

REPORT OF THE COMMITTEE ON ANTITRUST

I. INTRODUCTION

This report summarizes certain energy industry cases brought under the federal antitrust laws (i.e., Sherman Act,¹ Clayton Act,² Robinson-Patman Act³) for the prior three years. This report also summarizes several significant Supreme Court decisions concerning the antitrust laws during this period. These cases did not involve energy matters, but they may have a significant bearing on antitrust situations involving energy companies.⁴

One of the most significant developments is the emergence of the “legitimate business justification” defense for claims arising under section 2 of the Sherman Act.⁵ As outlined below, many utilities have been able to successfully utilize this defense against “essential facilities” or “price squeeze” claims. On the other hand, the Supreme Court recently has placed severe restrictions on state-action immunity which may have significant antitrust implications for FERC-sponsored regional transmission groups (RTGs) or state-sponsored demand-side management (DSM) programs.

II. RECENT SUPREME COURT CASES

A. *Predatory Pricing*

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,⁶ Brooke Group Ltd. (Brooke), a cigarette manufacturer, charged that Brown & Williamson Tobacco Corporation (B&W) violated the Robinson-Patman Act when it reduced its prices for generic cigarettes below cost by offering volume discounts to wholesalers. According to Brooke, the goal was to raise the price of generic cigarettes to protect the market share of non-generic cigarettes. Brooke claimed that B&W’s below-cost pricing would reduce Brooke’s share of the generic cigarette market and force Brooke to raise the price of its cigarettes to cover costs. Brooke alleged that B&W would then attempt to recoup its predatory losses by raising its own prices for generic cigarettes with the tacit coordination of other cigarette manufacturers. The Supreme Court found no violation of the Robin-

1. 15 U.S.C. §§ 1-7 (1988).

2. 15 U.S.C. § 12 (1988).

3. 15 U.S.C. § 13 (1988).

4. While the Committee does not believe it relevant to discuss administrative cases under the Natural Gas, Atomic Energy, Federal Power, or Energy Policy Acts which use antitrust “terms” (i.e., “anti-competitive,” “competition,” “market power,” etc.), this report outlines the significant cases which examine the respective roles of the antitrust courts and the various administrative agencies which have jurisdiction over energy industries.

5. See, e.g., *Eastman Kodak Co. v. Image Technical Serv. Inc.*, 112 S. Ct. 2072, 2091 (1992) (section 2 liability turns on whether “valid business reasons” can explain the defendant’s actions).

6. 113 S. Ct. 2578 (1993).

son-Patman Act because Brooke did not demonstrate price discrimination which had the potential to injure competition.

In general, the Robinson-Patman Act prohibits discriminatory pricing schemes that threaten competition with a reasonable possibility of producing "primary-line injury." A predatory pricing scheme will violate the Robinson-Patman Act only if it creates a reasonable possibility of substantial injury to competition. In this case, the Supreme Court held that Brooke could only show a reasonable possibility of substantial injury to itself, a competitor. Brooke could not show a reasonable possibility of substantial injury to competition because it could not show that the scheme would likely result in sustained supercompetitive prices sufficient for B&W to recoup its predatory losses. As such, B&W was entitled to judgment as a matter of law.

The decision makes it more difficult for a plaintiff to prevail in Robinson-Patman suits alleging predatory pricing schemes harmful to competition. The Supreme Court's earlier decision in *Utah Pie Co. v. Continental Baking Co.*⁷ had interpreted the Robinson-Patman Act to require only a showing that the defendant had intended to harm competition or to create a pricing structure below that which previously existed. In *Brooke*, however, the Supreme Court found that "the primary-line competitive injury [requirement] under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under section 2 of the Sherman Act."⁸ Plaintiffs now must present evidence that would support an inference that the pricing scheme posed an actual threat to competition.

B. Monopolization

In *Spectrum Sports, Inc. v. McQuillan*,⁹ the Supreme Court reaffirmed the principle that a showing of attempted monopolization under section 2 of the Sherman Act must include evidence that the defendant possessed *both* a specific intent to monopolize and a dangerous probability of success. The decision reversed a long-standing but unique rule of the U.S. Court of Appeals for the Ninth Circuit that evidence of unfair or predatory conduct, while short of establishing an inference of a dangerous probability of success, could still sustain a section 2 action. According to the Supreme Court, the Ninth Circuit rule was clearly "inconsistent with the policy of the Sherman Act." The Court held that intent alone is insufficient; rather, the Court held that "an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."¹⁰

7. 386 U.S. 685 (1967).

