No. 72-402 10/22/73

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, AND FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-66a) is reported at 341 F. Supp. 534.

JURISDICTION

The opinion and judgment of the district court was filed on April 13, 1972. The notice of appeal to this Court (J.S. App 67a-68a) was filed on June 7, 1972. Probable jurisdiction was noted on December 11, 1972. The jurisdiction of this Court rests on Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *El Paso Natural Gas Corp.,* 376 U.S. 651.

QUESTIONS PRESENTED

1. Whether, under Section 7 of the Clayton Act, coal is a relevant line of commerce for determining the competitive effects of the combination of two coal producers, who were the second and fifth largest coal producers in Illinois and the second and sixth largest in the Eastern Interior Coal Province sales area.

2. Whether Illinois and the Eastern Interior Coal Province sales area are relevant sections of the country for determining the competitive effects of such a combination.

3. Whether, in this line of commerce and in these sections of the country, the effect of the combination may be substantially to lessen competition.

4. Whether the district court applied an erroneous legal standard in ruling that the merger would have no anticompetitive effect because, at the time of trial, the acquired company was not a viable competitive force in the market due to its lack of adequate coal reserves.[1]

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Fed-

[1] This question is a revision of the fourth question presented in the jurisdictional statement. The focus has been shifted from the evidentiary support for the finding to its legal sufficiency as a basis for concluding that the merger would have no anticompetitive effect. The latter issue was raised in both the jurisdictional statement and the brief in opposition to the motion to affirm. See note 47, *infra*, p. 70.

> eral Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

STATEMENT

The United States instituted this civil antitrust case, charging that the acquisition of the stock of United Electric Coal Companies ("United Electric"), by Material Service Corporation ("Material Service") and its successor, General Dynamics Corporation ("General Dynamics"), violated Section 7 of the Clayton Act (15 U.S.C. 18). It alleged that actual and potential competition in the Illinois and Eastern Interior Coal Province sales area coal markets may be substantially lessened by the acquisition. After a trial on the merits, the district court held there was no violation.

A. THE COAL INDUSTRY

The coal industry has undergone a substantial transformation since the Second World War. It lost the railroad market entirely to diesel fuel. It lost most of the home heating market and a substantial portion of the industrial market to gas and oil (J.S. App. 11a–12a). From 1947 to 1954, total coal production in the United States decreased more than a third.[2] Since

[2] Production was 441 million tons in 1947 and 278 million tons in 1954 (DX 85, A. Ex. 657). The appendix volumes containing exhibits have been separately paginated. "A. Ex." references are to the exhibit volumes. "A." references are to the other appendix volumes.

1954 the electric utility market has become the mainstay of the coal industry, accounting by 1968 for 71 percent of the national coal consumption (DX 85, A. Ex. 657).

This change in markets has not, however, led to the disappearance of the coal industry. On the contrary, the utilities' rapidly increasing energy demands have stimulated a resurgence of coal production since the low point of 1954. By 1968, United States coal production was up nearly to the 1947 level (DX 85, A. Ex. 657), and the Bureau of Mines estimates that production will continue to increase at the rate of 3.1 percent per year through 1980 (GX 232, A. Ex. 152).

Coal usage by electric utilities varies among different areas of the country. Utilities on the east and west coasts use substantial amounts of oil, but almost no oil is used in the interior of the country. Natural gas is used in most states west of the Mississippi, and is the principal fuel for utilities in the southwest and south central states; but very little gas is used east of the Mississippi. Coal is the dominant fossil fuel[3] for utilities east of the Mississippi and south and west of New York, and it supplies more than half of the requirements of utilities in the New York-New England, west north-central, and mountain areas.[4]

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[3] Fossil fuels are hydrocarbon energy sources which have been mineralized through geological ages and are extracted from the earth. They include various forms of coal, natural gas, and petroleum.

[4] In 1966 oil accounted for 18 percent of the BTUs of fossil fuel consumed by utilities in the Pacific Coast area, 12 percent in the South Atlantic area, 21 percent in the Mid-Atlantic area, 42 percent in the New England area, and

Bituminous coal is found in four major producing areas in the United States. The area involved in this case—commonly known as the Eastern Interior Coal Province (A. 680–681)—is composed of the central and southern two-thirds of Illinois and much of southwestern Indiana and western Kentucky. The other areas are: the Appalachian or Eastern Coal Province, encompassing Pennsylvania, West Virginia, eastern Kentucky, and parts of Ohio, Tennessee, and Alabama; the Western Interior Coal Province, comprising parts of Iowa, Kansas, Missouri, and Oklahoma; and the Western Province, consisting of scattered deposits in Montana, Wyoming, Colorado, and Utah (Kurtz Dep. Ex. 10, A. Ex. 1657.) (Anthracite and lignite coal deposits, which are not involved in this case, are respectively located east of the Appalachians and in Montana and the Dakotas. *Ibid.*)

High transportation costs, which may approach 30 to 40 percent of the delivered price of coal (J.S. App. 57a), tend to insulate coal producers in one producing area from competition from mines in other producing areas. Although the Eastern Interior Coal Province produced approximately one-fourth of the coal sold in

less than 2 percent in each of the interior states except Utah and Montana. Natural gas accounted for more than 90 percent of the BTUs consumed by utilities in Kansas, Oklahoma, Arkansas, Texas, Louisiana, and Mississippi, and more than 80 percent in California and Arizona, but it represented less than 6 percent of the BTUs consumed by utilities east of the Mississippi River. Coal accounted for more than 90 percent of the BTUs consumed by utilities in all the states east of the Mississippi and south or west of New York except New Jersey, Delaware, South Carolina, Florida, and Mississippi. (Kurtz Dep. Ex. 10, A. Ex. 1658–1659.)

the United States in 1967, coal from that area did not account for any of the reported sales in the northeast and far west and accounted for less than 10 percent of coal sales even in the relatively nearby states of Michigan and Ohio. At the same time, more than 90 percent of the non-metallurgical coal [5] sold in Indiana and Illinois and more than half of that sold in Minnesota, Wisconsin, Iowa, Missouri, and Kentucky was produced in the Eastern Interior Province (Gallagher Dep. Ex. 3, A. Ex. 1424–1447).

All of the mines of the acquired and acquiring companies are located in Illinois within the Eastern Interior Coal Province, where the leading producers have accounted for an ever-increasing share of the coal production. The following table shows the increase in the percentage shares of coal production by the leading producers in a recent 10-year period:

	Eastern Interior Coal Province (GX 86, A. Ex. 100)		Illinois (GX 73, A. Ex. 92)	
	1957	1967	1957	1967
Top 2 firms	29.6	48.6	37.8	62.9
Top 4 firms	43.0	62.9	54.5	75.2
Top 10 firms	65.5	91.4	84.0	98.0

This period was also marked by a sharp decline in the number of producers. Although 144 companies were producing coal in the Illinois portion of the producing area in 1957, only 39 companies remained in 1967 (GX 73, A. Ex. 92).

[5] Metallurgical coal is used in coke production for metallurgical purposes. Illinois mines produce only 4 million tons of such coal annually out of a total production of almost 65 million tons (GX 210, A. Ex. 135). Coal used for all other purposes is termed nonmetallurgical coal.

B. THE ACQUIRING COMPANY—GENERAL DYNAMICS, MATERIAL SERVICE, AND FREEMAN

General Dynamics is a large and diversified company; it ranked 27th among industrial corporations in the United States in 1968, with total sales of more than $2.6 billion (*Fortune Magazine,* May 15, 1969, p. 168). It became the Nation's fifth largest coal miner as a result of its acquisition in 1959 of Material Service, which was then engaged in producing and supplying building materials, coal, and limestone (J.S. App. 2a–3a). Material Service had, since 1942, owned all of the capital stock of Freeman Coal Mining Corporation ("Freeman") (J.S. App. 3a, 4a).

Freeman's mining operations have always been centered in southern Illinois. It operated three mines in that area at the time this action was filed and had opened a fourth by the time of trial. It also operated the Crown Mine in central Illinois. All of the Freeman mines are deep mines. (J.S. App. 4a, 6a.)

In 1959 Freeman produced 6.9 million tons of coal—approximately 15 percent of Illinois production (GX 64, A. Ex. 83) and 8 percent of Eastern Interior Coal Province production (GX 77, A. Ex. 96). It was the second largest producer in each area. In 1967 it produced 8.4 million tons—approximately 13 percent of Illinois production (GX 72, A. Ex. 91) and 6 percent of Eastern Interior Coal Province production (GX 85, A. Ex. 98). Freeman's production is 92 percent nonmetallurgical coal (A. 1529–1530). At the time of trial it controlled approximately 484 million tons of deep coal reserves in Illinois (DX 61, A. Ex. 577).

C. THE ACQUISITION AND THE ACQUIRED COMPANY (UNITED ELECTRIC)

Material Service began acquiring United Electric stock in 1954 and had increased its holdings to 34 percent by 1959 when Freeman's president, Frank Nugent, was elected Chairman of United Electric's Executive Committee (J.S. App. 7a–8a). General Dynamics acquired Material Service a few months later and continued to acquire United Electric stock. General Dynamics had increased its holdings to 66 percent of United Electric's stock by September 1966, when it made a successful tender offer for the remaining shares. United Electric became a wholly-owned subsidiary of General Dynamics at the beginning of 1967. (J.S. App. 8a–9a.)

United Electric has operated mines in various parts of Illinois and western Kentucky since it was formed in 1919. At the beginning of 1959 it operated one mine in Kentucky and four in Illinois, and at the time of trial it was operating only four in Illinois. All of these mines were open pit or strip mines; United Electric has not operated a deep mine of any kind since 1954. (J.S. App. 6a–7a.)

From at least 1955 through the time of trial United Electric has been a healthy company with a good financial record and a secure future. It has been one of the leading coal producers in the Eastern Interior Coal Province, and its production increased from 3.6 million tons in 1957 to 5.7 million tons in 1967 (GX 62–72, A. Ex. 81–91). This average annual growth rate of 5.1 percent is higher than the average for producers in the State of Illinois (3.4 percent) and in the Province as a whole (3.6 percent) (DX 87, A. Ex. 783, GX 86, A. Ex. 100). During a comparable period, United Electric's share of the total State and Province production remained relatively stable. In 1959 it accounted for 8.1 percent of Illinois production and 4.8 percent of Province production (GX 64, A. Ex. 83, GX 77, A. Ex. 77); in 1967 the figures were 8.9 percent and 4.4 percent (GX 72, A. Ex. 91, GX 85, A. Ex. 98).[6]

United Electric has consistently had one of the highest profit margins in the coal industry. It led the industry in operating income as a percentage of revenues in 9 out of 11 years from 1955 through 1965, as shown in a Standard & Poor's survey of 13 major coal companies (GX ~~2[illegible]~~, A. Ex. 24). From 1959 through 1967, the company had total profits of \$24.1 million on sales of \$181.2 million (GX 25, A. Ex. 12). Freeman had profits of \$15.8 million on sales of \$289.9 million during the same period (Nugent Dep. Exs. 1–9, A. Ex. 1741–1763). 26

In 1959, United Electric had a net worth of \$19.6 million, working capital of \$2.8 million, and long-term debt of \$1.2 million (GX ~~2[illegible]~~, A. Ex. 11). By 1968, despite the payment of \$11 million in dividends to General Dynamics (Nugent Dep. Ex. 22, A. Ex. 1774–1775, GX 27, A. Ex. 29–31), United Electric had eliminated all its long-term debt, had increased its net worth to \$26.9 million, and had accumulated \$10.7 million in working capital (GX 34, A. Ex. 41). 24

In 1970, United Electric owned or leased an estimated 52 million tons of strip reserves in its existing mines (J.S. App. 9a). Assuming that no other reserves

[6] In 1959, United Electric was the fifth largest producer in the State and the sixth largest in the Province; in 1967, it was sixth in the State and ninth in the Province (GX 64, A. Ex. 83, GX 72, A. Ex. 91, GX 77, A. Ex. 96, GX 85, A. Ex. 98).

around these four mines are acquired, the mines would continue as of 1969 to produce at that year's levels for 2, 7, 9, and 16 years, respectively (DX 60C, A. Ex. 544–572, DX 60D, A. Ex. 573).[7] The company also owns 12.6 million tons of strip reserves in a field that contains an estimated 25 to 50 million tons of coal (DX 60A, A, Ex. 517, A. 1142, Morris Dep. Ex. 31, A. Ex. 1686–1687). These reserves will in time be economically mineable (Kolbe Dep. Ex. 59, A. Ex. 1552, GX 201, A. Ex. 133, A. 54–55, 182, 204, but see A. 1528).

