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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v. No. 72-402

GENERAL DYNAMICS CORPORATION ET AL.,

Appellees.

Washington, D. C.

December 5, 1973

Pages 1 thru 58

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v.	:	No. 72-402
GENERAL DYNAMICS CORPORATION, ET AL., Appellees.	:	

Washington, D. C.
Wednesday, December 5, 1973

The above-entitled matter came on for argument at 10:38 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; For the Appellant.

REUBEN L. MEDLUND, ESQ., 2900 Prudential Plaza, Chicago, Illinois 60611; For the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-402, United States v. General Dynamics Corporation.

Mr. Friedman, you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF APPELLANT

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

This is a direct appeal from an order of the United States District Court for the Northern District of Illinois which after trial dismissed a government civil antitrust case challenging the condemnation of two large coal companies in Illinois as violating section 7 of the Clayton Act.

As is true in most of these merger cases, the issues relate to the proper definition of the relevant product and geographic markets and, then the final question, whether within those markets the effect of the merger may be substantially to lessen competition.

The two companies involved are the Freeman Coal Company, which in effect is the acquiring company, and the United Electric Coal Companies, which is the acquired company. There was not a direct acquisition of one company by the other, however. The acquisition came about in this fashion:

Since 1942, a firm called Material Service Company,

which was primarily in the building trade material business, owned all of the stock of the Freeman Coal Company. Beginning in 1954, the Material Service Company started to acquire stock of United Electric, the acquired company, and by 1959 it had acquired 34 percent of the stock of United Electric. At that time, the President of Freeman became the chief executive officer of United Electric, and at the same time five new members of the board were appointed to United Electric, four of them being people connected with Freeman and Material Service.

Q In 1959?

MR. FRIEDMAN: That was in 1959.

Q You went a little fast for me.

MR. FRIEDMAN: I'm sorry.

Q Material was the dominant stockholder in Freeman?

MR. FRIEDMAN: Material owned all of Freeman since 1942.

Q Was the sole stockholder of Freeman.

MR. FRIEDMAN: The sole stockholder.

Q And Freeman began acquiring United Electric's stock --

MR. FRIEDMAN: Material Service.

Q Material Service, not Freeman?

MR. FRIEDMAN: That's right, it began acquiring United Electric stock in 1954.

Q And did so during the period between '54 and '59,

at which time it had acquired something over 30 percent?

MR. FRIEDMAN: 34 percent.

Q And at that time the -- you were going to tell us, the officers and directors --

MR. FRIEDMAN: At that time, the President of Freeman became the head of the executive committee of United Electric, and there was a shift in the board of directors, there was a nine-man board, five new members were appointed to the board, four of whom were directly connected with either Material Service or Freeman, that is the company or companies that had control.

Q And the other 66 percent of the stock of United Electric in 1959 was broadly held, or held how?

MR. FRIEDMAN: Medium broadly held. Some of it was held I think by -- I will come to that in a minute as to what happened.

Q All right.

MR. FRIEDMAN: But I want to stress the fact that both of the expert economists in this case, both the government expert and the appellees expert, testified that as a result of these events in 1959, Material Service then obtained control of United Electric.

Now, the next step in this somewhat complicated series of transactions took place a few months later in 1959 when the appellee General Dynamics Corporation acquired all the stock of

Material Service and, as a result of that acquisition, it in turn got 34 percent of the stock of United Electric. General Dynamics then continued to acquire the stock of United Electric and by 1966 --

Q Directly or through Freeman?

MR. FRIEDMAN: I believe directly. I think it --

Q So then Freeman owned 34 percent of the stock and General Dynamics began from zero number of shares and begun building up its ownership?

MR. FRIEDMAN: General Dynamics, of course, indirectly owned all of Freeman through Material Service.

Q But Freeman owned the 34 percent?

MR. FRIEDMAN: Freeman owned the 34 percent, but of course at that point on General Dynamics has complete control of Freeman.

Q I know, but --

Q I thought Material owned 34 percent?

MR. FRIEDMAN: I'm sorry, Material, I'm sorry, Mr. Justice.

Q But not Freeman?

MR. FRIEDMAN: Freeman did not own any of the stock of the -- and it is my understanding that the stock after General Dynamics acquired control of Material Services, it was then General Dynamics that in turn proceeded to acquire more United Electric Stock until in 1966 it had, together with the 34

percent owned by Material Service, roughly two-thirds of the stock of United Electric. At that point in 1966, General Dynamics made a tender offer for the balance of United Electric stock and got all of it, and the following year, in 1967, United Electric became, through a corporate merger, a wholly-owned subsidiary of General Dynamics.

Q Well, when in the government's view was the acquisition then in this case?

MR. FRIEDMAN: We say the acquisition was in 1959, but we say moreover the acquisition continued to be solidifed up until 1967. But we think 1959 was the acquisition and that, as I will develop, is an important factor in connection with the claim --

Q I know it is, and therefore you can't say well it was in '59 and it was also in 1967.

MR. FRIEDMAN: No, we think it was in '59. There is a dispute as to that, but we think in 1959 --

Q The date is quite important, isn't it?

MR. FRIEDMAN: It is, yes, Mr. Justice. And we think in 1959 there was an acquisition because, as a practical matter, as showing what happened, they got control of the company.

Q General Dynamics wasn't there at all.

MR. FRIEDMAN: No, United Electric -- I'm sorry, Material Services got control of United Electric and as a

result of Material Service wholly owning Freeman -- and this in effect at that point resulted in a combination and the kind of acquisition at which section 7 was directed.

Q Now, is there any dispute between the parties to this case (a) as to whether or not there was an acquisition within the meaning of section 7, and (b) as to when that acquisition took place?

MR. FRIEDMAN: I don't believe, Mr. Justice, that they challenged there was an acquisition. I think, I am not certain, they may disagree that the acquisition took place in 1959. I am not sure of that.

Q As I read your brief, you kept giving alternative '59 or 1966, and it seemed to me that the date can be rather critical.

MR. FRIEDMAN: Yes. I think, Mr. Justice, after further study of the case, we would say that the acquisition did take place in 1959.

Q But you think there may not be agreement between you and your brother on that?

MR. FRIEDMAN: I think there may not. Mr. Hedlund will have to answer that question.

Q All right.

Q When did the government file its complaint in this case?

MR. FRIEDMAN: In 1969 -- I'm sorry, 1967, in

September 1967.

Now, there are in the United States four major coal producing areas, and the one that we are concerned with in this case is an area in the Midwest which we refer to as the Eastern Interior Coal Province, a phrase that is derived from descriptions in the U.S. Geological Survey maps. It consists of central and southern Illinois, parts of western Indiana, and western Kentucky. All of the mines of both of these companies are not only located in the province, as I shall refer to it, but in central and southern Illinois.

Both of these companies, Freeman and United Electric, are old and substantial companies. Freeman got its first coal mine in 1922. In the year 1959, it produced about seven million tons, and it had revenues of $32 million. All of Freeman's coal is mined from deep mines. They put shafts down and mine the coal out of the deep ground.