8. *Brooke*, 113 S. Ct. at 2587.

9. 113 S. Ct. 884 (1993).

10. *Id.* at 891-92.

C. *Noerr-Pennington Doctrine*

Generally, joint presentations to governmental bodies (e.g., to a legislature, a court, or an administrative agency) are exempt from the antitrust laws under the *Noerr-Pennington*¹¹ doctrine unless that joint activity is a sham. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,¹² the Supreme Court held that a party's litigation actions cannot fall within the sham exception unless that action was "objectively baseless"—i.e., that "no reasonable litigant could reasonably expect success on the merits."¹³

In *Columbia*, Columbia Pictures sued a resort hotel that rented motion picture videodiscs to its guests. The hotel counterclaimed under the antitrust laws charging that Columbia's suit was brought with the subjective belief that the claim was not meritorious. The Supreme Court held that a court must apply a two-tiered test to determine whether litigation is a sham. It must first find that the legal basis for the litigation is objectively without merit. Only then may a court proceed to examine the subjective belief of the party. Because the district court found probable cause for Columbia Pictures' suit, the litigation was protected by the *Noerr-Pennington* doctrine.¹⁴

D. *Tying*

In *Eastman Kodak Co. v. Image Technical Services, Inc.*,¹⁵ independent service operators (ISOs) for Kodak equipment sued Kodak alleging, among other things, that Kodak's policy of selling Kodak replacement parts only to customers who purchased Kodak services or self-serviced Kodak equipment constituted an illegal tying arrangement under section 1 of the Sherman Act and an illegal attempt to monopolize the parts market under section 2 of the Sherman Act. The Supreme Court found that Kodak was not entitled to summary judgment on either the section 1 or the section 2 claims.

The Supreme Court further held that the tying arrangements would be unlawful only if the seller had appreciable market power in the market of the tying product, in this case replacement parts. The Supreme Court found that Kodak parts and service could be separate products for tying analysis because a sufficient consumer market existed for each such that one could be economically provided without the other. Further, it declined to accept Kodak's claim that it lacked market power in the secondary (parts) market merely because it lacked market power in the primary market (equipment).

11. The *Noerr-Pennington* doctrine began with *Eastern-Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (legislative lobbying) and was expanded four years later in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (administrative lobbying).

12. 113 S. Ct. 1920 (1993).

13. *Id.* at 1928.

14. *Id.* at 1929-31.

15. 112 S. Ct. 2072 (1992).

The Court also held that Kodak was not entitled to summary judgment on the section 2 claim. The Court found that the relevant market for review of monopoly power may be as narrow as a single brand of product or service. A relevant market consists of interchangeable products, and Kodak products are not freely interchangeable with other products from a Kodak equipment-owner's perspective. Finally, the Court noted that Kodak's legitimate business explanations for its tying arrangements were insufficient to support summary judgment.

E. State Immunity Doctrine

In *FTC v. Ticor Title Insurance Co. (Ticor Title)*,¹⁶ the Federal Trade Commission (FTC) charged a number of title insurance companies with violations of section 45(a)(1) of the Federal Trade Commission Act¹⁷ which prohibits unfair methods of competition. The FTC charged that the companies had engaged in a horizontal pricing scheme to collectively price title search, examination, and settlement service charges through rating bureaus in various states. The companies asserted that state regulatory review provided immunity for their actions. Such immunity is available to otherwise private price fixing arrangements provided a state's regulatory review scheme is pursuant to a clearly articulated and affirmatively expressed state policy and the state actively supervises the regulatory review scheme.

The insurance rate bureau submitted a proposed rate to the state under the regulatory processes under review. That rate would become effective unless the state took positive action to reject it. In the states in question, the regulatory body provided little or no actual review. The Supreme Court held that none of the states' regulatory review schemes provided immunity for the defendants' private price fixing actions. The purpose of the second prong of the state-action immunity doctrine is to insure that the regulated actions are the product of active and deliberative state intervention. According to the Court:

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for State supervision is not an adequate substitute for a decision by the State.¹⁸

F. Standing

In *Kansas v. Utilicorp United Inc.*,¹⁹ a number of utilities and five states in their role as *parens patriae* sued a pipeline company and five natural gas production companies alleging that the providers violated section 4 of the Clayton Act²⁰ by overcharging for natural gas provided. The district

16. 112 S. Ct. 2169 (1992).