Apart from strip reserves, United Electric owns about 44 million tons of deep reserves (DX 60A, A. Ex. 517) and controls by location[8] another 40 to 50 million tons (A. 1055–1056, 1103–1105, DX 60A, A. Ex. 517).[9]

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[7] The district court found that all but four million tons of the estimated reserves have been committed under long-term contracts (J.S. App. 9a, 65a). The defendants' own exhibit, however, shows that nearly 11 million tons classified by the court as "committed" are committed only to "Current Negotiations" (DX 63, A. Ex. 579). Moreover, most of the actual commitments were made after the acquisition and after this action was filed. United Electric entered into a 20-year contract for approximately 21 million tons in 1968 (A. 1204, DX 35, A. Ex. 262, DX 63, A. Ex. 579).

[8] Reserves contiguous to those owned, leased, or optioned are "controlled by location" if, in order to be mined at all, they must be mined by the holder of the rest of the reserves in the area (A. 87).

[9] While the district court stated that United Electric now lacks the ability to mine these deep reserves (J.S. App. 65a), the company has the financial resources necessary to embark on a deep mining operation, and the court made no finding that the company could not have obtained the necessary expertise had it not been combined with Freeman (see pp. 72–73, *infra*).

D. COMPETITION BETWEEN THE ACQUIRING AND THE ACQUIRED COMPANIES

Both Freeman and United Electric sell coal in Wisconsin, Illinois, Kentucky, Iowa, and Missouri (GX 54–60, A. Ex. 73–79). As shown in the following table, the companies sell about half of their coal to the same customers and most of that is shipped to the same customer facilities (GX 88–91, A. Ex. 107–117):

	Year	Tons sold (thousands)	Percent of total sales to common customers	Percent of total sales to identical customer facilities
United Electric	1965	5,487	70.2	54.7
	1966	5,964	62.1	52.9
	1967	5,914	61.6	48.2
Freeman	1965	7,916	51.4	37.4
	1966	8,562	44.0	37.0
	1967	9,078	42.3	39.8

That Freeman and United Electric are actual and potential competitors was acknowledged by officials of the companies and by customers of each (A. 84, 131, 1437, GX 93, A. Ex. 118–119, GX 94, A. Ex. 121–123, GX 104, A. Ex. 124–125). Freeman and United Electric salesmen solicit many of the same customers (A. 48, 121).

E. THE PROCEEDINGS BELOW

The United States filed its complaint on September 22, 1967. The trial was held from March 30 to April 22, 1970, and the district court issued its opinion on April 13, 1972.

The government's theory was that the United Electric acquisition involved a merger of competing firms. It contended that coal is an appropriate line of commerce, and that Illinois and the Eastern Interior Coal Province sales area[10] are appropriate sections of the country in which to assess the competitive effects of the combination. The government's proof was directed to showing that the Freeman-United Electric combination had an inordinate share of those concentrated markets and was likely to produce substantial anticompetitive effects within them.

The district court rejected the government's proposed product and geographic markets. It held, after a lengthy discussion of interfuel competition in the electric utility market, that "the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination" (J.S. App. 53a). It also adopted the geographic markets proposed by the defendants. These consisted of the Commonwealth Edison Company, the Metropolitan Chicago Interstate Air Quality Control Region, and utility and non-utility sales areas for coal mines located in each of four different freight rate districts (J.S. App. 56a-59a).[11]

[10] The Eastern Interior Coal Province sales area—in which Province coal producers sell most of their coal—consists of Illinois, Indiana, the western half of Kentucky, the western one-third to one-half of Tennessee, the extreme eastern portion of Missouri on or near the Mississippi River, the eastern half of Iowa, southeastern Minnesota, and southern Wisconsin (see pp. 38–39, *infra*).

[11] The Interstate Commerce Commission has designated various coal producing areas within Illinois, Indiana, and western Kentucky as freight rate districts (J.S. App. 4a). The normal freight rates are uniform for all mines located in a particular freight rate district.

The district court also concluded that the government had failed "to show that a substantial lessening of competition resulted from the United Electric-Freeman combination" (J.S. App. 60a). The court's conclusion that there was no substantial anticompetitive effect rested on subsidiary findings (a) that United Electric's strip coal reserves are committed and the government did not show that additional economically mineable strip reserves are presently available (J.S. App. 63a), (b) that United Electric did not have the skill to mine its deep reserves (J.S. App. 65a), and (c) that United Electric and Freeman do not compete but are "predominantly complementary in nature" (J.S. App. 61a) because of their different mining techniques, because Freeman produces some dust and metallurgical coal while United Electric does not, because Freeman produces some coal that has a lower sulphur content than United Electric coal, and because Freeman and United Electric mines are located in different freight rate districts (J.S. App. 61a–62a). The court therefore concluded that the United Electric-Freeman affiliation "is not adverse to competition, nor would divestiture benefit competition" (J.S. App. 66a).

SUMMARY OF ARGUMENT

I

A. The district court held that "energy" is the exclusive line of commerce for determining the competitive effects of this combination of two coal companies. Section 7 of the Clayton Act, however proscribes a merger if it may substantially lessen competition in *any* line of commerce. Even if energy is an appropriate product market, coal satisfies the "practical indicia" of an "economically significant submarket," as defined by this Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325.

Coal is recognized by the industry, by governmental authorities, and by the public as a separate economic entity. It is physically different from other forms of energy, its heat producing qualities are unique, and it is used for a narrower range of commercial purposes than other fuels. Its mining and production techniques are unlike those for oil, natural gas, and nuclear fuel. In the areas served by Freeman and United Electric, coal is sold at a delivered price per BTU significantly lower than that for competing fuels.

Because of its low price, coal is overwhelmingly preferred as a fuel by those consumers—particularly steam-electric utilities—for whom fuel expenses are the principal cost of doing business. In the areas involved in this case coal has had minimal competition from other fuels for the business of this narrow class of consumers, producing, for example, 90 percent of the BTUs consumed by steam-electric utilities in Illinois. It is likely to maintain its substantial competitive advantage in these areas, where major coal deposits are located.

Just as coal's advantages make it attractive to utilities and other industrial fuel consumers, its commercial and aesthetic disadvantages make it unattractive to other consumers. Highway, air, and rail transportation are dependent on liquid fuels; consumer preference for gas and oil, despite higher prices in many areas, make coal an ineffective competitor in the space-heating market. Fluctuations in the price of other fuels are not likely to affect the delivered price of coal.

B. The district court's holding that "*the* relevant line of commerce must encompass interfuel competition" (J.S. App. 55a, emphasis added), rests upon a misunderstanding of *United States* v. *Continental Can Co.*, 378 U.S. 441. That case involved a merger of a metal container producer and a glass container producer, and the Court held that, because of the substantial interindustry competition between the two products, the combined metal and glass container industries constituted an appropriate line of commerce.

Continental Can dealt only with how broadly, not how narrowly, the product market may be drawn. The decision does not imply that, in evaluating a merger between two coal companies, the *only* revelant market must include other competing fuels. Indeed, the Court in *Continental Can* recognized that, in addition to the combined glass and metal market, each of those industries separately would be an appropriate product. Here, too, regardless of whether energy may be a relevant line of commerce, coal is an appropriate submarket.

II

A. The government showed that the United Electric-Freeman combination may substantially lessen competition in two sections of the country—the Eastern Interior Coal Province sales area and the State of

Illinois. Each corresponds to the competitive realities of the coal industry, and each is an appropriate geographic market.

There are four major coal producing regions or provinces in the country, and producers in one tend to be insulated from competition by producers in another. Because of transportation costs, which may be 30 to 40 percent of the delivered price of coal, the competitive sales area for producers within a region generally conforms to the geographic range beyond which the delivered price is higher than that for coal originating in another province. The Eastern Interior Province, where all the Freeman and United Electric mines are located, is a geographically distinct coal producing region, and producers there enjoy a competitive advantage over producers in other provinces with respect to sales in an identifiable area comprising Illinois and Indiana and parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri. Nearly all the coal used by steam-electric utilities in this sales area is produced in the region, and more than 80 percent of the coal produced in the region is consumed in the sales area. Freeman and United Electric sell almost all their coal to customers in the sales area, and each has shipped coal to almost every State within the area.

Within this broader market, Illinois is an appropriate submarket. The State has been a separate mining district under the Bituminous Coal Act of 1937, its production figures are separately reported by the Bureau of Mines, and all the Freeman and

United Electric mines are located within its boundaries. Illinois consumers buy most of their coal from Illinois producers (90 percent in the case of utilities), and Illinois mines sell most of their coal (about 60 percent) to Illinois customers. Freeman and United Electric sell more coal in Illinois than in any other State.

B. Appellees' ten geographic markets, which the district court adopted, do not reflect the competitive realities of the coal business. Instead of focusing on the area of competitive overlap between Freeman and United Electric in which the impact of the acquisition would be most direct and immediate, the district court erroneously adopted geographic markets that ignore the areas of competitive overlap.

In any event, Section 7 proscribes mergers with anticompetitive effects in *any* section of the country. Even if the district court's geographic markets were appropriate, they do not negate the existence of one or more broader markets—here, the Province sales area and Illinois—within which the combination may substantially lessen competition.

III

A. Under Section 7 a horizontal merger is *prima facie* unlawful if it produces a firm controlling an undue percentage share of the market and significantly increases concentration in the market. While no specific percentage share is necessarily "undue," this Court has applied the principle of *prima facie* illegality in mergers involving combined shares as small as

4.5 percent, 7.5 percent, and 11 percent, where concentration in the relevant markets had been rapidly increasing.

B. In both the Eastern Interior Coal Province and the State of Illinois, concentration levels prior to the 1959 acquisition were greater than the pre-merger levels in markets this Court has considered sufficiently concentrated to bar mergers producing relatively small combined shares. Between 1957 and 1967 the concentration levels in those areas rapidly increased while the number of producers in Illinois decreased from 144 to 39. The acquisition of United Electric, whether viewed as of 1959, when Material Service took control, or as of 1967, when General Dynamics became the sole shareholder, brought together two of the leading producers in each of these concentrated markets. The combined shares of coal production in the Province (12.4 percent in 1959) and Illinois (23.2 percent in 1959) exceed or approach the shares this Court has held *prima facie* unlawful for concentrated markets. Moreover, the acquiring company significantly increased its share of the markets, and the acquisition resulted in substantial increases in market concentration.

C. Apart from this structural data showing that the acquisition resulted in an undue combined percentage share of the relevant markets, the combination eliminated substantial direct competition between Freeman and United Electric. The companies sell about half their coal to common customers, and most of those sales are to identical customer facilities. Salesmen of the companies solicit the same customers.

D. The district court held, however, that the merger would have no anticompetitive effect because United Electric's coal reserves were so inadequate that the company could not continue as a viable competitor in the market. This claim of inadequate resources rests on the same economic premise as the "failing company" defense—that elimination of a firm does not substantially lessen competition if the firm would not otherwise have been a viable enterprise. Although an "inadequate resources" defense requires a different factual showing, it must be tested by the same general legal standards applied in failing company cases.

A failing company defense requires a showing that, prior to the acquisition, every reasonable method of economic rehabilitation was explored but found unavailable and that the acquiring company was the only available purchaser. Similarly, in the case of an extractive industry, a defense based on the claim that the acquired company's resources were virtually exhausted requires a showing that there was no alternative method of prolonging the company's life, including sale to other purchasers.

This Court has recognized that the validity of a failing company defense must be determined as of the time of the acquisition, not the time of trial. The district court's findings with respect to United Electric's lack of coal reserves do not sustain an "inadequate resources" defense because they do not relate to United Electric's viability in 1959, when Material Service took control of the company, or in 1967, when General Dynamics became the sole shareholder. There is no finding, and the record does not show, that United

Electric's reserves in 1959 or 1967 were so depleted that the company was about to go out of business; that United Electric could not have acquired additional strip reserves after 1959 or 1967; or that United Electric could not have acquired deep-mining expertise if it had not become affiliated with Freeman (a deep mining company). It is unlikely that a firm as large and successful as United Electric would have allowed its coal business to disappear. Moreover, there is no finding that United Electric explored other less anticompetitive means of solving its reserve problems. In particular, the record does not establish that Material Service was the only available purchaser with access to additional coal reserves.