United Electric is even older, it was formed in 1919, and in 1959 it had production of 3.5 million tons, sales of $15 million. United Electric has been an extremely profitable company. It had profits in 1959 of $1.8 million, and it has one of the highest profit margins of any company in the coal business. It, unlike Freeman, is engaged only in strip-mining. It digs a hole, it takes the side off of a mountain and pulls the coal out, without going deep down into the ground with a shaft associated with deep mining.

There have been some rather dramatic changes in the coal industry since World War II. After World War II, the coal industry lost its entire railroad business, which at one point had been its mainstay, to diesel oil. In addition, there was a sharp trend away from the use of coal in household heating and in many industrial uses. And in the seven years from 1947 to 1954, the production of coal in this country dropped sharply, more than a third.

But since 1954, coal has made a substantial comeback as a fuel, due primarily to the tremendous market it has been able to develop with the electric utility interests. And as there has been a great expansion in the production of electric power in the last twenty years or so, so has the production of coal increased, and the result is that by 1967 and 1968, the production was almost back to the post-war 1947 level.

Now, most of the coal that is sold to the electric utilities is sold under long-term contract, usually five to ten years, some of them longer. And, in addition, when a utility is planning to install a large generating station, which is going to call for a substantial amount of coal over the life of the generating station, it insists, quite understandably, that the utility be able to be certain of an adequate supply of coal from the coal company before it will sign the contract. That is, the coal company has to satisfy it that it has adequate reserves.

Now, let me speak briefly of the reserves, because that is a critical issue in the case. At the time of the acquisition in 1959, United Electric had 81 million tons of strip reserves and 27 million tons of deep reserves, a total of slightly more than 100 million tons.

Q All in this area?

MR. FRIEDMAN: All in the State of Illinois, Mr. Justice, all in the State of Illinois. The record shows that since that time, most of these strip reserves have been committed, although they still have what we consider substantial strip reserves at this time. They also, after that time, acquired about 50 million ton in deep reserves which have not been mined.

Now, when we talk of reserves, the description of them, they are always spoken of as being economically minable or economically recoverable. What is meant by that is that they treat as reserves coal which, with the present level of technology and the present price structure of coal, can be taken out of the ground and sold at a profit. Of course, as we know, what may be economically minable today may not be economically minable next year. Techniques, for example, have improved remarkably in strip mining. Coal that twenty years ago was considered far too deep to get out of the ground can now be extracted with new modern machinery.

We are all familiar with the energy crisis today, and

it seems not unreasonable that, as other fossil fuels become scarce, efforts will be made to mine coal thathhitherto has been considered not economically minable. And it may well be that as the price of coal goes up, the reserves that were once considered rather hopeless will suddenly take a new lease on life.

In addition to that, coal people tend to be rather conservative in estimating their reserves, and a former president of the United Electric, Mr. Colby, testified that every strip mine that they openad in fact turned out to have more reserves than they had estimated. That statement is at page 144 of the record.

Now let me just describe briefly the situation within both the Eastern Interior Coal Province and the State of Illinois. And I should add, I will come to it in a few minutes, the government alleged in this case that there were two relevant markets, one was the State of Illinois, the other is what we call the Eastern Interior Coal Province Sales Area, which is an area comprising eight states contiguous to and surrounding the province.

The production of coal in both the province and in the State of Illinois is today highly concentrated. We have set forth at page 6 of our brief a table giving the statistics. I will not repeat them here because there are a lot of statistics. But the fact is that a relatively small number of producers have the major share of coal production in these two areas.

In the same period, from 1957 to 1967 -- let me come back and say these tables we have in the brief also show that from 1957 to 1967, concentration increased.

In the same period, the actual number of producers of coal in the State of Illinois dropped 73 percent, from 144 to 39. Now, it is quite true, as the appellees point out, that many of these coal producers disappeared because they were small producers whose mines were exhausted or who lost their markets. On the other hand, there is an exhibit in the record, at pages 101 to 106, of what we call the exhibit appendices -- there is an eight-volume printed appendix before this Court. The transcript portions and the exhibit portions are separately paginated. And at pages 101 to 106, there is an exhibit showing that 21 or 22 independent coal mines in the province were absorbed through merger from 1905 to 1968.

Now within these two concentrated markets, the province and the State of Illinois, Freeman and United Electric each had significant shares. Again, we have a detailed table at page 58 of our brief giving these figures. Freeman was the second largest coal producer in both the province and the state. It had 7 percent of production in the province and 14 percent in the state. United Electric was the sixth largest in the province, the eighth largest in Illinois. It had 4.5 percent of the production in the province and 8 percent of the production in Illinois.

The record also shows that Freeman and United Electric sell approximately half of their production to common customers, and the major portion of half of their production is sold to the same facilities of the same customers. That is, each of them sells coal to the same plant of the same customer, and the record also shows --

Q These customers being electric utilities primarily?

MR. FRIEDMAN: Mainly, primarily electric utilities, a few heavy industry, there are some cement plants, but mainly electric utilities.

Q Is metallurgical coal used for fuel?

MR. FRIEDMAN: No, it is not, Mr. Justice. United -- let me explain the situation on that. United Electric does not produce any metallurgical coal.

Q What about Freeman?

MR. FRIEDMAN: Freeman produces approximately 8 percent of its product as metallurgical coal. But the major share the overwhelming share of Freeman's production is coal that is used for the same basic purpose as United Electric's, that is as fuel to produce heat, largely boiler fuel for electric utilities.

The record also shows that even at the present time salesmen from both United Electric and Freeman continue to solicit the same customers, and the testimony is that they did

that before the merger as well as after.

In dismissing the government's complaint, the District Court basically made three holdings. First, the District Court said the relevant market in this case is not coal, as the government contended, but a broader category which it described as the energy market. That is, in addition to coal, the District Court said you had to take account of oil, natural gas, and nuclear power.

Secondly, the District Court said that the government's two proposed geographic markets, the Eastern Interior Province Sales Area and the State of Illinois, were, as they described them, unrealistic, and instead the District Court proposed -- suggested there should be ten different geographic markets which the defendants had proposed. We have set them out in this little colored diagram opposite page 48 of our brief. And in this diagram each special color is a single geographic market, according to the District Court.

The way these ten markets were determined is as follows: There are four freight rate districts within the State of Illinois, and under the Interstate Commerce Commission freight regulation, all mines in a single freight district have the same freight rate to a single facility. So the court said we will take each of these separate freight rate districts and treat that as a separate section of the country. But then the District Court did not include in the single freight rate

all utility and non-utility customers. The District Court broke it up and said one market is the utility customers in the freight rate district, another market is the non-utility customers.

The District Court excluded, however, from these four freight rate districts the largest customer of both companies, which is Commonwealth Edison, to which each of them sells approximately 25 percent of its production, and said that the Commonwealth Edison plant constituted a separate geographic market. Those are shown in the little black dots in our map, and, rather interestingly, one of them is in one of the freight rate geographic markets, another one is in the Chicago market, which is the last market, and another one is in the third one, and three of them are not in any market.