17. 15 U.S.C. § 45(a)(1) (1988).

18. *Ticor Title*, 112 S. Ct at 2179.

19. 497 U.S. 199 (1990).

20. 15 U.S.C. § 15 (1988).

court dismissed the states' suit on the basis that the plaintiffs were indirect buyers and thus lacked antitrust standing. The Tenth Circuit agreed. The Supreme Court granted certiorari to resolve a conflict between the Tenth Circuit's decision in this case and the Seventh Circuit's decision in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*²¹ The Court accepted the Tenth Circuit's analysis and refused to create a special exception to the indirect purchaser standing rules for cases involving regulated public utilities. The Court held that contractual customers—and not states suing as *parens patriae*—should be the proper plaintiffs because they, as direct purchasers, suffer actual damages beyond the cost of the overcharge as the lost opportunity to impose a rate increase not connected to the overcharge. The Court reasoned that the difficulty of proving apportionment makes an exception to the indirect purchaser standing rules undesirable. Further, state regulators often require utilities to pass through a portion of antitrust recoveries, making apportionment unnecessary.

Finally, the Supreme Court also held that section 4 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,²² which allows a state to sue on behalf of its residents for antitrust damages, did not apply in this case because the residents would not have standing to do so on their own. That section is only applicable, reasoned the Court, when the residents suffer direct buyer antitrust injury and thus have independent standing.

III. ELECTRICITY

A. Conspiracy Claims Under Sherman Act Section 1

In *Rosemount Cogeneration Joint Venture v. Northern States Power (Rosemount)*,²³ developers of a proposed cogeneration facility alleged that a public utility and its wholly-owned subsidiary conspired to monopolize the market for cogeneration facilities. Plaintiffs alleged that the parent, which had signed an agreement to purchase electricity from plaintiffs' proposed facility, had withdrawn its support from the project and that the subsidiary, itself a developer of cogeneration facilities, obstructed plaintiffs' access to possible fuel supplies for the facility. Plaintiffs argued that the *Copperweld* rule,²⁴ which provides that a parent corporation is not capable of conspiring with its wholly-owned subsidiary, did not apply to a public utility and its wholly-owned subsidiary because such utilities are statutorily required to form subsidiaries to pursue non-utility projects. The district court rejected this contention, holding that "plaintiffs may not carve out a public utility exception to the *Copperweld* rule."²⁵

21. 852 F.2d 891 (7th Cir. 1988).

22. 15 U.S.C. § 15c (1988).

23. 1991-1 Trade Cas. (CCH) ¶ 69,351 (D. Minn. Jan. 23, 1991).

24. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

25. *Rosemount*, 1991-1 Trade Cas. (CCH) at 65,408.

B. Claims Under Sherman Act Section 2

1. Essential Facilities Doctrine

Traditionally, in order for a plaintiff to prove a violation of the essential facilities doctrine under section 2 of the Sherman Act, that plaintiff had to show: (1) control of the essential facility by the monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility; and (4) the feasibility of providing the facility to the competitor.²⁶ As noted above, however, many utilities were able to successfully defend essential facilities claims by arguing that their actions were the result of a "legitimate business justification."

In *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*,²⁷ a group of cooperative electric systems claimed that they could not compete with the supplying utility unless the utility sold them an interest in one of its power plants.²⁸ The cooperatives claimed that the utility's refusal to do so constituted an anticompetitive denial of access to an essential facility. In an unpublished decision, the U.S. Court of Appeals for the Fourth Circuit held that the cooperatives had failed to establish an essential facilities claim against the utility by failing to show that they had no economically feasible alternative to purchasing a part interest in one of the utility's power plants.²⁹

In another unpublished case, *Florida Municipal Power Agency v. Florida Power & Light Co. (Florida Municipal Power)*,³⁰ a federal district court granted summary judgment against a municipal customer's claim that its wholesale transmission and power supplier violated the antitrust laws. The customer argued that the supplying utility violated the antitrust laws because the utility could and should have made transmission service available on terms and conditions different from those on file with the FERC.³¹ The court rejected these claims, holding that under the Filed-Rate doctrine³² exclusive jurisdiction over transmission rates, terms and conditions disputes rests exclusively with the FERC—not with the antitrust courts.³³