ARGUMENT

I

COAL IS AN APPROPRIATE LINE OF COMMERCE FOR DETERMINING THE COMPETITIVE EFFECTS OF THE ACQUISITION

The district court held that "the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination" (J.S. App. 53a). A merger violates Section 7 of the Clayton Act, however, if it has the proscribed anticompetitive effect "in any line of commerce." The proper inquiry in determining the market in this case, therefore, is not whether the energy market is "the" appropriate line of commerce, but whether coal is "an" appropriate line.

There may well be an energy market that would be an appropriate line of commerce for testing the competitive effect of a merger between companies operating in different segments of that market. Cf. *United States* v. *Continental Can Co.,* 378 U.S. 441. But the possibility of that broader market is not inconsistent with and does not negate the existence of a narrower coal market as an appropriate line of commerce for determining the validity of a merger between companies engaged solely in that business. For "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325). Coal is such a submarket.

A. COAL SATISFIES BROWN SHOE'S "PRACTICAL INDICIA" OF AN "ECONOMICALLY SIGNIFICANT SUBMARKET"

The Court in *Brown Shoe* stated (*ibid.*):

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. * * *

A realistic appraisal of these "practical indicia" of a discrete product shows that coal is an "economically significant submarket" (*ibid.*) for purposes of Section 7.

1. Coal is recognized as a separate economic entity.

Coal is classified as a separate industry by the Office of Management and Budget (GX 29, A. Ex. 34). The industry has its own trade associations, labor unions, and trade publications (A. 140). Federal and state agencies and various trade associations publish separate statistics on coal reserves, coal production, and coal shipment (see, *e.g.,* Gallagher Dep. Ex. 3, A. Ex. 1416–1455, Simon Dep. Ex. 1, A. Ex. 1810–1820, Terleke Dep. Ex. 11, A. Ex. 1841–1845).

2. Coal has peculiar characteristics and uses.

A lump of coal is quite different from any comparable unit of oil, uranium, or natural gas. The equipment necessary for burning coal differs from that for other fuels (See DX 150, A. Ex. 1110). Coal's thermal efficiency differs from that of other fuels (*ibid.*).[12] While the various fuels have generally similar end uses—the generation of energy or production of heat—because of coal's special advantages and disadvantages it is used principally by electric utilities and other industries in which fuel is a major cost factor; unlike gas and oil, coal is now rarely used for space heating or by the transportation industry (see pp. 25–27, *infra*).

3. Coal has unique production methods and facilities.

Coal is mined by the strip or open pit method, or by the deep or underground method. In strip mining the dirt, rock, and shale (overburden) overlying the coal seam is removed with large earth-moving machines and the coal is scooped up and hauled away with smaller pieces of equipment. The

[12] In power generation, coal requires between three and five percent fewer BTUs per kilowatt-hour than does gas; oil is less efficient than coal but more efficient than gas (DX 150, A. Ex. 1110).

coal is then sent to preparation plants which size the coal and improve its quality through a washing process (Kolbe Dep. Ex. 2, A. Ex. 1526–1529). There are three types of deep mining—the drift operation (punching or going into the coal seam from a hill-side), the slope operation (removing coal by a conveyor belt going underground at 17 degrees or less to fairly shallow depths), and the shaft operation (using a deep vertical shaft through which coal is removed by hoists and skips) (A. 75–76, 1358–1359).

By contrast, natural gas and crude oil are channeled or pumped out of the ground through pipes. Crude oil is broken down into different distillates at highly complex computerized refineries (DX 81, A. Ex. 621, A. 463).[13] Natural gas either travels from the wellhead to the fuel burner through a series of pipelines or is liquified at a liquefaction plant and shipped or stored in tanks (A. 482–483). The production and processing of nuclear fuel is, of course, considerably more complex.[14]

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[13] Residual oil—the only fuel oil used for electric generation in this country—is an oil-refinery by-product that remains after the more valuable refined liquids have been extracted and solids have been removed (DX 150, A. Ex. 1114).

[14] The nuclear fuel cycle involves the following steps: the ore is subjected to a milling process which increases the concentration of uranium oxide; the concentrate is converted to uranium hexafluoride, which is then enriched in gaseous diffusion plants; the enriched matter is converted to uranium dioxide pellets, which are inserted into specially manufactured zirconium tubing; the tubing is then fabricated into fuel elements which are assembled in the reactor as the core; spent fuel is reprocessed to recover the remaining usable uranium, plutonium, and other valuable isotopes (DX 116, A. Ex. 1043–1057).

4. Coal has distinct prices.

In the areas served by Freeman and United Electric, coal's delivered price per BTU is significantly lower than that for any other combustible fuel except interruptible natural gas, which is available only on a seasonal basis (GX 35, A. Ex. 35, GX 36, A. Ex. 47, GX 37, A. Ex. 53).[15] The president of Central Illinois Light Co., for example, testified that his company purchases coal for 27 cents per million BTUs and buys some refined oil for ignition fuel at 70 cents per million BTUs; the company's lowest firm rate for natural gas is 45 cents per million BTUs (A. 1207, 1210). The witness also testified that coal prices have been significantly lower than gas or oil prices for the last ten years and that he did not expect gas to approach the price of coal in the near future (A. 1209–1210). A cement company official stated that his company did not need to make any formalized surveys in order to determine which fuel to use. A cursory investigation revealed that the cost of coal was substantially less than the cost of gas or oil (GX 43, A. Ex. 63).[16]

[15] Gas is supplied at either a firm or an interruptible rate. Firm rate gas is substantially higher in price and approaches the price of purchased electricity (A. 740, 1116, GX 41, A. Ex. 60). Firm rate customers are supplied according to their needs, and they always have priority. Interruptible gas is sold at a lower rate and only when it is not required by firm rate customers (A. 1180–1181). In the midwest, interruptible gas is placed on the market only during the warmer months, and its availability varies among different locations (Morris Dep. Ex. 70, A. Ex. 1713, Kolbe Dep. Ex. 4, A. Ex. 1531, A. 475, 479, 483).

[16] Other witnesses attested to the price differential. A past president of United Electric stated that coal prices have been "much lower" than gas prices, and that United Electric used to sell a ton of coal for about $5 while an equivalent amount of

5. Coal has distinct customers and its prices are relatively insensitive to changes in the price of other fuels.

Coal's commercial advantages and disadvantages in the areas served by Freeman and United Electric make it attractive only to a distinctively limited set of potential customers. Coal is unable to compete for the business of some fuel consumers, but at the same time it has an overwhelming competitive advantage with respect to others. The preferences and requirements of consumers in the relevant geographic areas tend to minimize interfuel price competition, except at the geographic fringes, because price-oriented consumers prefer coal, while those for whom delivered price is secondary generally choose other fuels.

a. As the court below recognized, for many customers factors other than delivered price may control the choice of a fuel (J.S. App. 29a):

> The costs of storing, handling, and in some instances, disposing of the fuel by-products or residue, for example, are economic factors which can make a low-cost fuel the most expensive fuel. These costs become a particularly important consideration in selecting a proper fuel in locations where land costs are high and in heavily congested areas. In some areas, operating considerations, such as air pollution control regulations, may require a premium priced fuel and foreclose consideration of others.

Thus, the technology of highway and air transportation requires the use of liquid fuels, and because of

oil was selling for about $8 (A. 140–141). See, also, A. 279–280, 363, 574–575, GX 41, A. Ex. 60, GX 39, A. Ex. 59.

dieselization oil is now the fuel used in rail transportation (DX 102, A. Ex. 944). Simple consumer preference, rather than price, is the controlling factor in the space-heating market, where gas and oil are preferred despite their higher prices (DX 102, A. Ex. 981).

The capital investment in equipment necessary for the burning of coal is 10 to 15 percent greater than for the other fossil fuels (DX 150, A. Ex. 1110); and those industrial consumers for whom capital charges are more significant than fuel prices in relation to total fuel costs are more likely to choose another fuel (DX 102, A. Ex. 990).

For these groups of consumers, whose fuel choice is dictated primarily by considerations other than delivered price, coal is not an effective competitor unless other fuels are unavailable (see DX 150, A. Ex. 1110).

b. The market for coal is therefore effectively confined to electric utilities and other large fuel users, such as cement manufacturers, for whom the delivered price of fuel is the most significant portion of their total cost of doing business (*e.g.*, A. 811–812, GX 43, A. Ex. 63). Except for users of metallurgical coal, most coal consumers burn coal rather than another fuel because of its low price (A. 140, Morris Dep. Ex. 70, A. Ex. 1713).

For this limited class of consumers (or for that portion of a consumer's fuel requirements that are purchased on the basis of delivered price), coal has had minimal competition from other fuels in Illinois and the Eastern Interior Coal Province sales area. Thus, in each of the years 1960 to 1967, coal produced 90 to 94 percent of the BTUs consumed by steam-electric utility plants in the Province sales area (GX 31, A. Ex. 33). Similarly, in 1967 coal provided 74 percent of the BTUs consumed by cement plants in the Province sales area and 94 percent of that consumed by such plants in Illinois (GX 32, A. Ex. 38–39). Most of the balance of the fuel consumed by these customers is interruptible natural gas (A. 740, GX 32, A. Ex. 39), which is available at a greatly reduced price on a seasonal basis only (see note 15, *supra*).[17] A former United Electric president stated in 1962 (Morris Dep. Ex. 70, A. Ex. 1713):

> We do not have any serious competition in the Midwest from oil for use in industrial and utility plants. We do have severe competition from natural gas when it is dumped at low prices during the summer months when there is no heating load. We feel, however, that with our mining methods and transportation costs, we can continue to hold our position with this competition. It is expected that with the diminishing reserves of gas and the possible higher prices, our competitive relationship with this fuel will improve.

c. Coal's dominance among utility and industrial consumers in the relevant portions of the midwest is not likely to disappear soon. The supply of natural gas is limited and some is being imported in liquified form for use during peak periods (A. 475–476). Gas companies serving the midwest are increasingly stor-

[17] Some oil is used by coal consumers for tasks that coal is not suited for, such as starting up boilers or kilns, and operating diesel units (A. 608, 637, 644, GX 36, A. Ex. 47, Redard Dep. Ex. 1, A. Ex. 1809).

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ing gas in underground formations or liquified in tanks during low demand periods instead of selling it at the "dump" prices in those months (A. 217–218, 278, 443, 475–476, 481–482, 575, 741, 1209, GX 200, A. Ex. 132). Many coal consumers would not have the facilities to burn gas even if it were available and low-priced (A. 564, 665, DX 59, A. Ex. 509).

Nuclear energy is presently available commercially only for the generation of power, and is not a realistic alternative for non-utility coal consumers (A. 1250). In addition, because a nuclear power plant is different in design and construction from a conventional steam-electric power plant (A. 763, 1252), nuclear fuel is not an available option for use in existing fossil-fuel utility plants (A. 1250). At the time of trial Commonwealth Edison was the only company in the Province sales area that had an operational nuclear plant of commercial size (DX 107, A. Ex. 1004–1005), and nuclear energy accounted for less than one percent of electrical generation in Illinois in 1967 (Kurtz Dep. Ex. 8, A. Ex. 1651–1653).

Although, as the court below found (J.S. App. 34a–35a), newly constructed nuclear plants will account for an increasing share of electric power generation in the midwest, coal burning units will continue to provide a substantial portion. Only larger utilities can economically construct nuclear plants. Witnesses estimated that the minimum economic size of a nuclear power plant is 500 to 800 megawatts (A. 1200, 1239, 1273), and several utility officials stated that their companies' new units are too small for nuclear energy to be a feasible alternative (A. 1200).[18] Even a large utility does not build a 500 megawatt unit each time it expands; when it installs smaller units, it will have to choose among the fossil fuels (A. 1310). There is a continued demand for generating units of less than 500 megawatts in the midwest (Kurtz Dep. Ex. 8, A. Ex. 1654–1655).

Furthermore, large utilities that need additional generating capacity as quickly as possible are likely to choose a conventional plant. It takes as long as eight years to license and construct a nuclear facility and only three to four years to build a conventional unit (GX 232, A. Ex. 153, A. 1118). This need for expedition resulted in the construction of a new coal-fired unit by Commonwealth Edison (A. 1413).