And finally the court said that the Chicago Air Pollution Control District, in which there are certain special requirements imposed with respect to avoiding pollution limitations on the kinds of fuels you can burn and so on, that was a separate geographic market.

Then the court went on and said that in any event, if you looked at these markets, and it said even accepting the government's markets the result would be the same, they said there was no adverse effect on competition. The rationale of that decision was basically two- or three-fold.

First, the court said that United reserves are

presently committed, and the government hasn't shown that there were any economically minable strip coal reserves that United could acquire. It pointed out, the court pointed out that United Electric, having always been in the strip-mining business, didn't have the necessary skills, it said, to go into the deep mining business, and therefore you couldn't consider United Electric's deep mines as reflecting any potentiality to engage in meaningful competition in the coal business.

And then the court finally said that it viewed United Electric and Freeman as complimentary rather than competitive. Apparently, when one reads the opinion, the theory seems to be, again, because one is a strip mine firm and the other is a deep coal mine.

Q Well, part of it is the kind of coal they sell.

MR. FRIEDMAN: It is the kind of --

Q And what kind of customers they have?

MR. FRIEDMAN: It is some of that, but it doesn't, the court doesn't say that exactly. What the court says at page 61 of the jurisdictional statement, where the opinion is repeated, what the court says is these companies have been and are now predominantly complimentary in nature. United Electric is a strip-mining company, with no experience in deep mining or the likelihood of acquiring it. Freeman is a deep-mining company with no experience or expertise in strip-mining. And

then he goes on and he says Freeman sells metallurgical coal, United does not and cannot.

Now, again, as I have indicated in my answer to Justice Powell's question, Freeman's sales of metallurgical coal are a very small portion of its output. Freeman sells a by-product known as dust, which is primarily from its production of --

Q What about excluding Commonwealth Edison, none of the sales by United Electric in the two critical years chosen by you would have or could have been competitive with Freeman had the two companies been independent? Now what about that?

MR. FRIEDMAN: We disagree with that.

Q Well, this is a flat finding though, isn't it?

MR. FRIEDMAN: That is a flat finding, but our basic answer --

Q Well, how are we going to -- must we turn that over for you to win?

MR. FRIEDMAN: I don't think so, Mr. Justice. Let me explain --

Q Well, let's assume you took that, let's assume you agreed with the District Court on his competitive, no-competition findings. Everything that he said you agreed with. Wouldn't it almost make irrelevant whatever may be wrong with his product and geographical market?

MR. FRIEDMAN: No, we don't think so. We don't think

so, Mr. Justice, and let me explain the reason why we don't think so. We think that the proper approach in these cases, as this Court has repeatedly said, is to consider the structure of the market, consider the structure of the market to see what happens in a market.

Q I understand that, but some of the things he says in his finding on competition, it wouldn't seem to me to make much difference what the --

MR. FRIEDMAN: Well, I think, Mr. Justice --

Q -- even if you looked at coal as the market, like you suggest, you would still arrive at his conclusion. And even if you used your geographical markets, you would arrive at the same conclusion.

MR. FRIEDMAN: I think, Mr. Justice, he is using -- when he says these sales are not competitive, he uses it in a very, very narrow sense, not as we define competition within the meaning of section 7. What he is saying is that he looks and says here are 20,000 tons shipped to this plant and 30,000 tons shipped to this plant, and these are not competitive because if they had been separate companies obviously the one wouldn't have sold to the other. We think that is not the kind of competition to which the protections of section 7 are restricted.

What we are dealing with here is two large firms, each of which is trying to sell its coal in the area, and that,

it seems to us, is the critical thing and the critical thing about this merger. The vice of this merger, we think, is that this is taken in a concentrated market, where there is an increasing tend toward concentration, and this has resulted in a substantial increase in the concentration, and that we think the teachings of this Court have indicated that is enough, that is enough to make the merger prima facie illegal unless there is some justification presented.

Q Well, let's assume we agreed with you, that the court erred in the product market, that coal is a product market. Would the Court have to get to deal at all with the District Court's views about effect on competition?

MR. FRIEDMAN: Well, the Court could reverse on the market definitions and remand for the District Court to consider the case further in the light of those. We would think, however, since there is a full record before this Court, and since the basic facts on which we base our case are really not disputed, we think it would be appropriate, as the Court has done in many other cases, if it finds there are errors in the definition of the relevant markets to then go on and decide the competitive issue in the case.

And let me address myself a bit to -- let me just say one other thing, if I may. The last statement, at the end of the District Court's opinion, at pages 65 to 66 of the jurisdictional statement, just before the very end of it, he says,

under these circumstances, that all the mining reserves have been sold and United Electric has neither the possibility of acquiring more nor the ability to develop deep coal reserves, under these circumstances continuation of the affiliation between United Electric and Freeman is not adverse to competition nor would divestiture benefit competition even were this court to accept the government's unrealistic product and geographic market definitions.

It seems to us that what the court is saying here is basically the court doesn't think that divestiture relief is appropriate, that divestiture relief would in any way improve competition. That it seems to us is putting the cart very definitely before the horse because before you decide what is an appropriate remedy in the case, you have to decide whether or not the merger violates section 7, whether its effect may be substantially to lessen competition.

Q As I read this record -- I haven't gone through entirely, of course, but I get the impression that we have here in totality a rather large monopoly, a fuel monopoly, oil companies, gas companies owning coal companies and owning uranium companies. Is that right?

MR. FRIEDMAN: Well, there is no --

Q Does that bear upon this problem before us?

MR. FRIEDMAN: I don't think so, Mr. Justice. What we do have I think is that we have the coal business. The coal

business here we think is controlled, there is an oligopolistic type of market. We have a relatively small number of producers that own most of the coal and produce most of the coal. In addition to that, we do have evidence relating to the competition between coal, oil, natural gas, nuclear power, and so on, the different types of fuel.

But there is no claim here that there is any sort of combined monopoly involving different types of energy. Our case here is directed against the situation in the coal industry.

Q That is not affected by the fact that if this, if I read the record correctly, there is a monopoly of oil and gas over coal?

MR. FRIEDMAN: No, no, no. What there is evidence is that in recent years some of the large oil companies have gone into the coal business for --

Q I understand 25 of them have.

MR. FRIEDMAN: I don't know how many, but we know there is a substantial number. Now, we do know, for example, one of the things that I think is significant, the argument has been made here that United Electric, because it is a strip-mining company, couldn't possibly mine any of its deep mines.

In 1958 or 1959, a subsidiary of the Humble Oil Company, which is a very large company, opened a deep mine. Humble Oil Company had never been in the coal mining business at all. It was able to acquire the skills and open a large

deep mine and it expects to produce I think three million tons a year and has entered into a contract to sell this coal to a large utility.

Q As I understand your argument, it runs exactly counter to the suggestions contained in the question of Brother Douglas, because the District Court thought that the relevant market was the energy market, and you said he was quite wrong in that, he should have confined himself to coal alone.