Two decisions by the U.S. Court of Appeals for the Ninth Circuit rejected claims that denials of access to a utility's transmission system violated the essential facilities doctrine. In both instances, the court found that legitimate business reasons justified denying transmission access to

26. See, e.g., *MCI Communications Co. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983).

27. 1993-1 Trade Cas. (CCH) ¶ 70,264, No. 92-1517, 1993 U.S. App. LEXIS 13524 (4th Cir. June 9, 1993).

28. See also *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 780 F. Supp. 322 (M.D.N.C. 1991).

29. 1993 U.S. App. LEXIS 13524, at *11.

30. No. 92-35-Civ-Ord-22 (M.D. Fla. Dec. 16, 1993).

31. *Florida Mun. Power*, Slip op. at 13.

32. See, e.g., *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (state utility commission may not approve an allocation of power that differs from the allocation approved by the FERC when the FERC's allocation indirectly effects wholesale rates).

33. *Florida Mun. Power*, Slip op. at 15-16.

plaintiffs. In *City of Vernon v. Southern California Edison Co. (Vernon)*,³⁴ a municipal customer claimed that a utility should be required to provide “relative size share” access to its transmission system—i.e., access proportional to the customer’s percentage use of the electricity transmitted into the utility’s service territory—even if the utility required the transmission line’s total capacity to serve its own native load.³⁵ The Ninth Circuit rejected this claim. The court held that this was not a situation where the utility had no use for the facility and arbitrarily denied someone else its use, nor a case where the utility failed to supply the customer with its power needs. According to the court, the municipalities’ “demand that [the utility] turn over its [transmission] facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head.”³⁶

The court went on to find that to the extent the utility had monopoly control over transmission to the customer, it “had a duty to integrate purchases of outside resources upon reasonable notice.”³⁷ The decision also states that even though the utility had the right to interrupt service under an interruptible transmission agreement with the customer, that “contractual right to interrupt service does not grant [the utility] the freedom to act anticompetitively.”³⁸ The court found, however, that the customer had not adduced sufficient evidence that the utility had interrupted service to it in order to harm the plaintiff’s ability to compete with the utility.

In the other Ninth Circuit decision, *City of Anaheim v. Southern California Edison Co. (City of Anaheim)*,³⁹ the court found that a utility’s need to use its transmission capacity to obtain inexpensive power—and thus realize savings for all of its customers—provided a legitimate business justification for its refusal to allow wholesale customers or other utilities access to the limited available capacity. Moreover, the court found that the essential facilities doctrine was inapplicable in this case. The court held that the Pacific Intertie was not an essential facility because the plaintiffs could have obtained power from other sources—including from the utility itself—which would in effect have given the plaintiffs access, albeit through the utility’s service territory, to inexpensive hydro-power via the Intertie.⁴⁰ The court found that the plaintiffs sought to impose a duty to provide access to the Intertie based on the extent to which they might benefit from access, rather than the extent to which competition would be harmed by a refusal of access.⁴¹ The court concluded that “the fact that the Cities could

34. 955 F.2d 1361, 1367 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 305 (1992).

35. *Id.* at 1364 n.3.

36. *Id.* at 1367.

37. *Id.*

38. *Id.* at 1368.

39. 955 F.2d 1373, 1381 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 305 (1992).

40. *Id.*

41. *Id.*

achieve savings at the expense of Edison and its other customers is not enough to turn the Pacific Intertie into an essential facility."⁴²

2. Price Squeeze

A price squeeze claim involves assertions that a utility with market power over wholesale power in a given region has set its wholesale rates so high, relative to its retail rates, that a wholesale customer cannot buy from the utility and compete with it for retail sales.⁴³

