17 JUN 69

COURT OVERTURNS EL PASO GAS PLAN

High Tribunal Orders Case Back to Lower Bench for 'Complete Divestiture'

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WASHINGTON, June 16 — The Supreme Court ruled today that the latest plan for undoing the merger of the El Paso Natural Gas Company and the Pacific Northwest Pipeline Corporation was unacceptable.

It therefore ordered the case returned to the Federal District Court in Denver for "complete divestiture," in line with its original decision in 1964.

In a separate case, the court held that the prohibitions of the Robinson-Patman Act against discriminating between different customers in the prices charged extended even to situations where the harm done thereby to competition involved a customer of a customer of a customer.

Damages Awarded

The Standard Oil Company of California was ordered to pay a total of $1,298,213.71 in damages to Clyde A. Perkins, a former operator of chains of independent gasoline stations in Washington and Oregon.

In the El Paso case, the court's majority said that any new divestiture agreement must place the new company that would be formed "in the same relative competitive position vis-à-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger."

In addition, the majority said, the new divestiture agreement should not permit shareholders of El Paso to retain a stock interest in the new company to be formed by the divestiture, as they would have in the divestiture agreement that the court struck down.

Tax Burden a Factor

"The reason advanced for allowing El Paso to take a stock interest in the new company, rather than cash, is to reduce its income-tax burden," the court said.

But, it continued, "the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern . . . retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community . . . only a cash sale will satisfy the rudiments of complete divestiture."

The court's 4-2 opinion in the case was written by Chief Justice Earl Warren. Justices Byron White and Thurgood Marshall, who were in the Department of Justice during part of the time the case was in litigation, took no part in the decision.

Second Rejection

The decision marked the second time that the Supreme Court had rejected a divestiture agreement reached by the company and the Justice Department, which brought the original antitrust suit, and approved by a lower Federal court.

Before examining the latest divestiture agreement and finding it unacceptable, the court first had to deal with the unusual procedural situation that the only appellant left in the case — the State of Utah — wanted to withdraw. The United States Government, the State of California and a number of utility companies had originally joined in the appeal.

By the time the case was ac-

Continued on Page 65, Column 1

Continued From Page 59

tually argued before the Supreme Court earlier this year, the only people objecting to the divestiture agreement were some private citizens, including William M. Bennett, a former member of the California Public Service Commission, who has been the most persistent opponent of all the previous settlements of the case.

Standing Not Pertinent

The court's majority said that it did not have to decide whether Mr. Bennett and two other persons filing briefs as friends of the court had any standing in the case.

The majority said that regardless of their standing or lack of it, the Court itself had the right to look and see whether its earlier instructions, commanding complete divestiture, had been carried out, before deciding whether to let Utah withdraw. It found that they had not been carried out.

The two-man minority, consisting of Justices John Marshall Harlan and Potter Stewart, said that the majority had "discarded . . . all semblance of judicial procedure. . . in the head-strong effort to reach a result that four members of this court believe desirable."

The dissenters disagreed not only with the majority's decision to consider the case, when all appellants had signified a desire to withdraw, but also with the substantive decision. They said the majority had arbitrarily altered the meaning of the original decision.

The central issue involved in the divestiture is the quantity of natural gas reserves that are to be given up by El Paso.

The purpose of the Court's 1964 decision "was to restore competition in the California market," the majority said. And it concluded that the reserves ordered divested under the latest agreement "will not be sufficient to meet the old Northwest's existing requirements and those of a California project."

It said that the illegal merger, and 12 years that have elapsed since it was completed have stregthened El Paso's position in the California market.

The allocation of gas reserves in the divestiture thus "must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market," the Court said.

In the price discrimination case against the Standard Oil Company of California, the court's five-man majority said it was "wholly artificial" to "immunize" price discrimination from prosecution "simply because the produce in question passed through an additional formal exchange before reaching the level of Perkins's actual competitor."

The majority opinion was written Justice Hugo Black.

The dissenters, Justices Thurgood Marshall and Potter Stewart, said they would have reached the same decision in this particular case, because there was a legal relationship between Standard and the retailer down the line who competed with the Perkins chain. But they said they did not believe the Court should have reached the sweeping conclusions that it did about the applicability of the Robinson-Patman Act.

Justice John Marshall Harlan took no part in the decision.

Dairy Suit Rejected

WASHINGTON, June 16 (AP)—The Supreme Court declined today to take up an antitrust suit by three St. Louis dairies against a supermarket chain they claimed was trying to monopolize the market.

The independent dairies claimed a $2-million dairy plant built by the Kroger Company with a capacity to supply 20 per cent of the market would give the food chain the power to control prices and drive competitors out of business, and that the plant was built "with specific intent to monopolize."

Kroger replied it sought merely to compete, and that with 70 dairies in the area its ability to serve 20 per cent of market did not give it monopoly control over prices.

The Justice Department, asked its opinion, had advised the court not to take the case.

It said there was insufficient evidence to justify an antitrust claim, and that the court should avoid action that might "inhibit firms from seeking to increase competition by entering new markets."

The suit was filed by Hiland Dairy, Reiss Dairy and Sunny Hill Farms, all situated in the St. Louis suburbs. They said Kroger used dairy products as "loss leaders," selling them below price to attract customers to the chain's stores.