MR. FRIEDMAN: Yes, but I thought -- I'm sorry, perhaps I misunderstood Mr. Justice --

Q I was wondering if that is why the District Court got off on that trail of the energy --

MR. FRIEDMAN: No. I think what the District Court did was, the District Court concluded that because there is obviously competition among these different forms of energy in selling to the utilities, he concluded therefore you should evaluate the impact of this merger in this broader energy market.

Q And you say that was quite erroneous, that the relevant market is coal, period.

MR. FRIEDMAN: That's right -- well, if I may modify that, Mr. Justice, we say that there may be an energy market in some types of mergers, but we say that coal is an alternative market. There is -- I think the teachings of this Court have indicated there is usually no single relevant product

market, there may be product markets, and sub-markets. And we think that coal, under the practical indicia test announced in Brown Shoe, that coal is a relevant sub-market within which to measure the impact of this merger upon competition.

Q You don't deny the existence of an energy market area as such, do you?

MR. FRIEDMAN: No, no, no. And, Mr. Chief Justice, for example, if we had a merger between an oil company, a natural gas company and a coal company, the energy market might be the relevant market. All that we say is that whether or not there is an energy market, there is in addition to that a coal market, and that a coal market is a relevant market within which to determine the effect upon competition of the merger of these two coal companies.

Q And specifically within the geographic market of the Eastern Interior Coal Province?

MR. FRIEDMAN: Coal Province Sales Area and the State of --

Q Which is what, one of five or four provinces?

MR. FRIEDMAN: Well, there are basically four provinces, and we have gone beyond the province to include a slightly broader area which is where the vast majority of coal produced in the provinces -- we say within that and the State of Illinois is the geographic markets, and viewing the relevant market for this case as coal, that within that market this

merger does meet the standards that this Court has developed in a large number of cases to determine prima facie the anti-competitive effect.

Now, the basic answer that was given by the District Court in this case, and is given by our opponents here, is that, well, as a practical matter, United Electric really isn't a viable competitor at all. They say United Electric, as of the time of trial, was about to exhaust its resources. United Electric had almost all of its strip mines committed. United Electric doesn't have the capacity to mine the deep coal and, therefore, they say the disappearance of United Electric through merger could not possibly substantially lessen competition.

This, it seems to us, is basically another version of the traditional failing company defense. In the traditional failing company defense, the company is failing because of its lack of financial resources. It is about to go under economically. Here the claim is that the company is about to go under resourcefully. It doesn't have any resources.

Now, it seems to us that this defense has to be tested by the same standards by which the court has tested the failing company defense. And the reason is it is fundamentally the same claim. It is fundamentally the claim that although it might appear on its face that an acquisition substantially lessens competition because of the change it makes in the

structure of the market; in fact, it really doesn't, because if there hadn't been the merger the acquired company would have disappeared from the market anyhow in a short time, and therefore the fact that it disappears as a result of a merger rather than through the operation of natural economic forces can't be viewed as substantially lessening competition.

We think this argument is falacious for several reasons, the first of which is that this Court has made it clear that the validity of this defense must be tested at the time of the merger, because the question is whether as of the time of the merger the effect may be substantially to lessen competition, and you have to look and see whether the removal of this firm by merger has an adverse competitive effect on the basis of what its position was when it disappeared from the market. And therefore we think that the critical time was as of 1959.

As of 1959, it certainly cannot be said that the condition of this company's resources was so depleted and so hopeless that it couldn't possibly continue for any significant period. At that time, United Electric had substantial reserves of strip coal. There is nothing to indicate that at that time all of those reserves were committed. There is an indication that since that time other firms had acquired strip reserves, but more important than that, it is just impossible at this time on the basis of hindsight fourteen years later to say what United Electric would have done if United Electric had remained

an independent firm, how it would have solved its problems.

We do know, for example, the record shows that another formerly large strip-mining firm, Ayrshire Collieries, since that time, although it had been -- had no deep coal experience, first acquired two small mines, with that experience opened a large mine which has been operating for eleven years. The appellees point out that the mine was spectacularly unsuccessful. It lost money nine of the eleven years. The testimony, however, is not that it lost money because they didn't know how to operate the mine but because the mine was a bad one, the roofing wasn't right, and the man said frankly "we sold the coal for too little money."

It can't fairly be said -- and we also have the experience of Humble going into deep mining. I don't think it can fairly be said now that if United Electric had remained independent it could not possibly either have obtained additional reserves or that it could not have acquired the skills for deep mining. Of course, it has the skills for selling and marketing coal. That is what its business is. It is in the coal business.

Q Mr. Friedman, what did Freeman do between 1959 and the date of trial with respect to the acquisition of additional reserves?

MR. FRIEDMAN: Of strip reserves or deep reserves?

Q Any kind of reserves.

MR. FRIEDMAN: I am not certain, Mr. Justice, but Freeman, of course, had a very large, much greater reserves than United Electric at the time of this acquisition. I would suggest, Mr. Justice, that the whole history of extractive industries in America is that you have a problem if you are in an industry where you are using up your raw materials, you have to go out and acquire additional -- they did around 1959 or 1960, United Electric did acquire this very large deep mine.

And also the testimony is that after 1959, United Electric was willing to acquire more reserves but they only wanted to pay farm prices for them, that is they would buy land with strip reserves at the prices one would ordinarily pay for farm land. Now, we don't know what an independent United Electric would have done. It might have concluded that it was willing to pay more for this land. It might have decided it had to buy it. All that I am suggesting is it -- I don't think it can fairly be said at this point of time that if United Electric had remained independent it would have found no way to solve its problem.

Q Did the total reserves of General Dynamics, that is controlled by General Dynamics through these two subsidiaries, increase substantially between '59 and date of trial?

MR. FRIEDMAN: I understand so. I don't have the exact figures.

Q That would be in the record, I suppose?

MR. FRIEDMAN: I think so. The record is huge and, while I have looked through the 3,500 pages, frankly I haven't been able to check every exhibit. But I am told by my colleague who tried the case that the record does show, and I think it is a fair assumption that somewhere in the 17,000 pages of record there are statistics --

Q The thought underlying my question is that General Dynamics, with its vast resources, was perhaps in a better position to acquire additional reserves than either one of these companies independently w-uld have been. I wondered whether it exercised that economic power that it had.

MR. FRIEDMAN: Well, let me say, Mr. Justice, there is an exhibit in the record that shows that United Electric was a very prosperous company. It kept increasing its profits, it paid substantial dividends to General Dynamics during the period that General Dynamics controlled it. It paid off all of its long-term debts. It might have found it more difficult than General Dynamics to acquire coal, but again we don't know. We just can't say. And since section 7 is dealing with probabilities, not with certainties, but probabilities, it condemns mergers where the effect may be substantially to lessen competition.

Now, let me just say one other thing with respect to this failing company or failing resources defense. This Court, in both the Citizen Publishing case and in the newspaper case,

the comics, Greater Buffalo Press, has said that, among other things, for this defense to be available you have to show that the firm to whom the property was sold was the only available purchaser. There is nothing in this record to show that United Electric could have sold its property or dispose of its property only to Freeman or Material Service.