In *Town of Concord v. Boston Edison Co. (Town of Concord)*,⁴⁴ the First Circuit held that a price squeeze does not ordinarily violate section 2 where the defendants' prices are regulated at both the wholesale and retail levels.⁴⁵ The court reasoned, *inter alia*, that: (1) regulators control prices directly in a regulated industry; (2) regulatory factors are more likely to determine new entry into a regulated industry than a "new entrant's fear of a two-level monopolist's enhanced retaliatory power"; and (3) regulation in the electric utility industry makes it less likely that a price squeeze will actually drive independent distributors from the market, because even if an integrated utility managed to set prices that severely squeezed a distributor, the utility could not take over the competitor's distribution area without the regulator's permission.⁴⁶ In light of these factors, the First Circuit held that the appropriate forum to challenge an alleged price squeeze is before the FERC who—pursuant to its authority under sections 205 and 206 of the FPA—may reduce the offending wholesale rate to within a zone of reasonableness.⁴⁷

In *City of Anaheim*, several transmission-dependent municipalities sued a fully-integrated utility under section 2, claiming that a price squeeze occurred when the utility's wholesale rate exceeded the utility's industrial rate for one year. The Ninth Circuit disagreed with the First Circuit's "restrictive" view of the price squeeze doctrine. Rather, the court held that "the requirement of specific intent is an appropriate way to erect a dike which is sufficient to prevent an outward invasion of the land of legal monopolies by the sea of antitrust law."⁴⁸

The Ninth Circuit applied this standard to the facts of the case. The court agreed with the district court's finding that the utility applied for its rate increases at both the state and federal levels with the knowledge that a

42. *Id.*

43. *See, e.g.,* *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). For a detailed examination of the price squeeze doctrine, *see* Lawrence J. Spiwak, "Is the Price Squeeze Doctrine Still Viable in Fully-Regulated Energy Markets?," 14 *ENERGY L.J.* 75 (1993).

44. 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).

45. *Id.* at 22.

46. *Id.* at 25-26. *See also* *Cities of Anaheim v. FERC*, 941 F.2d 1234, 1250 (D.C. Cir. 1991) (utility successfully rebutted the FERC's anticompetitive presumption under section 206 of the FPA that a price squeeze occurred).

47. *Town of Concord*, 915 F.2d at 28.

48. *City of Anaheim*, 955 F.2d at 1387.

rate differential was likely to develop. The court held, however, that this fact “alone may show general intent, but that alone should not suffice for a finding of liability.”⁴⁹ Rather, the court reasoned that:

It can hardly be argued that monopolistic acts have taken place simply because a company seeks what it actually believes is a fair rate of return from two separate administrative agencies. Of course that is not a complete answer if other motivating factors are shown. We are well aware of a monopolist’s special duties regarding its competitors, but those are only applicable “when there is no justification for refusing to aid a competitor.” In fact, even if the monopolist does refuse to aid partially because it wishes to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist’s conduct.⁵⁰

After review, the Ninth Circuit found that the utility had a legitimate business justification for its actions because the utility “simply sought rate orders that it considered to be just and reasonable from both agencies.” Accordingly, the court held that the utility did not have the requisite anticompetitive intent necessary to violate section 2.⁵¹

3. Monopolization and Attempted Monopolization

In *Nugget Hydroelectric v. Pacific Gas & Electric Co. (Nugget)*,⁵² the Ninth Circuit held that a private power producer failed to satisfy the standards of monopolization and attempted monopolization under section 2 of the Sherman Act. There, the plaintiff alleged that the defendant utility presented it with an interconnection plan that was substantially more expensive than the utility’s initial representations. The plaintiff alleged that as a result of these setbacks to its plans to develop certain hydroelectric projects its lender withdrew its financial support and it was forced to file for bankruptcy protection.⁵³

The court held that in order to state a valid monopolization claim the plaintiff must allege: (1) possession of monopoly power in a relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. The plaintiff alleged that it could have generated and sold power in interstate commerce in competition with the utility and, by failing to enter into the interconnection agreement on reasonable terms, the utility enhanced its monopoly power. The court rejected this argument, holding that the plaintiff’s complaint alleged only that it planned to be a *supplier* to the utility. As such, the court concluded that the plaintiff’s eventual bankruptcy could not have helped the utility “to acquire or maintain monopoly power.”⁵⁴

In order to prove a claim for attempted monopolization, the court held that the plaintiff must allege: (1) specific intent to monopolize the relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous

49. *Id.* at 1379.

50. *Id.*

51. *Id.*

52. 981 F.2d 429 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993).

53. *Id.* at 432.