There are other practical obstacles to the installation of nuclear facilities. Construction costs for nuclear plants have increased more rapidly than for coal-fired units (A. 762–763, GX 233, A. Ex. 168, GX 253, A. Ex. 195). Because the industry is still in its infancy, unforeseen difficulties in design, construction, and operation are not uncommon (see A. 676–677). One company revised its estimate of $83 million for a nuclear plant to $112 million because of delays and construction problems (A. 667–668). There are, in

[18] All but one of the 55 nuclear units for which contracts were awarded nationwide from 1967 to 1969 had capacities of at least 500 megawatts, and the average size of those units was nearly 900 megawatts (DX 107, A. Ex. 1005).

addition, problems of thermal pollution, which may be especially difficult to solve in colder climates (see A. 1436).[19]

It is therefore not surprising that announcements of new nuclear units have been declining. The following table shows that, with respect to announced steam-electric plant additions from 1965 through 1969, conventional units account for a growing, not shrinking, proportion of the capacity in the last four years (DX 107, A. Ex. 1007):

Year announced	Fossil		Nuclear		Total
	Megawatts	Percent	Megawatts	Percent	
1965	15,928	73	6,009	27	21,937
1966	20,096	47	22,477	53	42,573
1967	32,320	55	26,460	45	58,780
1968	24,600	62	14,803	38	39,403
1969	37,040	86	6,229	14	43,269
Total	129,984	63	75,978	37	205,962

d. Because of the substantial price advantage coal has over the other fossil fuels in the areas served by Freeman and United Electric, fluctuations in the delivered price of gas and oil are not likely to affect the delivered price of coal. Most coal consumers choose

[19] Two of the defendants' expert economists stated in another context (GX 232, A. Ex. 162):

"The problem of thermal pollution is especially severe for nuclear plants, which are, as yet, considerably less efficient than fossil-fueled plants. A nuclear plant converts about 25 percent less of the heat output into electric energy and, for an equal number of kilowatt hours, discharges about 50 percent more heat into the cooling water than does a fossil-fueled plant. This has already created some difficulties in obtaining construction permits for nuclear plants, and in one instance has necessitated the use of cooling towers."

coal because it is much cheaper and are unlikely to make a sudden switch on the basis of small or temporary reductions in the price of gas or oil—even if that were feasible and even if those fuels were sufficiently available. Thus, in *Kennecott Copper Corp.* v. *Federal Trade Commission*, 467 F. 2d 67, 79 (C.A. 10), petition for certiorari pending, No. 72–637, the court stated that, despite the competition of other fuels, coal prices "are now, and promise to be in the future, subject to the peculiarities of the coal business," and "other fuels appear to have a limited effect."

e. In sum, although coal is undoubtedly subject to some interfuel competition in some areas of the country and competes to a limited degree outside its distinctive market, it has a limited class of customers which is significantly narrower than that for all forms of "energy." Its special advantages are not competitively significant for some fuel customers; for other consumers its advantages give it a clear competitive edge. While other fuels may be attracting the business of some coal customers, thereby diminishing the narrow class, the confines of that class are clear. Thus, as the court held in *Kennecott Copper Corp., supra,* "[t]he coal industry is a distinct submarket which has characteristics which are not shared by the other fuel industries" (467 F. 2d at 79).[20]

[20] The appellees argue (Motion to Affirm, p. 17) that the court below "did not choose energy as the framework for its analysis in order to ignore the merger's competitive implications within the coal industry," but rather "because it assisted in explaining 'what has happened in the *coal* industry and to *its markets*.' "

The situation here is thus like that in *United States* v. *Aluminum Co. of America,* 377 U.S. 271, where this Court held that aluminum conductor is a relevant line of commerce for determining the effects of an acquisition combining a manufacturer of aluminum conductor and a manufacturer of copper and aluminum conductor. The competition between aluminum and copper conductor, upon which the district court had relied in refusing to treat aluminum conductor as a separate line of commerce, was, in the Court's view, "enough to justify grouping aluminum and copper conductors together in a single product market" (377 U.S. at 275). The Court concluded, however, "contrary to the District Court, that that degree of competitiveness does not preclude their division for purposes of § 7 into separate submarkets" (*ibid.*). Aluminum conductor, like coal, "has little consumer acceptance" for many uses but "enjoys decisive advantages" in a narrow application, where its substantially lower price is "the single, most important, practical factor in the business" (*id.* at 275–276). As with coal and other fuels, "aluminum and copper conductor prices do not respond to one another" (*id.* at 276).

The court's opinion, however, reflects no analysis of the structure of the coal submarket or of the impact upon it of the Freeman-United Electric combination. Indeed, the appellees have agreed that what they call the "subsidiary technicalities of market definition were not determinative of the decision below" (Motion to Affirm, p. 15). This Court, however, has repeatedly emphasized the importance of a proper market definition in determining the probable effects of a combination. *E.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 322, n. 38, 343; *United States* v. *Continental Can Co.*, 378 U.S. 441, 458, 459–460, n. 10.

B. THE DISTRICT COURT'S CONCLUSION THAT ENERGY IS THE EXCLUSIVE RELEVANT LINE OF COMMERCE RESTED UPON A MISUNDERSTANDING OF UNITED STATES V. CONTINENTAL CAN CO., 378 U.S. 441.

The district court, after an extensive discussion of interfuel competition (J.S. App. 27a–53a), concluded that *United States* v. *Continental Can Co.*, 378 U.S. 441, "compel[s] this Court to conclude that since coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass interfuel competition" (J.S. App. 55a).[21] This conclusion rests upon a misunderstanding of *Continental Can*.

Continental Can involved the merger of a large producer of metal containers and a large producer of glass containers. The district court, although recognizing that there was substantial "interindustry competition" between the two products, held that the only appropriate lines of commerce were the can industry and the glass container industry separately and rejected various broader markets covering both products (378 U.S. at 447–448). This Court reversed,

[21] Despite the district court's express holding that "the energy market is *the* appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination" (J.S. App. 53a, emphasis added), it seemingly recognized, in its discussion of the relevant geographic markets, that coal is a separate product. Thus, the geographic markets, were defined on the basis of "the distributive patterns of * * * coal" (*id.* at 56a); the discussion focused on "those facilities for whose business coal mines are able to compete and those mines to which coal consumers can practicably turn for supplies" (*id.* at 57a). The sections of the country defined by the court were called "coal market[s]" (*id.* at 58a).

holding that "the interindustry competition between glass and metal containers is sufficient to warrant treating as *a* relevant product market the combined glass and metal container industries and all end uses for which they compete" (p. 457, emphasis added). Although "[g]lass and metal containers were recognized to be two separate lines of commerce," the Court ruled (pp. 456–457) that "given the area of effective competition between these lines, there is necessarily implied one or more other lines of commerce embracing both industries."

Continental Can was thus an application of the settled principle that there may be many relevant lines of commerce. It reflected the economic reality that where there is substantial competition between related products in different industries, the line of commerce to be used in examining a merger between companies in those industries must be drawn sufficiently broadly to "conform to competitive reality" (p. 457) and should not be limited "to competition between identical products" (p. 452). All that *Continental Can* suggests with respect to the energy market is that, in evaluating a merger between companies in different segments of that market—for example, the acquisition of a coal company by a natural gas producer—it would be appropriate to define a line of commerce to include both products.

There is nothing in *Continental Can,* however, which even suggests that, in evaluating a merger of two companies in the same industry, the market must be drawn to include other industries which compete with that industry. *Continental Can* dealt with the question of how broadly a line of commerce may be drawn, not how narrowly, and the Court explicitly stated (p. 457) that the interindustry line of commerce it selected was "a" relevant product market. *Continental Can* cannot be read, as the district court in effect interpreted it, as indicating that, in evaluating a merger of two can companies or two glass companies, neither product alone would be a relevant line of commerce. To the contrary, the Court accepted the district court's conclusion that glass and metal containers were "two separate lines of commerce" (p. 456; see, also, p. 447), and ended its discussion of the relevant line of commerce with the statement from *Brown Shoe,* quoted above, that "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" (p. 458, quoting from 370 U.S. at 325).

Continental Can, therefore, supports rather than refutes the government's contention that coal is a relevant line of commerce for testing the competitive impact of this merger of coal companies. See, also, *United States* v. *Aluminum Co. of America, supra.*

II

ILLINOIS AND THE EASTERN INTERIOR COAL PROVINCE SALES AREA ARE APPROPRIATE SECTIONS OF THE COUNTRY FOR DETERMINING THE COMPETITIVE EFFECTS OF THE ACQUISITION

The district court further erred in rejecting the two geographic markets the government proposed—the Eastern Interior Coal Province sales area and the State of Illinois, which is part of that sales area—and instead adopting as the sole relevant sections of the country the ten markets the defendants proposed. The court's error in defining geographic markets was the reverse of its error in defining the product market. In choosing energy as the exclusive line of commerce, the court ignored relevant submarkets; in adopting the ten geographic markets, the court ignored relevant broader markets which constituted appropriate sections of the country.

A. THE GEOGRAPHIC MARKETS PROPOSED BY THE GOVERNMENT CORRESPOND TO THE REALITIES OF THE COAL INDUSTRY AND ARE ECONOMICALLY SIGNIFICANT

This Court in *Brown Shoe* identified the criteria for selecting appropriate sections of the country for Section 7 purposes (370 U.S. at 336–337): "[t]he geographic market selected must * * * both 'correspond to the commercial realities' of the industry and be economically significant." The Court emphasized that the combination is unlawful if "anticompetitive effects * * * are probable in 'any' significant market" (*id.* at 337). As the Court reiterated in *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 549, the government is not required to delineate sections of the country "by metes and bounds" but need only show that the combination "may have a substantial anticompetitive effect somewhere in the United States—'in *any* section' of the United States."

The government here showed that the Freeman-United Electric combination may have a substantial anticompetitive effect in two sections of the country—the Eastern Interior Coal Province sales area and the

State of Illinois. Each corresponds to the competitive realities of the coal industry and is economically significant. Each is an appropriate geographic market.

1. The Eastern Interior Coal Province sales area is a relevant section of the country.

Transportation costs and the uneven distribution of coal deposits are the fundamental commercial realities affecting market structure in the coal industry (see J.S. App. 57a, Kurtz Dep. Ex. 10, A. Ex. 1657). These factors tend to insulate producers in one coal province from competition by producers in another coal province, and thereby to establish identifiable geographic markets. As the court below recognized (J.S. App. 57a), since transportation costs may be 30 to 40 percent of coal's delivered price, a consumer's geographical proximity to a mine and the resulting costs of transporting coal from the mine, are critical factors affecting the choice of a coal supplier. Because coal is found primarily in four producing regions (see p. 5, *supra*), a consumer's choice of a supplier is likely to be made from among producers within the nearest or most accessible region. The competitive sales areas for producers within a region thus conform generally to the geographic range beyond which transportation costs result in a delivered price that is higher than that for coal originating in another producing region.

The Eastern Interior Coal Province, within which all of Freeman's and United Electric's mines are located, is one of the country's four coal producing regions; it consists of the central and southern two-thirds of Illinois, southwestern Indiana, and western

Kentucky (Kurtz Dep. Ex. 10, A. Ex. 1657). The region is geologically united, and underlain by a coal-bearing sequence of rock known as the Pennsylvania System (A. 292–293, 679–681, 685). It is estimated that the region contains over 40 billion tons of bituminous coal resources, some 36 percent of the Nation's total resources (Kurtz Dep. Ex. 10, A. Ex. 1661).[22]

Because of the Province's geographic separation from the other producing regions (see Kurtz Dep. Ex. 10, A. Ex. 1657), its coal producers generally enjoy a competitive advantage over producers in other provinces with respect to sales to consumers in an identifiable sales area (A. 33–36). This sales area, within which most of the coal produced in the region and nearly all the coal produced by Freeman and United Electric is sold, comprises Illinois, Indiana, west Kentucky, west Tennessee, east Iowa, southeast Minnesota, south Wisconsin, and the extreme eastern portion of Missouri.[23]

[22] The coal industry and the public generally recognize the Eastern Interior Coal Province as a distinct geographic producing area (see A. 36–40, 74, 277, 330–331, 334–335, 694). The Mid-West Coal Producers Institute, Inc., a trade association for producers in the region, publishes monthly and annual production figures for mines within the Province (A. 327–329, 333–334).

[23] Bureau of Mines data reflecting the origin of coal shipments to each state show that an overwhelming proportion of the coal sold in Illinois and Indiana is produced in the Eastern Interior Province and that a substantial portion (40 to 90 percent) of the coal sold in the other states mentioned above originates in the Province (Gallagher Dep. Ex. 3, A. Ex. 1428–1429).