The initiative for this transaction did not come from United Electric. United Electric, according to the record, has nothing to show that it approached Material Service and said we are in trouble, will you take us on. To the contrary, the initiative came from Material Service which looked and saw this as an attractive company and it frankly said it was attractive because it recognized that its resources were dwindling, Freeman had large resources, and therefore it would seem like an attractive opportunity for it to combine its resources with this company.

And nor is there any indication in this record that United Electric made other attempts to solve its problem, such as seeing if some way couldn't be worked out to get this coal, this deep coal out of the ground. And we think that the appellees have not, have not made the kind of showing that this Court has said is necessary before a failing company or failing resources defense can be sustained.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Hedlund?

ORAL ARGUMENT OF REUBEN L. HEDLUND, ESQ.,

ON BEHALF OF THE APPELLEES

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

The government lost this case below not because of the legal issues that they would try to raise here but because of the controlling facts in issue. As I will develop in my argument, these were head-on controversies which Chief Judge Robson, as the trier of fact, decided against the government on the basis of a meticulous two-year review of all of the evidence in this lengthy trial record. Thus, it is our position, contrary to that of my distinguished opponent, that the real issue before this Court on appeal is whether these findings were clearly erroneous.

There are five factual determinations below which I particularly --

Q Was there a finding that this merger would not have an adverse effect on competition, is subject to that clearly erroneous --

MR. HEDLUND: I think that the facts which support that legal conclusion are --

Q So your answer is no?

MR. HEDLUND: My answer to that is no.

There are five controlling factual determinations

below which I particularly want to list before focusing on the evidentiary support and implications. As to the central facts found against the government's case, these included, first, the fact that the acquired company, United Electric, is dead competitively in all of the markets alleged, including those urged by the government, and it cannot be resurrected.

Second, it was found that United Electric and Freeman would not and could not compete with each other to any substantial degree, and that was a fact, whatever the lines of commerce and whatever the sections of the country chosen.

Third, it was found that the combination had been in effect since 1959, and the evidence was that it had not adversely affected competition, however that competition was defined.

Fourth, it was found that present in the markets served by United Electric-Freeman were large, sophisticated buyers, wielding substantial bargaining power, and practiced in the ability of playing one coal company against the other and coal itself against alternative forms of energy. This fact spoke convincingly in explanation of why is the government virtually admitted and, as the court found below, there had been abundant competition in the Midwest coal industry in the past which was certain to continue. Moreover, the fact that purchasers of coal and other fuels were made by powerful sophisticated buyers placed the merger in a totally different factual context than that present in other section 7 cases

before this Court, most notably Von's Grocery, Pabst, and Philadelphia National Bank.

Fifth, based on a virtual and unprecedented census in this record of the very consumers on whose behalf this action was purportedly brought, including carefully reasoned testimony from buyers of more than one-half of all the coal produced in the Midwest, Chief Judge Robson found that, quoting from page 65a of the jurisdictional statement, "Evidence from numerous knowledgeable industry representatives, including competitors and customers of United Electric and Freeman, confirms the defendant's contention that the challenged combination has not led and is not likely to lead to a substantial lessening of competition."

In developing these now, and turning to the facts --

Q One of the findings that you have just reviewed was that the acquisition took place in 1959, and you accept that, I assume?

MR. HEDLUND: Yes, Mr. Justice. In fact, that was our position at trial. At trial the government took a contrary position.

Q But now the government agrees with you?

MR. HEDLUND: Now the government agrees with us.

Q So my earlier questions are red herring, I mean there is no dispute about that.

MR. HEDLUND: They have been answered, Mr. Justice.

Q Is there any indication why, if this had the adverse effect on competition, the government waited eight years after the acquisition to bring the action?

MR. HEDLUND: There is no explanation of that in the record at all, Mr. Justice Rehnquist, and which brings up a point that we have made in our brief, that section 7 cases and section 7 itself was designed to deal with insipient mergers, with a merger whose anticompetitive effect was ripening. This factual situation, far from ripening into an anticompetitive effect, first of all it never had one and, secondly, the combination is in effect over at this point.

In turning to the facts, I respectfully direct the Court's attention to the proposed findings filed by defendants in the trial court, and particularly the numerous citations to the record that appear therein. These proposed findings are at pages 880 to 1016 of the joint appendix and are a virtual encyclopedia of the facts and the evidence in this case.

Now, among the most compelling of the central determinations made below is that United Electric is just not a competitive factor in any of the markets alleged, including those suggested by the government, and it cannot become one. And while this was one of the most hotly disputed issues at trial, the trial court's findings on United Electric's terminal condition are no longer seriously challenged by the government in this appeal.

I will say that I think that since the briefs and Mr. Friedman's argument today that perhaps they have gone back to that. But in any event, as the court below found, United Electric was and is a competitively moribund Illinois coal producer which by the close of this current year will be operating only two strip mines of the six it had when the acquisition took place fourteen years ago. Virtually all of United Electric's minable coal reserves have been sold pursuant to long-term contracts with utilities and it has no realistic hope of obtaining additional reserves to serve any of the markets alleged by the parties to this litigation.

Precisely to this point was the trial testimony of A. H. Davis, President of Central Illinois Light Company. When asked by the government on cross-examination whether he was in any position to say that United Electric-Freeman combination would have no effect on his company, he responded as follows -- this is at page 1213 of the joint appendix: "Well, we have studied the United Electric reserves, Mr. Sims, and we just can't see where United Electric has the reserves to be a factor in the coal business as far as we are concerned."

United Electric is in fact a company that has been in liquidation for a goodly number of years, and that process cannot be reversed. It was in anticipation of this that led the company in the 1960's -- I'm sorry, in the 1950's unsuccessfully, as the court noted below -- and that is at page 8a of

the jurisdictional statement -- to seek affiliation with other coal producers. And when Freeman obtained control of United Electric in 1959, it found a company with only a short-term supply of minable reserves.

Irrefutable evidence of this is contained in a lengthy memorandum by the company's land manager, United Electric's land manager, some twenty years ago, in November 1955, four years before the control took place. This appears in the appendix of exhibits, at page 1646. In this memorandum, Tom Lattimer, in a desperate plea for United Electric to improve its coal reserve position, notes that "We had during the years examined something over 200 coal fields. Of those, we have taken up only seven. Some of the best were dropped without going into." Lattimer further observes that "Practically all of our competitors have a far better organization for prospecting than we." The memo ends with the following -- again this is 1955: "I would like to discuss the entire problem at length with you some place where we can have plenty of time to go over it thoroughly, as I am afraid we are not building up properly the basis upon which our future lies."

Now, during his deposition, the company's former chief executive officer, who retired shortly after Freeman took control, defended United's reserve policy under his pre-merger administration on the basis that the company had other uses for its money and the company had lost half its business to

gas and oil. That appears in the record at page 145.

Now, Mr. Lattimer's prediction of some two years ago unfortunately came true in spades, notwithstanding the vigorous but unsuccessful efforts of Freeman which, contrary to Mr. Friedman's argument, are documented over and over again in this record, Freeman's and General Dynamics' attempts to reverse United Electric's liquidating position. United Electric's reserve position was discussed time and again at board meetings, commencing with control by Freeman. That is in the record.