54. *Id.* at 436.

probability of success. The court found that the plaintiff failed to satisfy the third element of the attempted monopolization claim for the same reasons that the plaintiff failed to satisfy the willful acquisition or maintenance of power element for the monopolization claim. The Ninth Circuit therefore dismissed plaintiff's section 2 claims on the ground that the plaintiff failed to state an antitrust claim.⁵⁵

C. State Action

The state action doctrine provides an affirmative defense to antitrust claims if "first, the State has articulated a clear and affirmative policy to allow the anti-competitive conduct, and second, the State provides active supervision of anti-competitive conduct undertaken by private actors."⁵⁶

The Ninth Circuit in *Nugget* held that PURPA does not preempt the state action doctrine.⁵⁷ In *Nugget*, a private power producer sued a utility under section 2 of the Sherman Act claiming that the utility violated the antitrust laws by refusing to grant certain force majeure extensions on a power project contract. The defendant, citing the California Public Utility Commission' (CPUC) "Guidelines Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities" (Guidelines),⁵⁸ claimed that its actions were protected under the state action doctrine.

The plaintiff argued that the antitrust savings clause in PURPA referred only to statutory law, not the common law state action doctrine.⁵⁹ The Ninth Circuit ruled that as a court interpretation of the Sherman Act, the state action doctrine is one of the "antitrust laws" within the meaning of PURPA. Thus, the PURPA antitrust savings clause preserves antitrust defenses as well as causes of action.⁶⁰ The court then held that the defendant's actions satisfied both prongs of the state action test. First, the court found that because the utility's actions were governed by a state statute and regulations, under which the CPUC could specify the prices, terms and conditions for such sales of power, and which required utilities to negotiate force majeure claims only in instances in which a settlement is in the rate-payers' best interests, these state laws satisfied the requirement of a clearly articulated state policy.⁶¹ Second, the court held that because the CPUC has the power to review utility actions with respect to force majeure claims and actively does so, the court found that the second requirement for state action immunity was satisfied.⁶² The court also found, however, that the utility had not shown that its actions involving the interconnection plan with the plaintiff were pursuant to a clearly articulated state policy and

55. *Id.*

56. *Ticor Title*, 112 S. Ct. at 2175; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

57. *Nugget*, 981 F.2d at 433.

58. 29 C.P.U.C.2d 415, 431 (1988).

59. *Id.* at 433.

60. *Id.*

61. *Id.* at 434.

62. *Id.* at 435.

actively supervised by the state. Although the utility's alleged actions concerning the interconnection plan were not immune from antitrust liability, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's antitrust claim for failure to allege willful acquisition or maintenance of monopoly power.⁶³

In *Pacificorp v. Portland General Electric Co.*,⁶⁴ a municipal customer sought a declaratory order of a local state public utility commission (PUC) order authorizing a 1972 contract among two utilities to exchange electric distribution properties and customer accounts in certain defined areas. The customer argued that the agreement did not empower the utility which obtained the area in which the customer was located to monopolize service of electric power to the customer. The court agreed, holding that under Oregon law, antitrust immunity was available in connection with contracts approved by the local PUC that specifically allocated exclusive retail service territories. The agreements at issue did not order the allocation of service territories and customers and did not designate which territory was to be served by which contracting party. As such, the court found the state action doctrine inapplicable to this case. According to the court:

The purpose of the doctrine of state action was to allow a state to authorize certain acts not otherwise open to private parties. It would be contrary to the purpose of the doctrine of state action to allow private parties to claim monopolies that have not been specifically and clearly authorized by the relevant statutory practice.⁶⁵

In *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*,⁶⁶ various fuel oil dealers and related heating equipment suppliers claimed that a utility's rebates and incentive rates to promote the use of heat pumps had anti-competitively increased the utility's share of the home heating market. The court granted summary judgment in favor of the utility on the grounds that its heat pump promotion programs were "conducted pursuant to a clearly articulated state policy and under active state supervision," and therefore were protected by the state action doctrine.⁶⁷ The court found it sufficient that the utility's programs "logically followed" from Pennsylvania Public Utility Commission (PPUC) policies that encouraged, although did not compel, state utilities to develop rebate and load management programs.⁶⁸ The court also found that the PPUC had ample authority to regulate load management programs, and "through adjudications, rulemakings, and investigations, has exercised this pervasive authority."⁶⁹

63. *Id.* at 434.

