As you know, and as you have pointed out, in this kind of business, it isn't like selling groceries on the corner grocery store. It is for the incremental demand only that we can compete.

Now, we have dedicated trained, knowledgeable people which is one of the fortunate things about ---

Q I am not imputing motives or anything like that.

A I realize that.

Q I am just saying the cold reality is that a year from now we may end up where we started.

A It is possible. It may be that the competition in California, today, which is much more difficult than it was

ten years ago, is so entrenched that we can't get in there, maybe, but I say if the new company is going to get in there at all, and compete, it will be under our control and with our help because there is no other way it can do it.

That is my point.

We stand ready, assuming we can develop that market so that we know we have got customers for gas we can deliver in three or four years, to go out and get the reserves.

We are negotiating very actively, very actively for reserves right now in competition with others, which if we get them will be ample to supply this market.

But with every day of delay our problem of getting access to sufficient reserves to move into the California market becomes more difficult. The competitive handicap is greater.

Now, if we have reasonable assurances that we have the business, we have the customers, and these people are interested in talking with us about meeting their needs in the future -- not all of them obviously -- not all of them -- but enough to make the project feasible -- and we can get the reserves on which we are currently working very hard on, then ve are planning a pipeline which will cost about $250 million to move this gas to California.

But there is nothing we can do over and beyond what ve are doing. There is nothing anybody else can do. There is

nothing anybody else can do. There is no way to go in and sign up a contract today to deliver gas in three years and guarantee that you can do that until you know you have got the market and you can get the gas and you can finance the pipeline.

And this is a complicated and difficult business in which to move. It is very difficult to compete particularly when you are competing for the incremental demand.

As your Honor knows, what do you do with the reserves in the meantime. You have to pay or take them.

Q I would think you would be making a strong argument to a District Court not to approve a plan at this stage, then.

A Well, unless we have the assurance of the plan, why should we go out and spend very substantial amounts of money to try to make it work.

I believe it was Tetigo that spent $9 million trying to get into California and then dropped it. They couldn't get in.

Now, we are a successful company, but we are not one of the giants. For us to dedicate manpower, financial reserves, engineering talent, and we have been at this for some time, we have got to have some optimism, that if we are capable we will get the rewards that comes.

Colorado is a hard-headed company. They have been interested in acquiring these facilities because they are

convinced it is the only way they can compete in the California market. They have known for years, and the record is abundantly clear, they couldn't do it without these facilities and they will not do it.

It is either do it this way or they can't do it at all. Now, obviously, the new company, Northwest, divested to some new owner who by the way would pay "cash" for say 20 percent of the stock and then try and sell stock to raise the money to do it. There isn't any other contender for these properties who has got the wherewithal, the resources in management, the skills and the experience to do this.

That is why Judge Chilson chose our company, and that is why he thought we would be the most effective entrant. But the commitment, Mr. Justice, to enter into this market runs into the hundreds of millions of dollars.

So that is why we were happy to give California that agreement, in which we outlined the particular program we would follow to try to get as soon as possible to the conclusion that we could do the job.

That is the reason. We couldn't do it any other way. It is impossible for anybody to do it any other way. We can't go out and acquire the reserves before we have the market because the reserves can become surplus and you pay and leave it in the ground or take. That is an enormous financial burden. And the reserves required for this are tremendous.

So we have to go forward in steps. We have to have an assurance of the market, and if we can deliver, and then we have to go out and get the gas to be sure that we can meet that market and then we have to build $250 million pipeline to get the gas to the customers.

That is the kind of competition I think, Mr. Justice, you were talking about. It is already having an impact in the California market, because in the feelings of the California customers, with the present suppliers, they are aware of our program.

And the California customers today are benefiting from our threat to enter the California market in their present negotiations.

It is competition at work in this complicated industry. So I say to your Honor that if there is any way to set up a viable competitor, a new competitor for California, it has got to be this way. Otherwise this court and the lower courts will have labored in vain. There will be a successful operation but thepatient will have died.

Q Where did you say you were preparing to build that $250 million pipeline to?

A From Canada, Mr. Justice, to California, assuming the program is feasible. It is a bold project and we are actively negotiating now to try and get adequate reserves in Canada. I don't want to mention where because we are in

competition and there are two other large companies right now engaged in negotiating for reserves, to the extent that if they get them, obviously we will not have access to them for ours.