United Electric's Vice President for Operations testified that he had an open book, an open checkbook to acquire reserves. The company's former President at trial testified that he put no restrictions on the company in acquiring reserves as long as they were black.

So compelling was this evidence that even the government stated at trial "that after 1959 UEC's management sought to acquire economically recoverable reserves." My distinguished opponent would try to walk away from that concession now, saying well that is talking not about the future. But the fact is that the question of future reserve prospects is one best committed, as it was in this case, to expert testimony, industry knowledge, and not lay speculation or, what we submit is an incredible plea for judicial notice, contained in the government's brief in chief.

Finally, on United Electric's inability to regain its

lost --

Q It is an incredible plea for judicial notice?

MR. HEDLUND: Yes.

Q And what was it he asked to take judicial notice of --

MR. HEDLUND: That United Electric will acquire additional reserves in the future. That is what the plea for judicial notice is, Your Honor.

Q I see.

MR. HEDLUND: Finally, on United Electric's inability to retain its lost competitive position in the future --

Q Mr. Hedlund, on this record isn't there some indications that estimates of future reserves were quite far of the mark when they were made just relatively recently?

MR. HEDLUND: To the contrary, Mr. Chief Justice, I think the record is the other way. While Mr. Kolbe did testify that the company always -- that their mines ended up having more coal than they had thought at the outset, the fact is that we have the Mary Moore Mine of United Electric, that closed two years earlier than anticipated. We now have the Banner Mine of United Electric that is closing this year, three years earlier than anticipated.

Q The point that I was driving at, I thought this record indicated that earlier estimates proved to be too optimistic --

MR. HEDLUND: Oh, yes.

Q -- that reserves ran out much sooner than they thought.

MR. HEDLUND: That is correct. I'm sorry, Mr. Chief Justice, I misunderstood your question. Yes, that is correct.

Finally, on United Electric's inability to regain its lost competitive position in the future, we need only observe that this was confirmed in the record by Paul Weir Company, one of the world's leading mining engineering consulting firms, and one, I might add, who is frequently used by the federal government itself, by the head of the Illinois Geological Survey, by an experienced independent geologist whose life work had been acquiring coal fields for producers, and by other knowledgeable industry witnesses.

As Frank Nugent, President of United-Freeman, put it in his deposition by the government -- and I think this really sums it up: "Let me answer it this way, Mr. Cusack, and maybe it will save some time. The people who are in the business knowledgeable, as I said before, such as Mr. Kelce, Mr. Mullins and Norman Kelb, are fully familiar with the strip acreage that is available in this state, and there is not any necessity for any conversation between me and people in the business as to whether there are strip reserves available. The question is not debatable. We know that they are not there, so there just isn't anything to discuss. That goes down to cub

engineers who have just been in the business a couple of years. There is not a utility man in the state, a knowledgeable utility man in the state who does not know that the strip reserves are not available. There is not a salesman selling shovels and equipment who does not know that the reserves are not available. They have a keen interest in it. The Caterpillar Tractor Company are knowledgeable in that area. They know the reserves are not available. Their sales programs are directed elsewhere because the reserves are not here. This is not a question that is debatable among coal people, it is an accepted fact that reserves are not here." That testimony appears at page 62 of the record.

Q Well, I gather one of your arguments must be that in terms of United's condition in 1959, anybody, no matter who the acquirer was, could have acquired United without any damaging effect on competition because of its position in the market, that it was just too worn out a company, to ineffective competitively to be a factor in a section 7 case.

MR. HEDLUND: That would be my position, Mr. Justice White, but I don't believe I need go that far because in the context of this case you have the lack of competition between Freeman and United Electric.

Q Well, would you say -- did Freeman get any customers through United?

MR. HEDLUND: No.

Q Did they make some joint bids?

MR. HEDLUND: No.

Q Did Freeman help United carry out some of its contracts?

MR. HEDLUND: There were four instances -- and I believe these are mentioned in our brief -- where United Electric was able to enter into long-term contracts. This took place in 1966 or so -- able to enter into long-term contracts because at the tail end of the twenty-year period involved, Freeman was willing to guarantee that there would be coal there for the utility. In other words --

Q Well, what did that do to other competitors?

MR. HEDLUND: To competitors of Freeman, it did nothing. It has to be looked at, it seems to me, from the utility's standpoint.

Q Well, what did it do to competition, to other competitors, one or the other, who might want to get that utility customer?

MR. HEDLUND: It permitted United Electric to provide more vigorous competition against the coal companies with whom they were competing.

Q Because of the union with Freeman?

MR. HEDLUND: That is correct.

Beyond United Electric's terminal condition, whether viewed in 1959 and 1967 or at any other time, a second central

finding of the decision below on the basis of all the evidence was that, contrary to the government's allegations, United Electric and Freeman would not and could not compete with each other to any substantial degree. This salient fact, one unquestionably committed to the province of the trier of fact and subsequently determined by Chief Judge Robson from all the evidence is inescapable, as the court below recognized even under the government's market definitions.

Prior to trial, the government admitted in its answers to interrogatories that it could not name any customer of either United Electric or Freeman who had been or would be deprived of actual potential competition because of the combination. Their answers to interrogatories appear at page 305 and 318 of the joint appendix.

At trial, however, the government relied upon charts showing shipments to purported common customers of United Electric and Freeman in its attempt to find actual and potential competition between them. However, based on the evidence from the very customers involved on these charts, the testimony and the testimony of the government's own economist and the testimony of defendant's executives, the government's charts were totally discredited and the information shown thereon was demonstrated to be flat wrong.

Many of the shipments weren't even to the same plant, and others were of non-competing products, albeit to the same

plant. To illustrate, Freeman shipped Inland Steel metallurgical coal for making steel, while United Electric shipped Inland steam coal for power generation. Others were unique situations shown at trial to be non-competitive. Take TVA, for example. United Electric's shipments to TVA involved a situation where adverse river conditions precluded it from making its normal shipments. TVA's coal purchaser testified at trial that United Electric was not a potential supplier of TVA. The government's economist agreed, the government's own economist. As he put it -- and this is at 1694 of the record -- "The way the thing occurred in the record, I would not say that that particular shipment represented competition." Executives from other consumers listed on the government's charts similarly denied that both United Electric and Freeman could have competed for their business.

In view of the simplicity of the proposition involved, the almost unlimited scope of pretrial discovery permitted the government, the eleven-year period that the combination had been in effect by the time of trial, and the fact that the court had before it the testimony of purchasers of more than one-half of the coal produced in the Midwest, there can logically be, we submit, one reason why the government failed in its attempt to show that United Electric and Freeman were substantial potential competitors, and that reason is simply because they were not. And this was because of the different

locations of the mines, the different modes and costs of transportation available to each, and because of the varying quality characteristics of their respective coals.

And, we repeat, those were the facts, whatever the markets chosen, and specifically even if the market definition issues in the litigation had been resolved the way the government wanted them to be.