In 1967 about 82 percent of the coal produced in the Eastern Interior Coal Province was sold in the province sales area (GX 52, A. Ex. 67), and nearly 100 percent of the coal consumed by steam-electric utilities located within the sales area was produced in Province mines (GX 61, A. Ex. 79). In the same year Freeman sold 93.3 percent of its coal and United Electric sold 97.6 percent of its coal in the primary sales area (GX 52, A. Ex. 67).

The appellees' annual reports and advertisements acknowledge the ability of Freeman and United Electric to serve consumers throughout the midwest (see, *e.g.,* GX 5, p. 22, Kolbe Dep. Ex. 51, pp. 18–19, Nugent Dep. Exs. 14–16, Nugent Dep. Ex. 17, A. Ex. 1769, Nugent Dep. Ex. 19, A. Ex. 1771, and Nugent Dep. Ex. 20, A. Ex. 1773). Both United Electric and Freeman have at one time or another shipped coal to almost every State within the Province sales area (A. 218–230, 234–242, 250–255, GX 54–60, A. Ex. 68–78).

2. Illinois is a relevant section of the country.

Illinois has more coal resources than any other State (Kurtz Dep. Ex. 10, A. Ex. 1661, A. 681), and is the fourth largest producing State in terms of annual tons (Kurtz Dep. Ex. 10, A. Ex. 1660). The State was designated Mining District 10 under the Bitumi-

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The location of other coal deposits in or near portions of some of the states suggests that Eastern Interior Province sales are not evenly distributed throughout the state but are concentrated in that portion which is closest to the Eastern Interior Province. Industry witnesses confirmed that Province sales were concentrated in the sections of the states indicated above (A. 275–277, 336–338, 601).

nous Coal Act of 1937, 50 Stat. 72, 78, 15 U.S.C. (1940 ed.) 833. Separate production and distribution data are reported for the State by the United States Bureau of Mines (Gallaher Dep. Ex. 3, A. Ex. 1428–1429, Kurtz Dep. Exs. 9–10, A. Ex. 1650–1661). All the Freeman and United Electric mines are in Illinois.

In 1967, 82 percent of the coal consumed in Illinois was produced within the State,[24] and 90 percent of the coal consumed by Illinois steam-electric utilities was produced in the State[25] (Gallagher Dep. Ex. 3, A. Ex. 1428). In the same year, about 58 percent of the coal produced in Illinois was sold in the State (Gallagher Dep. Ex. 3, A. Ex. 1424–1447). Freeman sold about 42 percent of its coal, and United Electric sold about 62 percent of its coal, to Illinois consumers.[26]

Thus, within the broader Province sales area Illinois is an economically significant submarket in which coal users buy most of their fuel from Illinois producers and in which producers, including Freeman and United Electric, sell more coal then they sell in any other state. The impact of the combination within the State is likely to be even more "direct and immediate" than in the broader Province sales area. See *United States v. Philadelphia National Bank,* 374 U.S. 321, 357. Because Illinois coal sales are dominated by Illinois producers, and because all the Freeman and United

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[24] The figures for 1965 and 1966 were 77 percent and 81 percent, respectively (Gallagher Dep. Exs. 1, 2).

[25] The figures for 1965 and 1966 were 87 percent and 90 percent, respectively (*ibid.*).

[26] These facts were conceded by appellees in response to the government's proposed finding VI(A)(10).

Electric mines are in Illinois, structural data for the Province sales area as a whole will predictably understate the combination's effects within the Illinois submarket.

Although political boundaries do not always precisely parallel economic boundaries, both the government's and the appellees' expert witnesses testified that they are sometimes the best available approximation of a market (A. 1566, 1697). Cf. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, where the relevant section of the country was a four-county area in which the consolidating banks had their offices; this Court, acknowledging the "artificiality" of the dividing line, stated that "such fuzziness would seem inherent in any attempt to delineate the relevant geographical market" (374 U.S. at 360, n. 37). States, of course, have frequently been held to be relevant geographic markets or submarkets. In *United States* v. *Pabst Brewing Co., supra,* for example, this Court determined that the relevant markets for assessing a merger of brewers were the Nation, the three-state area of Wisconsin-Illinois-Michigan, and the State of Wisconsin alone. There, as here, because the combination would have a significant effect within the state boundaries as well as in the broader markets, it was appropriate to consider those effects. See, also, *United States* v. *El Paso Natural Gas Corp.,* 376 U.S. 651, 657, where this Court stated that there could "be no doubt that California is a 'section of the country' as that phrase is used in § 7."

3. The district court erred in rejecting these areas as relevant sections of the country.

The reasons the court gave for rejecting the Province sales area and Illinois as "sections of the country" are unsound. The court stated that these two regions reflect "past and present production statistics" but "do not relate to actual coal consumption patterns" (J.S. App. 56a). We have already shown, however, that transportation costs and the availability of coal from other areas limit the market for Eastern Interior Province coal, that a very large portion of Province coal is consumed in its sales area, and that nearly all the coal sold in the sales area is produced in the Province (pp. 37–39, *supra*). Similarly, we have shown that a very large proportion of the coal used by Illinois consumers is produced in Illinois, and that most of the coal produced by Illinois mines is sold in the State (p. 40, *supra*).

The appellees argue (Motion to Affirm, pp. 19–21) that individual mines are so limited by transportation costs that they can sell only in a small portion of the Province sales area or the State. The record shows, however, that the competitive range of a mine is much broader than the appellees contend. A producer ordinarily encounters more competition as the distance which coal is shipped increases, because transportation costs ordinarily increase with distance (A. 28–29). But a producer can be a strong competitive factor as far as 500 miles from his mine.

In 1967, for example, Freeman's Orient mines in southern Illinois shipped 260,000 tons of coal 500 miles to customers in Michigan (GX 55, A. Ex. 74, GX 56, A. Ex. 75), and 1.3 million tons to customers 300 to 500 miles from the mines (GX 55, A. Ex. 74, GX 56, A. Ex. 75, GX 57, A. Ex. 76). United Electric's Fidelity mine, located within 40 miles of the three Orient mines (Weir Dep. Ex. 1, A. Ex. 1845), shipped more than one million tons of coal to customers 300 to 500 miles away (GX 60, A. Ex. 79). These shipments represented more than half of the Fidelity mine's total production. Within the Eastern Interior Coal Province, most mines are situated within 500 miles of most locations in the Province sales area, and Freeman and United Electric both have mines that can supply any point in the sales region.[27]

That no one producer sells coal, and no one consumer buys coal, "throughout" the sales area (J.S. App. 56a) does not imply that the area is too large to be a relevant section of the country. In *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, this Court held that a requirements contract between a Florida utility and a Tennessee coal producer did not violate Section 3 of the Clayton Act because the estimated total consumption of the utility would amount to only about one percent of the coal produced by mines within the competitive producing area. The Court determined that producers throughout the Appalachian region and portions of the Eastern Interior Coal Province could supply the Florida utility, and that all of these producing districts should therefore be considered part of the relevant market.[28]

[27] Although Freeman did not sell any coal in Minnesota or Tennessee in 1967, a former Freeman president testified that Freeman could sell coal competitively in both states (A. 26–27).

[28] Because of Florida's location in relation to the Eastern and

Similarly, here, the important consideration is competitive ability. Since most mines within the Province can competitively supply most consumers in the sales area, it is an appropriate section of the country for Section 7 purposes, notwithstanding that no single mine in fact sells in every portion of the sales area at a given time.

B. THE GEOGRAPHIC MARKETS THE DISTRICT COURT ADOPTED ARE IMPROPER, BUT IN ANY EVENT THEY DO NOT NEGATE THE BROADER MARKETS OF ILLINOIS AND THE EASTERN INTERIOR COAL PROVINCE SALES AREA

The district court apparently adopted, as the exclusive sections of the country for purposes of Section 7, a patchwork of ten "geographic" markets proposed by the appellees.[29] The court's discussion (J.S. App. 56a–60a) indicates that it assumed it was required to choose between the smaller markets proposed by appellees or the broader ones proposed by the government. That assumption is erroneous.

As with product markets,[30] there may be more than one relevant section of the country, and narrow geographic markets do not negate the existence of one or more broader markets in which the combination

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Eastern Interior Coal Provinces, producers in both regions are able to compete for the business of that State's coal consumers (see Gallagher Dep. Ex. 3, A. Ex. 1438).

[29] The court did not separately identify each of these ten markets, but its discussion indicates that it accepted the appellees' market delineations (J.S. App. 56a–59a).

[30] The standards for identifying relevant sections of the country "are essentially similar to those used to determine the relevant product market" (*Brown Shoe*, 370 U.S. at 336).

will have an effect. Since the statute speaks of "any" section of the country, it is improper to ignore the larger market merely because the smaller one seems also appropriate. In *Pabst Brewing Co., supra,* the Court evaluated the impact of the merger in the Nation as a whole and in a specific three-state area, even though the State of Wisconsin was by itself a relevant section of the country.

The markets that the district court adopted, however, are not appropriate sections of the country for determining the competitive effects of the Freeman-United Electric combination even if they are considered to be additional rather than exclusive markets. The court's markets are purportedly based on the areas served by producers in the four freight rate districts in which Freeman's and United Electric's mines were located at the time of trial.[31] The appellees argued that, since the normal rail rates for coal are the same for all mines in a particular freight rate district, and since transportation costs are the principal competitive factor in the marketing of coal, mines in one district could not effectively compete with mines in another district for the same customers.

The conclusion, however, does not follow from the premises. Although transportation costs are a primary competitive consideration, ordinary *rail* rates are not

[31] Illinois is divided into eight freight rate districts: Mineral-Atkinson, Northern Illinois, Fulton-Peoria, Springfield, Danville, Murdock, Belleville, and Southern Illinois (see Weir Dep. Ex. 1, A. Ex. 1845). The United Electric mines are located in the Fulton-Peoria and Belleville districts; the Freeman mines are located in the Springfield and Southern Illinois districts.

the single controlling element in transportation costs. The record shows that about half of the coal sold in the five states that received most of the Illinois coal in 1967 was transported by all-rail shipments (Gallagher Dep. Ex. 3, A. Ex. 1424–1427). To the extent that other modes of transportation are employed, the railroad rates do not necessarily determine the delivered price of the coal. That is particularly true for United Electric, which transports most of its coal by barge (A. 271–274).

Moreover, the most competitively significant rail shipments are not governed by the ordinary rail rates for each freight rate district. Many of the largest shipments are transported by "unit trains" carrying only coal between a particular mine and a customer's facility pursuant to a specially negotiated rate. Freeman, for example, has shipped coal by unit train from a mine in the Southern Illinois district to a customer in the Belleville district sales area at a cost which is lower than any Belleville district rate to that location (A. 30–31).

Moreover, the freight rate district sales areas adopted by the district court do not include major portions of the sales of producers located in a single freight rate district. All the facilities of Commonwealth Edison Company are treated as a separate single market although they range throughout a substantial geographic area and are served by producers in different freight rate districts. Customers located in the Chicago Air Quality Control Region also constitute a separate market. Moreover, all the customers within the sales area of a particular freight rate district are not included in a single market. Such customers are divided into two categories, utility and non-utility firms, and each category is treated as a separate section of the country.[32] The result, as shown by the map facing page 48, is a crazy-quilt of artificial, noncontiguous sales areas, which do not reflect the way coal is marketed.

The map shows only six of the appellees' ten markets: the four freight rate district utility sales areas, the Chicago Air Quality Control Region, and the Commonwealth Edison Company.[33] One of these markets, represented in red, consists of three noncontiguous sections embracing parts of seven states. A second market, shown in blue, consists of two sections which are not contiguous to each other but are each contiguous to one of the three sections of the first market. A third market, shown in green, is a single section which is contiguous to one of the sections of the second

[32] Coal sold as dust also was excluded in defining sales areas. There is no basis for treating coal dust and coal screenings as separate products. See pp. 61–62, *infra*. The exclusion of dust necessarily distorted the sales area analysis. Producers in a single freight rate district (Southern Illinois) sold approximately one million tons of dust (constituting approximately 10 percent of their utility sales, DX 55, A. Ex. 475) to utilities in the sales area of another freight rate district.

[33] The map is based on the appellees' descriptions of the sales areas (A. 969, 972–977). Since those descriptions are somewhat imprecise, the map does not purport to be exact. It is an approximation of the six geographic markets. The four non-utility sales areas, which are not shown, are reasonably close to the utility areas, except that the Fulton-Peoria area (yellow) is larger and the Belleville area (blue) is limited to the lower section.

