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■ SUSMAN GODFREY

Litigator put money where his mouth was



By Emily Heller

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IN 2006, COMMERCIAL litigator Steve Susman was spouting off about using litigation to combat climate change, giving speeches and getting quoted, even though at that point it was just a bunch of hot air. He concedes of his rhetoric: "There was nothing. It was totally made up."

That summer, a coalition of Texas cities called his bluff.

The Texas Cities for Clean Air Coalition sought to block state approval of 10 new coal-burning power plants, but prospects were gloomy, said coalition organizer Laura Miller, then the mayor of Dallas. Texas Governor Rick Perry had issued an executive order shortening the approval process from 18 months to six. What's more, the permits for power company TXU Corp. would be processed simultaneously.

"We knew it was going to be an uphill battle," Miller said.

The coalition asked Houston firm Susman Godfrey to do the legal work. Although the firm had little or no environmental or regulatory law experience, Susman and his partners jumped at the chance. "This was a real lawsuit," he said.

In February 2007, at the beginning of a three-week administrative hearing on the permits' challenges, TXU withdrew eight of the 10 permit applications, a victory Miller said would not have happened without Susman Godfrey.

Although environmental groups and individual Texas cities often oppose power-plant permits, said



FIREBREATHER: Steve Susman and allies brought unprecedented resources to the fight against Texas coal-burning power plants.

environmental lawyer David Frederick of Loweree & Frederick in Austin, Texas, co-counsel in the case against TXU, this time the fight was joined by three dozen cities, towns and school boards, backed by ranchers and farmers who don't typically consider themselves kindred spirits with environmentalists.

Power-plant opponents typically are a "ragtag group" represented by counsel, but not by highly paid litigators, Susman said.

"We spent \$750,000 on our experts," he continued. "It was a real surprise to TXU when they saw us coming and saw it was going to be a fight." The coalition cities paid \$10,000 each for expenses and experts. Susman Godfrey gave \$2 million in billable time.

"For the only time in my 25-year practice, permit opponents were on equal footing, in terms of legal resources, with the applicant," said Frederick, who estimated his firm's time on the case at no more than \$70,000.

Neither TXU nor its lead counsel, John Riley of Houston's Vinson & Elkins, responded to requests for comment. The company has said in published accounts that the new plants would be cleaner than the facilities they would replace.

"There is no doubt in my mind this was not going to be business as usual," said Elena Marks, health and environmental aide to Houston Mayor Bill White, a former Susman Godfrey law partner.

Still, in challenging permits administratively, "the law is stacked

against you," Marks said. There is a strong presumption that permits will be granted by the governor-appointed Texas Commission on Environmental Quality. The State Office of Administrative Hearings judges, who hear permit challenges, work for the state.

Susman assumed that the permits would be granted, but planned to build an evidentiary record and attack the permits in a state trial court.

There were significant procedural hurdles to address. Susman Godfrey fought to consolidate the hearings for all the proposed permits; argued that opponents were entitled to discovery; and overcame standing challenges. The team argued that TXU was ignoring cleaner and more efficient power-generating technologies, such as coal gasification.

Time was another obstacle. "We had to learn on the fly a little bit," said Susman Godfrey partner John Turner. Preparing the case like any other hard-fought trial, lawyers had December and January in which to gather and digest data, conduct depositions, hire experts and submit written testimony. They prepared 25 witnesses to testify.

The case was teed up on Feb. 21 when a state judge ruled in a separate case that Perry lacked authority to fast-track the coal-plant permit reviews.

Thereafter, TXU announced that the company would be sold to two private equity firms and that it would withdraw eight permit applications. The lawyers believe that the strong

case they prepared—combined with public opinion against the facilities—pressured the company to withdraw the applications.

Susman Godfrey lawyers were disappointed not to try their case, but happy for the win. Other lawyers working with them on the case were Eric Mayer in the firm's Houston office; Terry Oxford and Ophelia Camina in its Dallas office; and Michael Diehl in the Seattle office.

Meanwhile, Susman Godfrey represents the coalition in a lawsuit in state court seeking to overturn permits for two other coal-burning plants, and the coalition is trying to block yet another plant 65 miles from Waco. "We're going to take on every coal plant until they stop proposing them," Miller said.

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