Another central finding below was that since 1959, the year when Freeman obtained control of United Electric, a fact, by the way, brought to the attention of the Antitrust Division at the time, which took no action, the court found that since 1959 the United Electric-Freeman combination had not adversely affected competition, whether the markets used for that analysis were those of the government or the defendants. That finding was based upon an analysis made by the court of the structure of the coal industry and its markets, upon the testimony of industry representatives as well as experts, and upon the government's own admissions. This showed, first, as I have discussed, that United Electric and Freeman would not and could not compete to any substantial degree.

Beyond that, the trial court specifically found that the record was not only "devoid of any signs of anticompetitive performance and behavior in the coal industry, but rather the past performance of the industry suggests there has been intense competition among coal producers." In fact, the

government, in response to defendants' proposed findings below, was forced to concede that it -- and this is the government's own words -- "It has never asserted during the twenty years preceding 1967 that the coal industry was not competitive." The government acknowledged, moreover, that the mine mouth price of coal in 1968 was less than at the beginning of the post-war period, despite general inflation in wholesale prices, and that there had been marked improvements in coal technology, techniques and productivity.

The trial court specifically found "from all the evidence presented at trial, it appears that coal producers will be under continuing pressure to reduce costs and keep prices low if they are to continue to serve their last remaining large market for steam coal." Among the factors which made this clear were the sophistication and market power of coal buyers and the presence of a substantial number of viable coal competitors.

In addition, the court found particularly significant the wealth of evidence dealing with the tremendous competitive pressure placed on coal producers from suppliers of alternative fuels. This pressure was expected to intensify in the future, particularly in light of the ever increasing environmental considerations.

Commonwealth Edison's spokesman at trial summed up the situation as follows, from page 1414 of the record: "Well,

as far as Commonwealth Edison is concerned, we have sort of put our eggs in the nuclear basket. We believe that nuclear power is the best way to provide baseload electric generation, and we intend to move in this direction."

Indeed, a representative of the Atomic Energy Commission testified that in the long term the most economical way to generate electricity would be a combination of nuclear and pump storage facilities, together with gas turbine peaking units.

Moreover, even with respect to the government's coal production statistics, which we contend were improperly aggregated and thus meaningless, and obscured the fact that United Electric and Freeman were predominantly complimentary rather than competitive companies. It was shown that on the government's statistics that excluding Peabody, the production shares of the two, four and ten largest producers since 1959 remained stable or declined. This is shown at pages 1276 and 1277 of the appendix sub-exhibits.

The effect that Peabody's increase in size has had on the midwestern coal industry has, of course, been cured to the government's satisfaction by virtue of the divestiture consent decree it obtained against Peabody in 1967 and deconcentration has been further advanced by the entry of Humble Oil into coal production, the establishment of the Midland operation divested by Peabody and the continued decline of the United-Freeman position.

It should be noted in this latter regard that the evidence was that United Electric-Freeman combination accounted for less of the midwest coal production in 1967 than it did in 1959. In fact, as the court found below, the combination had experienced more than a 10 percent decrease in its percentage of such production since 1959. The court anticipated that this would continue to drop, as United Electric's mines closed, as their reserves played out. That these predictions have become true is a matter of which we submit this Court can take judicial notice by examining the post-trial publications of the State of Illinois and the United States Bureau of Mines. These show that United Electric's/Freeman's combined coal production for 1972 was almost four million tons less than the 14 million ton total in 1967, and that its share of midwest production has dropped by more than a third.

The final factual finding upon which I wish to focus was the testimony of knowledgeable industry witnesses in this case. Notwithstanding a diligent government search before trial for competitors or customers of the combination, whose testimony would tend to prove the alleged adverse effect on competition, the government was unable to find a single member of the class for whose benefit this action was purportedly brought to add any substance to its claims.

The defendants, however, did adduce evidence from a broad cross-section of both producers and consumers to the

effect that the combination had not had and would not have an adverse effect on competition. This came from large, medium-size and small public utilities, a rural electric cooperative, a federal electric authority, a retail coal dealer, and several industrial concerns, as well as large and small coal producers. And the significant thing here about this testimony of consumers and producers alike is that it came from knowledgeable witnesses who gave concrete reasons for their conclusions, as was required by this Court's admonition in Philadelphia National Bank.

The most dramatic example, I submit, of this took place during the government's lone attempt to establish that these witnesses were indifferent to and unsophisticated about the competitive implications of mergers of coal producers. This occurred during the cross-examination by the government of Davis, President of Central Illinois Light Company. This elicited the fact that Mr. Davis had in the past taken the initiative in complaining to the Antitrust Division when his evaluation led him to conclude that another merger between coal producers did pose a threat to competition.

The question was asked of Mr. Davis, "Would you be concerned, Mr. Davis, as President of CILCO, if UEC and Freeman merge with Truax-Traer?"

"As your Department undoubtedly knows," Mr. Davis testified, "we made a complaint several years ago about the merger of two coal companies in our area, and you have reached

a satisfactory settlement, I take it, with those two companies, so anything that we feel reduces the amount of competition in our area, we are certainly not that bashful about making a complaint. If Truax-Traer were to merge with, say, Peabody in our area, we'd make another complaint."

"Well, why would that bother you, Mr. Davis," the government asked.

Mr. Davis said, "It's a reduction of competition in our area."

The government's first response to these determinations --

Q Would you have the page in the transcript where that --

MR. HEDLUND: I'm sorry, Mr. Chief Justice, yes, that is page 1222-23 in the --

Q Well, it is page 45 of your brief?

MR. HEDLUND: That is correct.

The government's first response to these determinations is that Judge Robson somehow did not make the proper structural analysis dictated by the cases. It seems to me that the trouble with that argument is two-fold. First of all, it does not avoid the hard reality of the specific finding by the trial court that the combination would not have an adverse effect on competition even if the government's product and geographic market definitions were accepted in full.

The second trouble is that the trial court did in fact make the structural analysis which the government claims is missing, and did so in conformity with the cases. Almost one-third of the opinion below is devoted to such considerations as the rankings of the defendants in both coal production and coal reserves, the background of the coal industry, the changes in the demand for coal, the emergence of the utilities as the principal market for coal, the changes that have taken place in production techniques, the way in which coal producers competed for their principal market utilities, and indeed one section of the opinion is even titled "Changes in the Structure of the Coal Industry."

Moreover, with the full point of Judge Robson's opinion, he declares that coal is the subject of the litigation. Now, what the government really complains about, we submit, is that the court refused to decide the case solely on the numbers the government had put up on their charts. Now, even if these numbers had been something more than improperly aggregated coal production statistics, which they were decidedly not, it seems to us that writing numbers on the blackboard is not enough in the present case, where the issue is not whether the government has not made out a prima facie case, but whether on the basis of all the evidence, after a full trial, a likely adverse effect on competition has been shown.

Even where the statistical data in evidence is not

misleading, this Court has stressed in Brown Shoe that its importance should not obscure, that only a further examination of the particular market, its structure, history, probable future can provide the appropriate setting for judging the probable anticompetitive effect of the merger.