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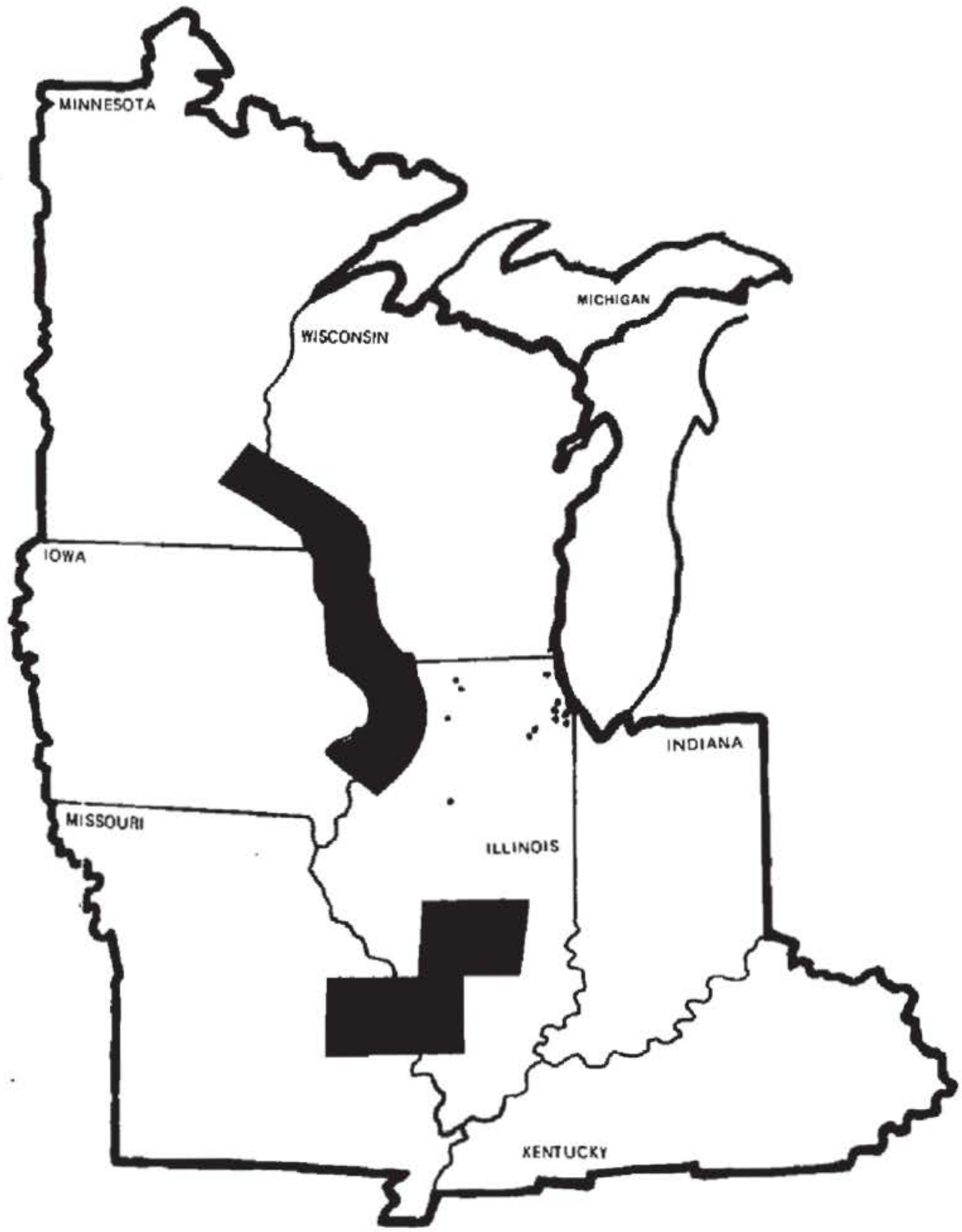
market. The Commonwealth Edison facilities, represented by black dots, are a separate market which is partially within three other markets. In sum, appellees' sales areas are "an obvious gerrymandering * * * to meet the exigencies of this case." *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 599 (S.D. N.Y.).

The artificiality of the appellees' markets is revealed by the fact that the eight sales areas for the four freight rate districts accounted for less than half of the total coal produced in those districts.[34] Nor did the eight markets accurately reflect the distribution of United Electric and Freeman coal. Some 25 percent of the coal produced in United Electric's Belleville district mine, for example, was sold to customers located in the Southern Illinois district sales areas (GX 60, A. Ex. 78), while nearly 20 percent of Freeman's Southern Illinois coal was sold in the Belleville sales areas (GX 55–57, A. Ex. 74–76). The two companies, though their mines were in different districts, sold about half of their production to common customers (GX 88–91, A. Ex. 107–117).

Moreover, because these markets were delineated on the basis of only one year's sales data, they necessarily reflected only the actual sales for that period and not the competitive ability of producers within the various districts who might, in another year, sell coal in a

[34] Only 46 percent of the coal produced in the Fulton-Peoria district was sold in appellees' utility and non-utility sales areas for that district; the figures for Springfield, Belleville, and Southern Illinois were 19, 47, and 70 percent, respectively (DX 55, A. Ex. 465, 468, 473, 478).



Chicago Air Quality Control Region
Fulton - Peoria Utility Sales Area
Springfield Utility Sales Area
Belleville Utility Sales Area
Southern Illinois Utility Sales Area
Com. Ed. Plant

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different geographic range (see A. 1670).[35] Similarly, the appellees' markets mask the competiton among mines in different freight rate districts for the business of new plants. With the development of high-voltage transmission lines, it is not uncommon for a utility to construct a plant near a mine that is several hundred miles away from the area the plant will serve (GX 239, A. Ex. 179, Kurtz Dep. Ex. 9, A. Ex. 1656). The appellees' expert conceded that a coal consumer may consider alternative suppliers located in various freight rate districts before settling on the site for a new facility (A. 1671).

Despite these deficiencies, the district court accepted the appellees' markets as the exclusive sections of the country for purposes of Section 7.[36] In our view "the

[35] Some of the markets were defined on the basis of only a few customers or sales. For example, the Springfield non-utility market consisted of two plants in Decatur, the Springfield utility sales area was two plants near Springfield, and the Fulton-Peoria utility area consisted of three customers with six plants on the Illinois River (DX 55, A. Ex. 462, 466–467). Subsequent developments demonstrated the danger of basing markets on so small a sampling of transactions. All three Fulton-Peoria area utilities have purchased from or negotiated with Springfield producers (A. 439–440, 1211, DX 55, A. Ex. 462, n. 1); a Fulton-Peoria mine has contracted to ship a million tons a year to a utility in Wisconsin (A. 609–610, 1640). That contract is for about half the tonnage sold to the three Fulton-Peoria area utilities in 1967 (DX 55, A. Ex. 462).

[36] Although the court stated that it would have reached the same conclusions even if it had accepted the government's geographic markets (J.S. App. 59a–60a), its discussion of competitive effects rested squarely on its view that "[t]he Freight Rate Districts in which the mines and reserves of United Electric are located serve separate and distinct markets from those in which the mines of Freeman are located" (J.S. App. 62a). The

pie [does not] slice so thinly." *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 331. The district court ignored this Court's direction that "[t]he proper question to be asked * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357. Instead of selecting sections of the country in which the competitive impact of the Freeman-United Electric combination would most likely be felt, the court below chose one of the "indefensible extremes" against which this Court cautioned in *Philadelphia National Bank*—it drew the market "so narrowly as to place appellees in different markets" (374 U.S. at 361).

III

THE EFFECT OF THE ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN THE RELEVANT MARKETS

A. A HORIZONTAL MERGER IS ILLEGAL UNDER SECTION 7 IF IT SIGNIFICANTLY INCREASES CONCENTRATION IN A CONCENTRATED MARKET

Amended Section 7 of the Clayton Act prohibits a merger whose effect "may be substantially to lessen competition." Congress was concerned in 1950 with the rising trend toward concentration in the American economy, and it amended Section 7 in order to prevent mergers which produced anticompetitive changes in market structure, *i.e.,* those which threatened to weaken the normal play of competitive market forces.

opinion contains no discussion of the effect of the combination on competition within the sections of the country proposed by the government (J.S. App. 60a–64a).

Brown Shoe, supra, 370 U.S. at 315–316, 320–322. Whether a horizontal merger has the proscribed effect under Section 7—and that Section deals with probabilities, not certainties—thus depends upon its effect on the structure of the relevant markets.

In *Brown Shoe* this Court stated that statistics "reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power" (370 U.S. at 322, n. 38).[37] Where the merger produces a firm that controls an "undue" percentage share of the market and significantly increases concentration in the market, those facts alone establish *prima facie* that the effect of the merger may be substantially to lessen competition. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363; *United States* v. *Continental Can Co.,* 378 U.S. 441, 458. The Court stated in *Philadelphia National Bank,* 374 U.S. at 363:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so in-

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[37] The Court also stated (370 U.S. at 343):

"The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market."

See, also, *United States* v. *Continental Can Co., supra,* 378 U.S. at 458.

> herently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

The Court noted also that in a market where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (374 U.S. at 365, n. 42).

The Court in *Philadelphia National Bank* did not specify a minimum combined share which would establish *prima facie* illegality. It concluded, however, that the merging banks' combined share of more than 30 percent of the relevant market was sufficient to invoke the principle. In *United States* v. *Von's Grocery Co.*, 384 U.S. 270, and *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, the Court applied the principle to invalidate combinations involving considerably smaller combined shares where the markets had experienced a rapid increase in concentration. "[A] trend towards concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be" (*Pabst*, 384 U.S. at 552-553).[38]

In *Von's*, there had been a rapid decline in the number of single-store retail groceries in the market, an increase in the number of chains, and a history of acquisitions and mergers; the merger in question com-

[38] In *Von's* the Court stated that "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers" (384 U.S. at 277).

bined the third and sixth largest chains with a combined share of 7.5 percent of the market. "These facts alone," the Court said, "are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7" (384 U.S. at 274).

In *Pabst* the Court held that *prima facie* illegality had been established in three sections of the country. In the Nation as a whole, the acquisition combined the 10th and 18th largest brewers to form the fifth largest with about 4.5 percent of the market. In the Wisconsin-Illinois-Michigan area, the combination of the sixth and seventh largest brewers controlled about 11 percent of the market. In Wisconsin, the first and fourth largest combined to form the largest with 24 percent of the market (384 U.S. at 550–551). In each of these markets there had been a significant increase in concentration.[39]

In *United States* v. *Aluminum Co. of America*, 377 U.S. 271, the Court held unlawful a merger of the first and ninth largest producers of aluminum conductor, where the resulting combination controlled 29.1 percent of the aluminum conductor market and 16.3 percent of the narrower market of insulated alu-

[39] In the Nation, between 1957 and 1961, the number of sellers decreased from 206 to 162, and the top ten firms increased their share from 45 percent to 58 percent. In the three-state area, the number of breweries dropped from 104 to 86, and the share of the top eight companies grew from 59 percent to 68 percent. In Wisconsin, the number of firms went from 77 to 54, and the four leading companies boosted their share from 48 percent to 59 percent. (384 U.S. at 550–551.)

minum conductor.[40] In *United States* v. *Continental Can Co., supra*, the unlawful merger had resulted in a combined share of 25 percent of the metal and glass container market.[41]

B. UNDER THESE CRITERIA THE FREEMAN-UNITED ELECTRIC COMBINATION IS UNLAWFUL

1. The market is concentrated and the trend is toward further concentration.

supra

As shown in the table on page 6, ~~*infra*,~~ in 1957 the top two coal producers in the Eastern Interior Coal Province had 29.6 percent of the production, the top four had 43.0 percent, and the top ten had 65.5 percent. Concentration in Illinois was even greater: the top two had 37.8 percent, the top four had 54.5 percent, and the top ten had 84.0 percent of the production. The pre-merger concentration levels in the relevant markets in this case, in *Von's*, and in *Pabst* are shown in the following table:

	Province	Illinois	Von's	Pabst, Wisconsin	Pabst, 3-State	Pabst, National
Top 2	29.6	37.8	....	....	....	....
Top 4	43.0	54.5	24.4	47.7	....	....
Top 8	....	....	40.9	....	58.9	....
Top 10	65.5	84.0	....	....	....	45.1
Top 12	....	....	48.8	....	....	....