Q Was I wrong today, I thought I heard someone say that there had been lines built or would be lines built, pipelines from California to Texas.

A Well, that certainly is not part of our plan of entry.

Q That would be other competitors.

A That is right. That would be other competitors. You see, since the 10 years when this matter was first gone into, when you had one company, you have now got three, and those three companies if I can just take one minute more ---

Q I was interested in that because of sending gas to Texas.

A The three companies who now confront us in the California market would be El Paso. Now El Paso, even after this divestiture, will have five times our revenues and it is twice our size.

The second company confronting us in California is Texas Eastern and Trans-Western. They have over five times our earnings and they are twice our size. They are in the market now.

The third is Pacific Gas and Electric and Pacific

Gas Transmission. They have over four times our revenues, and they are in the market now.

So I say, Mr. Justice, that the market in California now for out of State gas supplies is being supplied by three strong, entrenched companies, and it makes the competition of the incremental demand so much more difficult and so much more expensive to build a pipeline today costs so much more than it cost ten years ago.

I don't know how any new company, any new company can enter that market unless it is a combination of facilities which Northwest has, and money, know-how and desire and determination, which Colorado Interstate has. It is the only way to do it.

Q Is the FPC now allowing pipelines to be built from Texas to California and from California back to Texas?

A I can't give you a complete answer, Mr. Justice. There have been authorized enlargements of the facilities now in California, which have been approved by the Federal Power Commission.

We, of course, have our applications pending for certificates to take over the operation of Northwest, and all the FPC is waiting for there is for this court's disposition of this problem.

And then I believe we shall have very promptly the certificates and be lawfully entitled to operate the Northwest

properties.

Now, we have not filed any application yet.

Q Those properties will take you down to Oregon, but not to California.

A Yes, your Honor. But not to California.

We are not in a position to file an application yet for a new pipeline company because of the two threshold questions.

Can we get enough market and can we get enough of the incremental demand to make the project feasible, and if so, can we get enough gas to supply it, and where is the gas omingcfrom?

We are far enough down the road so that the California Interstate Executives believe it is still feasible to become a worthwhile competitor in the California market, but only by doing it this way.

Otherwise, the program is impossible.

They could not and wouldnot attempt to do it by themselves without the facilities which they propose to acquire here with this court's permission.

Q You stated that you had to build a pipeline from Canada to California, I think you misstated the record a bit didn't you because your pipeline runs down to Oregon now?

A Well, there is a segment, Mr. Justice, if we get

access to the reserves we are now negotiating for. There will be a segment of pipeline that will have to be built in Canada as well as in the United States.

If my recollection is correct, I think the total line of the pipeline involved, the total mileage of the pipeline that would be involved is something like 2,000 miles. It is a considerable pipeline and it will cost $250 million.

To get that kind of financing, obviously we have to have some market and we have got to have some contracts and we have got to have some reserves at hand.

Now may I just make one other observation.

All of the mystery that has been created about the Utah contract by counsel and the California contract, I think I can dismiss very briefly as I think the Court should, when our executives testified in the District Court before Judge Chilson they described what Colorado's policy was generally, and what they would do generally.

They mentioned that it was company policy as it was and is to try and put local men on Boards of Directors, to encourage local participation wherever the pipeline runs, and that they were going to do and that they had done.

The Utah contract which the Attorney General of Utah and the Governor regards as in the local economic interest of Utah most certainly is, but it has no anti-trust significance. Nor was it kept a secret. It was announced by the Governor

publicly.

The other thing is this reference to the so-called secret California agreement by counsel is absurd. In the papers before this Court counsel makes much of the fact that he couldn't find a copy of this so-called secret agreement.

All he had to do was to call us up. It has been on file at the Federal Power Commission for months, and a public record. That is why we appended both of them to our pages. The Utah agreement and the California agreement, so that your Honors could see there was nothing vicious or corrupt or wrongful about either one.

They are perfectly normal and sensible agreements. I am sure that we take as much pride in both of them as California does and Utah do. Their officials are very proud of them and so are we.

I have nothing further, Mr. Chief Justice.

Thank you.

Mr. Chief Justice Warren: Very well.

We will recess.

(Whereupon, at 11:50 a.m. the oral argument in the above-entitled matter was concluded, the Court recessing, to reconvene at 10 a.m. Monday, May 5, 1969.)