Square to the point here is the testimony at trial of the government's own economist, James Folsom. Now, during the litigation, it came to our attention that while the Antitrust Division was trying to split up United Electric and Freeman, they were acting affirmatively at the same time to approve a merger of two other Illinois coal producers that would have been structurally indistinguishable from United Electric-Freeman with the resulting combination in either situation constituting the second largest coal producer in Illinois and in the Midwest.

Now, at trial I submitted to Mr. Folsom a hypothetical based solely upon the structural numbers of the merger which the government said it would approve. I asked him to assume that the two companies were viable, and I asked him whether he would conclude on the basis of those facts that the merger posed a threat to competition. Mr. Folsom was not prepared to rest an appraisal on the numbers alone. As he put it, "I would still want more information, I would still want to look further."

So in this case, if the government's numbers did

anything at all, and we say they didn't in view of, among other things, their improper aggregation, the fact that production data rather than reserve data was used, and the fact that even then they included non-competing forms of coal, they created at the most a presumption that was rebutted and overcome by the facts which defendants placed in evidence.

With Commonwealth Edison testifying that they had put their eggs in the nuclear basket, with the documented loss of coal's position in other markets, with the undisputed fact that a coal producer competes for long-term contracts, not with production statistics, but with verifiable, uncommitted coal reserves, and with the government's own economist challenging the use of the Eastern Interior Coal Province Sales Area as a market, and failing to support the proposition that Illinois was a market, we submit that the trial court was undoubtedly correct in its finding at page 65a, that the only evidence produced by the government to support their claim of a substantial lessening of competition was statistics which failed to reflect the very real competition coal faces from other forms of energy, and which groups together coal producers into economically unrealistic markets while ignoring the key factor in a coal producer's market strength, coal reserves.

The government's remaining and we submit late arriving argument also fails. If there be any significance, and we say there is none, to the fact that Judge Robson entered no

specific findings with respect to United Electric's prospects of 1959, it is because government trial counsel not only failed to request such findings but asked the trial court not to make them.

However, defendants did propose findings on evidence that they had put in the record concerning United Electric's debilitated condition in 1959, the reasons why that unhappy circumstance had come about, and the merger efforts of United before 1959 to try to solve the problem.

In the fact of a lack of evidence to the contrary, however, all the government could claim at trial was that those findings were irrelevant.

If I may make a few more specific comments to certain of the things that Mr. Friedman touched on as far as the state of the record: I would suggest a careful look at the government's exhibit on mergers since 1959. That is page 106, I believe.

Careful analysis of that will show that almost all of the mergers since 1959 have involved the Peabody Coal Company, as I have already referred to, and that another rather large-looking one on the record was in fact an acquisition of an existing company in the Midwest from a company outside the Midwest.

With respect to Mr. Justice Douglas' observation about a fuel monopoly --

Q Question.

MR. HEDLUND: Question -- there is a reference or at least an aspect of that in Judge Robson's opinion, in which he does note that 25 percent of the production of coal in the Midwest has been produced by oil companies.

General Dynamics, of course, has no other fuel interests or utility interests, for that matter, other than these two coal companies.

As to whether Ayrshire's attempt at deep mining proves that anybody can go into deep mining, I would respectfully refer the Court to the testimony of Ayrshire's witness at trial on that subject and we submit that it is four-square against the government.

As far as General Dynamics' reserve position, coal reserve position in the Midwest or elsewhere in the country, that has not changed except as a result of small increments of the two coal companies involved since 1959.

Q Mr. Hedlund, would you comment on the nature of the competition or however you would describe it between these two companies with respect to Commonwealth Edison?

MR. HEDLUND: Yes, Mr. Justice Powell. The competition for Commonwealth Edison has to be viewed, it seems to us, in three lights. The first of which is that Commonwealth Edison is a unique coal purchaser in the Midwest. It purchases one-third of all the production in the State of Illinois, for

for example. Unlike any other coal purchaser revealed by either the government or ourselves, it must buy coal from a variety of producing districts. We believe that the real competition then for Edison's coal purchasers is among the producers in a district and not between different districts.

Secondly, in view of Edison's substantial size, their real leading commitment to nuclear energy, the sophistication and care with which that company makes every fuel decision, we do not think that this combination could have any effect on Commonwealth Edison as indeed was confirmed by their witness at trial.

A dimension of this, I think, Mr. Justice Powell, is the government's request or haste to point out, I should say, at trial that Commonwealth Edison does not take unfair advantage of coal producers.

Q Does the record show how many suppliers of coal are used by Commonwealth Edison?

MR. HEDLUND: Yes, Your Honor. Those are in defendant's Exhibit 49 -- I'm sorry, not 49, Defendant's Exhibit 55 -- well, that discloses only the producing districts. The actual names of the customers I do not think is shown, but I could be wrong.

To conclude, we submit that the decision below comports completely with settled principles of merger law and policy and signals no softening of or retreat from established

barriers to anticompetitive mergers. The findings below, we submit, were not clearly erroneous and we respectfully urge that the judgment be affirmed.

If there are no further questions, I would conclude my argument. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hedlund.

Mr. Friedman, you have a few minutes left.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

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

The government doesn't see this as basically a factual case. Our opponents have attempted to present this as a case in which the District Court fully considered all the factual issues, resolved them against the government, and therefore, as they see it, that is the end of it.

We think the basic issue in this case is whether the traditional standards that this Court has applied in passing upon the validity of mergers under section 7, an analysis of the structure of the industry, where the primary emphasis is on increases in concentration in the concentrated market, where Congress has made the judgment that increases in concentration are a distressing trend in the American economy that should be halted in their insipiency.

Whether the principles this Court has announced in

those cases are somehow not applicable to this industry because of the critical aspect of the reserves in this industry and because of the weak position United Electric was developing in its reserves. And we think the whole question of whether United Electric continued as a viable entity in this industry has to depend upon whether they have succeeded in establishing this failing company or failing resources defense. We think you can't just say because it looked as though United Electric in 1959 would have some trouble surviving therefore you jettison all the analysis that this Court has made in the past on this issue, and merely say it is therefore a factual question that we let the District Court decide whether -- and the District Court, by the way, did not make these decisions as of 1959, the time of the merger, it made them as of the time of trial. It said presently, whether we let the District Court say that nevertheless this merger is to be approved because on the basis of the record it concluded that in 1972 that United Electric was unlikely at that point to consider as a viable entity and that divestiture would be an appropriate thing.

The suggestion has been made here that, well, really, the coal industry is terribly competitive, everyone is competing for business, people were fighting to get business -- that is not the standard for determining the validity of a merger under section 7. What Congress was concerned with was changes

in the structure of the industry, not whether people were vigorously competing.

I dare say there are few industries I think more competitive, more competitive than the retail grocery industry. And I have no doubt that the industry, the retail grocery industry in Los Angeles, where this Court held the merger of Von's and Shopping Bag illegal, was at least as competitive as the coal industry involved in Illinois, if anything it was probably more competitive, but that didn't change the Court's decision.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 12:00 o'clock noon, the case was submitted.]

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