[40] Both markets were concentrated. In the aluminum conductor market, the top two firms controlled 50 percent, the top five 76 percent, and the top nine 95.7 percent. In the insulated aluminum conductor market, the top five had 65.4 percent and the top nine had 88.2 percent. (377 U.S. at 278.)

[41] The top two firms in that market had 48.7 percent of the business, the top four had 62.7 percent, and the top six had 70.1 percent (378 U.S. at 461, n. 11).

Both geographic markets here thus were concentrated prior to the time Material Service assumed control of United Electric in 1959, and concentration rapidly increased between 1957 and 1967. In the Province sales area the share of the top two producers increased about 65 percent (29.6 percent to 48.6 percent), the top four's share rose about 46 percent (43.0 to 62.9), and the top ten's share increased about 40 percent (65.5 to 91.4). In Illinois the comparable figures were 43 percent (37.8 to 52.9), 38 percent (54.5 to 75.2), and 17 percent (84.0 to 98.0). These increases were, for example, significantly greater than those in *Von's*, where, over a ten-year period prior to the merger, the top four's share of the market had slightly decreased, the top eight's share had risen about 21 percent, and the top twelve's had increased about 26 percent.

In addition, between 1957 and 1967 the number of coal producers in Illinois decreased approximately 73 percent, from 144 to 39 (GX 73, A. Ex. 92). In *Von's*, by comparison, between 1950 and 1961 the number of single stores dropped only about 30 percent, from 5,365 to 3,818.

The district court apparently discounted the decline in the number of producers on the ground that the reduction "has occurred not because small producers have been acquired by others, but as the inevitable result of the change in the nature of demand for coal" (J.S. App. 60a). This Court has held, however, that the government is not required to show that a trend toward concentration is due to mergers. *Pabst, supra,* 384 U.S. at 552–553. "[A] trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be" (*ibid.*). Moreover, the record contains a four-page exhibit showing that at least 22 Eastern Interior Coal Province producers were acquired by other companies between 1955 and 1968; these acquisitions involved the transfer of control over 40 mines (GX 87, A. Ex. 101–106).

Appellees argue (Motion to Affirm, pp. 12–13, n. 11) that there is no pronounced trend toward concentration because, apart from Peabody Coal Company, the market shares of the other leading producers remained relatively stable over the ten-year period. But the effects of an increasingly concentrated market structure are not mitigated merely because the increases are caused chiefly by a single company. Nor is a merger's anticompetitive impact minimized because the combining companies' shares of the increasingly concentrated market have remained constant. See *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 576–577.

The significant consideration is that increases in market concentration, whatever their cause, diminish the vigor of competition; it was this rising trend in concentration that Congress intended to halt in the 1950 amendments to Section 7 (pp. 50–51, *supra*). Appellees do not dispute that the trend in the Province and Illinois, without excluding Peabody or any other producer, is toward concentration.

2. The merger is prima facie unlawful because it produces a firm with an undue percentage share of these concentrated markets and significantly increases concentration there.

The acquisition of United Electric brought together two of the leading companies in each of these concentrated markets, and the market shares of the resulting Freeman-United Electric combination show that the acquisition "is of such a size as to be inherently suspect" (*Continental Can, supra,* 378 U.S. at 458). This is true whether the acquisition is viewed as of 1959, when Material Service obtained effective control over United Electric (J.S. App. 8a), or as of 1967, when United Electric became a wholly-owned subsidiary of General Dynamics (J.S. App. 9a).

The record contains detailed production data for mines in the Eastern Interior Coal Province and Illinois. Because of the correlation between production in Province mines and sales in the Province sales area, and between production in Illinois mines and sales to Illinois customers (see pp. 39–40, *supra*), the structural data based on production is a fair measure of the competitive impact of the acquisition within the two markets. Coal consumers in those areas will be directly affected by the alteration of the competitive structure of coal producers.

The following table shows, for 1959 and 1967, the ranking and share of coal production for Freeman, United Electric, and the two combined, in both the Eastern Interior Coal Province and Illinois:

	Province		Illinois	
	Rank	Share (percent)	Rank	Share (percent)
1959 (GX 64, A. Ex. 83, GX 77, A. Ex. 96):				
Freeman	2	7.6	2	15.1
United Electric	6	4.8	5	8.1
Combined	2	12.4	1	23.2
1967 (GX 72, A. Ex. 91, GX 85, A. Ex. 98):				
Freeman	5	6.5	2	12.9
United Electric	9	4.4	6	8.9
Combined	2	10.9	2	21.8

The combined companies' shares of these markets are thus within the range of shares that this Court has held *prima facie* unlawful. The Illinois figures of 23.2 and 21.8 percent approach the 23.95 percent share in the *Pabst* Wisconsin market, the 25 percent share in *Continental Can,* and the 29.1 percent share in *Alcoa.* The Province figures of 12.4 and 10.9 percent approximate the shares held unlawful in the *Von's* (7.5), *Pabst* National (4.49), and *Pabst* three-state (11.32) markets.

The acquiring company, both in 1959 and 1967, substantially increased its market share. When it assumed control of United Electric in 1959, Material Service enlarged its percentage share of coal production in the Province from 7.6 to 12.4, an increase of about 63 percent; in Illinois its share grew from 15.1 to 23.2 percent, a jump of about 53 percent. Viewing the acquisition as a 1967 transaction, General Dynamics' share in the Province increased from 6.5 to 10.9 percent, a growth of 68 percent; in Illinois its share increased from 12.9 to 21.8 percent, a growth of

70 percent. These increases greatly exceed that in *Continental Can, supra,* where an increase of only 14 percent was held unlawful (378 U.S. at 461).

The acquisition also resulted in substantial increases in market concentration in each of the relevant areas. Since in each market for both 1959 and 1967 the Freeman-United Electric combination ranks first or second, it becomes relevant to examine the market shares of the top producers in those markets for those years but for the merger. In the following table, we compare such market shares to the shares of the top two producers given consummation of the merger, and show the resulting percentage increase in concentration.

	1959 (GX 64, A. Ex. 83, GX 77, A. Ex. 96)			1967 (GX 72, A. Ex. 91, GX 85, A. Ex. 98)		
	Share of top 2 but for merger	Share of top 2 given merger	Percent increase	Share of top 2 but for merger	Share of top 2 given merger	Percent increase
Province	33.1	37.9	14	45.0	48.6	8
Illinois	36.2	44.3	22	44.0	52.9	20

Thus, the immediate effect of the combination, in either year, was to make an already concentrated market even more concentrated.

These structural data establish that the acquisition, whether viewed as of 1959 or 1967, "produce[d] a firm controlling an undue percentage share of the relevant market, and result[ed] in a significant increase in the concentration of firms in that market" (*Philadelphia National Bank, supra,* 374 U.S. at 363). It is therefore "inherently likely to lessen competition substantially" and "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects" (*ibid.*). There is, as we show below (pp. 63–75), no such evidence in this case.

C. THE ACQUISITION IS ALSO ILLEGAL BECAUSE IT ELIMINATES SUBSTANTIAL COMPETITION BETWEEN FREEMAN AND UNITED ELECTRIC

1. As the table on page 11, *supra,* illustrates, Freeman and United Electric sell about half of their coal to common customers, and most of those sales are to identical customer facilities. Indeed, even in appellees' Commonwealth Edison market the two companies have been substantial competitors. In the years 1965 through 1967, United Electric shipped about 31 percent of its coal and Freeman shipped about 21 percent of its coal to identical facilities of the Commonwealth Edison Company (GX 70–72, A. Ex. 89–91, GX 88–90, A. Ex. 107–116).[42]

Salesmen of the two companies have actively solicited the same customers (A. 48, 121), and the companies have been asked to make bids to supply the same customer (see GX 104, A. Ex. 124–125). United Electric's president and a former president acknowledged that the company competed with Freeman (A. 84, 131). Customers of both companies have considered them competitors (GX 93, A. Ex. 118–119, GX 94, A. Ex. 121, A. 1437).

2. The district court, however, concluded that "an independent United Electric would not and could not compete with Freeman to any substantial degree" because the "companies have been and are now predominantly complementary in nature" (J.S. App.

[42] United Electric's contract with Commonwealth Edison expired in 1970 (J.S. App. 62a).

61a). The reasons the court gave for this conclusion are either beside the point or not supported by the record.

The court stated that United Electric is a strip mining company and Freeman a deep mining company (J.S. App. 61a). But the record is clear that coal from deep mines and strip mines is competitive (GX 91, A. Ex. 117). Freeman sells metallurgical coal and United Electric does not (J.S. App. 62a). But this amounts to only a small portion of Freeman's sales—about eight percent in 1969 (A. 1530)—and only a small portion of coal production and reserves in the relevant areas.[43]

Similarly, Freeman sells coal dust, a by-product of the production of metallurgical coal, while United Electric sells only "screenings" (*i.e.,* pieces of coal) (J.S. App. 62a). But dust and screenings are competitive products. Both are produced in coal mines, priced according to their BTU content, and shipped to the same customers by the same means for use in the same boilers (A. 1125–1127, 1396). Coal is crushed to dust size or smaller prior to burning (A. 1144–1145); and dust and screenings have an identical consistency as they proceed from the pulverizer to the boiler (A. 263–264). Since a ton of dust replaces a ton

[43] The metallurgical coke industry seeks coal with a maximum of 1.5 percent sulfur and a low ash content (GX 210, A. Ex. 135). In Illinois only about three percent of total coal reserves are estimated as within a range of one to three percent sulfur content, and only about half of those reserves are estimated to average 1.5 percent or less in sulfur content (GX 210, p. 22).

of screenings (assuming an equivalent BTU content), dust consumers would purchase more screenings if dust were not available (A. 1127, 1143–1144, 1164, 1396).

While Freeman's and United Electric's mines are in different freight rate districts (J.S. App. 62a), we have already shown that mines in different districts, including Freeman's and United Electric's mines, can and do compete for the business of the same customers (pp. 42–43, 45–50, 60–61, *supra*).

The court stated that, because of local and federal air pollution controls in the Chicago area, United Electric's Chicago market for its relatively high sulfur coal will ultimately disappear, and the company will no longer be able to compete with Freeman in that area (J.S. App. 62a). The record does not indicate, however, that these pollution controls will preclude the use of all high-sulfur coal. The director of the Chicago Air Pollution Control Agency testified that the applicable ordinance permits the burning of high-sulfur coal when used, for example, in conjunction with low sulfur fuels, or when adequate control devices are installed (A. 496–497). Such control devices are being developed and are expected to be available within four to five years. (A. 1185, 1429). Moreover, utility and industrial coal consumers are building new facilities outside the Chicago metropolitan area (A. 495–496); high voltage transmission lines now permit a utility to locate generating plants considerable distances from distribution centers (A. 1185).

D. THE MERGER CANNOT BE JUSTIFIED ON THE GROUND THAT, BECAUSE OF INADEQUATE RESERVES, UNITED ELECTRIC NO LONGER WAS A SIGNIFICANT COMPETITIVE FACTOR IN THE COAL BUSINESS

1. The claim that the merger would not substantially lessen competition because the acquired company had "inadequate resources" to remain a significant competitor must be tested by the general legal standards that govern the "failing company" defense.

In *Philadelphia National Bank, supra,* 374 U.S. at 363, the Court stated that a merger which gives the merged firm an "undue percentage share" of the market and significantly increases concentration "is so inherently likely to lessen competition substantially" that it must be enjoined "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." Similarly, in *Brown Shoe, supra,* 370 U.S. at 346, the Court recognized that in merger cases the defendant might present "mitigating factors, such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position." Appellees have made no contention that United Electric was a "failing company," *i.e.,* one whose "resources [were] so depleted and [for which] the prospect of rehabilitation [was] so remote that it faced the grave probability of a business failure" (*International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302). Indeed, they could not possibly make the argument on this record, which shows that the company has been a vigorous and successful competitor in the coal business, whose financial health

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was good from at least 1955 to the time of trial (Statement, *supra*, pp. 8–9).

Appellees did contend—and the district court accepted the contention—that because United Electric's coal reserves were inadequate it "could not in the future be an independent, viable competitor of Freeman, or any other midwestern coal producer" (Defendants' Post-trial Br. 80; emphasis omitted); and that since United Electric standing alone could not continue as a competitive force in the market (Post-trial Br. 81–82), its elimination through merger could not substantially lessen competition. We submit, however, that this ruling reflects an erroneous concept of what constitutes the "inadequate resources" (*Brown Shoe*) that a defendant must establish, in order to overcome the government's *prima facie* case.

This Court has not elucidated the concept of "inadequate resources" which, it suggested in *Brown Shoe*, might justify an otherwise illegal merger.[44] It has, however, ruled that the analogous "failing company" defense has a "narrow scope" and can be successfully asserted only in extremely limited circumstances. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131,

[44] Congress has expanded the "failing company" defense in dealing with the banking industry. In the Bank Merger Act of 1966 it provided that an anticompetitive merger nevertheless may be approved if it is found that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. 1828(c)(5)(B). In creating this new defense Congress recognized that even though a bank might not be "so deeply in trouble as to

139. We submit that any defense based on the alleged inadequate resources of the acquired firm is similarly available only on narrowly circumscribed conditions.

a. The defense of inadequate resources rests on the same economic premise as the failing company defense: that if a firm has ceased to be an economically viable enterprise, its elimination cannot substantially lessen competition because it no longer is a significant competitive factor in the market. In manufacturing and distributing industries, it is difficult to envision a case where the inadequate resources defense could be made. In an extractive industry, however, there may be exceptional situations in which the condition of a firm's resources are such that, apart from the merger, it was about to disappear from the market.

Assume, for example, that a firm which currently produces 25 percent of a particular metal acquires a firm which produces 20 percent of that metal and that the industry is highly concentrated. Under this Court's market structure standards for deciding Section 7 cases, the merger would be *prima facie* illegal (*supra*, pp. 50–60). Further assume, however, that the

call forth the traditional 'failing company' defense," if it was "nonetheless in danger of becoming before long [a] financially unsound" institution, the public interest in avoiding the latter condition might outweigh the anticompetitive effects of the merger. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 187. Congress, however, has not created any similar exception to the "failing company" defense for the coal industry and certainly has not manifested any intention that the "inadequate resources" theory in *Brown Shoe* should be given a comparable expansion.

acquired firm, although having 20 percent of the market, (1) would exhaust its supply of the metal within a year, (2) could not obtain any substitute source of supply, and (3) had neither the financial resources nor the managerial skills that would enable it to prolong its independent existence through resort to new technology or further exploration. In such circumstances, the merger apparently would not substantially lessen competition because the acquired firm would soon cease operations.

Since Section 7 is concerned with the probable effects of a merger on competition, the failing company defense has focused mainly on the most convincing evidence of inability to continue operations—the imminent likelihood of financial collapse. An "inadequate resources" claim, however, requires a broader and more sophisticated analysis. Where the company is economically sound and not facing immediate financial catastrophe, there are substantial uncertainties with respect to its probable future even if its present supply of raw materials is about to be exhausted. The acquisition of a financially healthy firm in an extractive industry, such as United Electric, means that the firm is unlikely to conduct research and development designed to obtain more efficient use of existing resources or to discover new ones; use of new industrial techniques may permit the extraction of raw materials previously considered unusable and lead to the discovery of new sources of supply. See *infra,* pp. 71–74, and n. 53. Moreover, the longer the time before the resources will be exhausted, the less certain it is that the acquired firm would disappear without the merger.

Thus, although an "inadequate resources" defense invokes the same economic principle as a failing company defense, the inherent uncertainty that a lack of inadequate resources will result in the termination of operations requires an even stronger showing of imminent collapse than is required in the case of an allegedly failing company. Recognizing the differences in the factual showing required to support that claim, we submit that an "inadequate resources" defense must be tested by the general legal standards which this Court has established in "failing company" cases.[45]

b. This Court has made it clear that before a financially ailing firm can be considered "failing" the condition of the firm must be such that there is no realistic prospect of recovery so that were it not for this particular acquisition, the firm would quickly have disappeared from the market. The critical consideration is that there is no reasonable alternative possibility of rehabilitating the firm or keeping it going. Section 7 is concerned with long-range trends and changes in market structure, and the acquisition of an alleged "failing company" would pose no reason-

[45] "The burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it" (*Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138–139, footnote omitted). In view of the closely-related character of that defense to the inadequate resources defense, we submit that the burden of establishing the latter similarly is on "those who seek refuge under it."

able probability of anticompetitive effect only if that company were otherwise permanently and irrevocably incapacitated. For this reason, temporary difficulties, no matter how serious or substantial, are not sufficient to constitute a failing company defense. Before that defense can be accepted, every reasonable method of economic rehabilitation must have been adequately explored and found unavailable.

Thus, for a company to be "failing" so that its elimination cannot substantially lessen competition, its situation must be so precarious and so hopeless that it is "on the brink of collapse" and its prospects of reorganization or resuscitation must be "dim or nonexistent" (*Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138). The Court there also pointed out (*ibid.*):

> The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power.

In *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 555–556, the Court recently reiterated that the failing company defense requires a showing that the acquired company was in danger of imminent financial collapse and that the acquiring company was the only prospective purchaser. See, also, *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 189.

This Court's decisions also indicate that the validity of a failing company defense must be determined as of the time of the acquisition, not as of the time of trial. In *International Shoe,* the acquisition had taken place in May 1921, and the Court focused upon the acquired company's financial condition between 1920 and "the spring of 1921" (280 U.S. at 300). In *Citizen Publishing,* the transaction with respect to which the failing company defense was asserted took place in 1940, and the Court considered the acquired firm's condition as of that date, although the suit was not brought until 1965 (see 394 U.S. at 138). Similarly, in *Greater Buffalo,* the critical time for evaluating the defense was "the year of the sale," not the time of trial (402 U.S. at 555).[46] The reason is that, since the rationale of the failing company defense is that a merger cannot have anticompetitive consequences if the company thereby eliminated was about to disappear anyhow as a significant factor in the market, the company's viability must be determined as of the time of the merger.

For the same reasons, we submit that an "inadequate resources" defense is not available unless, at the

[46] In *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598, the Court stated:

"[T]he force of § 7 is still in probabilities, not in what later transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger."

See, also, *United States* v. *Continental Can Co.*, *supra*, 378 U.S. at 463; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 170, 177; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 577.

time of the acquisition, (1) the acquired company was about to cease operation because it had no reasonable likelihood of obtaining additional raw materials or otherwise solving its supply problem, and (2) there was no alternative way of preserving its existence, such as sale to a purchaser—other than one of its largest competitors—who would undertake to rehabilitate it. Neither condition was satisfied in this case, and accordingly the "inadequate resources" defense should have been rejected.[47]

2. The district court did not find, and the record does not show, that at the time of the acquisition United Electric was about to go out of business and could not be rehabilitated.

a. The district court held that United Electric cannot "continue operations beyond the life of its present mines" and "standing alone, cannot contribute meaningfully to competition" (J.S. App. 63a, 64a). It stated that the government "failed to come forward with any evidence that such reserves are *presently* available" (*id.*, 63a, emphasis in original), and that "virtually all of the economically mineable strip reserves of United Electric have been sold under long-term contracts, and United Electric has neither the

[47] Although we did not frame our argument in these terms in our jurisdictional statement, we argued there, as we do here, that the district court erred in considering only "whether the acquired firm could survive *at the time of trial* as a competitive entity, without also (and more significantly) determining the competitive potential cut off by the acquisition" (J.S. 22, emphasis in original). See, also, J.S. 20, 24. Similarly, we stated in our Brief in Opposition to Motion to Affirm (p. 5) that "appellees' claim that UEC is a self-liquidating company is essentially an affirmative defense, akin to the failing company defense * * *."

possibility of acquiring more nor the ability to develop deep coal reserves" (*id.*, 65a).

These findings do not sustain an "inadequate resources" defense because they do not relate to United Electric's reserves and viability in 1959, when Material Service took effective control of the company, or in 1967, when General Dynamics became the company's sole shareholder (J.S. App. 8a–9a). There is no finding, and the record does not show, that in 1959 or 1967 United Electric was about to go out of business as a consequence of depleted reserves. Nor is there any finding that virtually all of United Electric's strip reserves were committed in either of those years; the finding that 48 of 52 million tons of those reserves were committed (J.S. App. 9a, 65a) related to the time of trial (see note 7, *supra*). Similarly, although the court found that, at the time of trial, United Electric could not reasonably expect to acquire additional economically mineable strip reserves, it did not find that it could not have acquired such reserves in 1959 or 1967. Indeed, the record shows that between 1959 and 1970 United Electric did enhance its reserves at existing mines.[48] Moreover, other coal producers acquired new strip reserves in Illinois and Indiana after 1960 and were actively prospecting for coal reserves even at the time of trial (A. 1489–1490).[49]

[48] Although it mined 50 million tons of coal from 1959 to 1969, the estimated reserves dedicated to existing mines declined only about 18 million tons (DX 60, A. Ex. 517, 540, 544–561).

[49] Commonwealth Edison was itself acquiring central Illinois strip reserves which it expected to use (A. 1422, 1430, 1442).

The district court also found that United Electric has no experience in developing deep coal reserves and no "likelihood of acquiring it" (J.S. App. 61a). But it did not consider whether, had Freeman (a deep coal producer) not acquired the company, United Electric could have acquired the necessary expertise, either by training its own personnel, hiring already experienced personnel, entering into a joint venture of limited duration with a deep coal company, or even acquiring a small deep coal producer.

Appellees have never disputed that ample deep coal reserves are available in the Eastern Interior Coal Province. Humble Oil was able to acquire 3 billion tons of deep reserves in 1965 and 1966 (DX 61, A. Ex. 577, A. 849). The record shows that United Electric has had both the financial resources and general coal marketing experience necessary to enter deep mining,[50] that at least one company (Humble Oil) made a *de novo* entry into deep mining after 1964,[51] and that one strip mining company (Ayrshire Collieries) acquired an existing small deep mining company in the 1950s and used the acquired firm's staff as

[50] The company's financial health has for many years been excellent (p. 9, *supra*). In 1968, it had $10.7 million in working capital, a net worth of $26.9 million, and no long term debt (GX 34, A. Ex. 40). A past president of United Electric and of Freeman estimated that the cost of opening a deep mine at Round Prairie Field, where United Electric has acquired deep reserves, would be $6.5 million to $7.5 million (A. 94).

The market for United Electric's strip-mined coal would be available for deep-mined coal (A. 1493, 1693).

[51] Humble constructed a deep mine at a cost of between $10 million and $20 million (excluding the cost of reserves); the mine is expected to produce three million tons of coal per year for 20 to 30 years (A. 849).

the nucleus of a new deep mining organization (A. 1490–1491).[52]

It is a well-known fact in the American economy, of which this Court may take judicial notice, that firms in the extractive industries regularly and constantly seek and obtain new sources of supply. Oil companies and natural gas companies are searching for new oil and gas reserves; the record shows that coal companies, too, vigorously pursue this policy of exploration and acquisition of additional reserves (A. 1498). Moreover, research into new methods of extraction often succeeds in rendering usable reserves which previously could not have been economically mined.[53] It is hard to believe that a firm as large, important, and financially strong as United Electric, which both in 1959 and in 1967 was one of the major coal companies in the midwest, would idly sit by and allow its entire coal business to disappear because its existing coal reserves were becoming exhausted. To the contrary, the realities of economic life indicate that, had United Electric remained an independent company, it, like other companies similarly situated, would have vigorously

[52] Although the Ayrshire venture was not successful, an official of that company testified that the problems were unrelated to extractive expertise: "I rather doubt that anyone could have made a profitable operation out of it" (A. 1491).

[53] As a result of the technological changes in methods of extraction, the depths at which strip mining may occur and the proportion of ground cover to coal seam thickness (overburden ratio) which can be economically removed have changed so that mining of previously unusable coal deposits has become feasible (A. 57, 400, 532, 645–646. 689–690, 1489. 1495. 1532, DX 49, A. Ex. 403, GX 632, A. Ex. 158).

pursued a policy of obtaining additional reserves to enable it to continue its substantial business as its existing reserves were depleted.

b. Similarly, the district court did not find, and the record does not show, that, at the time of acquisition, there was no possibility of solving United Electric's problems of a lack of adequate coal reserves other than by eliminating the company. Cf. *Citizen Publishing Company, supra.* Indeed, the record does not indicate that United Electric sought or agreed to the merger because of concern that it was about to go out of business because of a lack of reserves. In light of the experience of other companies in entering into deep mining of coal without prior experience and the substantial deep mining reserves available in the area where United Electric operates (see *supra,* pp. 71–73), this merger could not be justified by reference to United Electric's "inadequate resources" unless and until that company had explored all possibilities but found them unavailable.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded for the entry of an appropriate decree.

Respectfully submitted.

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