64. 770 F. Supp. 562 (D. Or. 1991).

65. *Id.* at 571. In a subsequent, unpublished opinion, the same district court allowed the customer to recover the actual damages it incurred as a direct result of the utility's assertion of an exclusive right to provide electric services to the customer. *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, No. 90-524-FR, 1993 U.S. Dist. LEXIS 1417 (D. Or. filed February 5, 1993), *reconsideration denied*, 1993 U.S. Dist. LEXIS 7465 (D. Or. filed May 28, 1993).

66. 804 F. Supp. 700 (E.D. Pa. 1992).

67. *Id.* at 702.

68. *Id.* at 709.

69. *Id.* at 712.

In *Municipal Utilities Board v. Alabama Power Co. (Municipal Utilities)*,⁷⁰ a group of municipal and public corporations sued rural electric cooperatives for allegedly conspiring amongst themselves and with members of the Alabama Legislature to divide retail electric service areas horizontally. The defendants argued that their actions were protected under the state action doctrine, and the Eleventh Circuit agreed.

Plaintiffs argued that the legislation at issue was per se illegal because neither the general provisions of the legislation (setting forth the rules governing the division of the Alabama retail market into service territories), nor the private agreements incorporated into the legislation, complied with the two-part test for state action immunity. While largely conceding that the legislation satisfied the first prong of the test, the plaintiffs' argued that the general provisions of the legislation failed the second prong because the legislation did not establish a state agency to supervise private activity. The Eleventh Circuit rejected this argument, finding that the legislation "placed no decision-making authority over restraints on competition in the hands of private parties."⁷¹ Indeed, the court noted that the general provisions of the legislation gave the state legislature control over all of the decisions challenged by the plaintiffs.⁷² The court reasoned that this factor distinguished *Municipal Utilities* from *Patrick v. Burget*,⁷³ where the court held that state statutes granting private actors a degree of regulatory power do not qualify for state action immunity.

In *Transphase Systems, Inc. v. Southern California Edison Co. and San Diego Gas & Electric Co. (Transphase Systems)*,⁷⁴ the plaintiffs sold thermal energy systems for demand-side management (DSM) programs. In order to promote DSM, the CPUC authorized utilities to provide rebates for electricity customers who utilize DSM technology. Plaintiffs argued that the defendants (two California electric utilities) violated the antitrust laws because the utilities used their monopoly power over the energy supply in their respective areas to hold down the rebate levels to customers who utilize or desire to utilize DSM systems.⁷⁵

Defendants argued that the plaintiffs' antitrust claims were barred by the state-action doctrine, and the district court agreed. First, the court held that the California legislature had clearly articulated and expressed its desire to replace competition with respect to DSM bidding and rate-setting process in the California Public Utilities Code. According to the court, "the Public Utility Code clearly articulates the state's policy of displacing competition in favor of a highly regulated system of ratesetting and bidding on alternative DSM systems."⁷⁶

70. 934 F.2d 1493 (11th Cir. 1991).

71. *Id.* at 1503.

72. *Id.*

73. 486 U.S. 94 (1988).

74. 1993 Trade Cas. (CCH) ¶ 70,392 (C.D. Cal. Oct. 7, 1993).

75. *Id.* at 71,043.

76. *Id.* at 71,044-045.

Second, the court held that the CPUC “actively supervised” the defendants’ DSM activities. In support, the court found that the CPUC, not the defendant utilities, had the sole authority to: (1) decide whether DSM vendors should be permitted to bid directly against supply-side alternatives; (2) establish the amount of DSM funds to be budgeted for thermal energy storage systems; and (3) decide the way in which electricity savings derived from DSM systems are verified. Moreover, the court found that the rebates provided to the plaintiff’s customers are derived from ratepayer funds and cannot be collected or disbursed without the CPUC’s explicit approval.⁷⁷ Therefore, the court held that, in light of its two findings, the defendants were immunized from federal antitrust liability by the state action doctrine.⁷⁸

D. *Noerr-Pennington*

In *Transphase Systems*, the defendants also argued that their conduct was protected under the *Noerr-Pennington* doctrine.⁷⁹ The plaintiff alleged that the defendants maintained their monopoly power by “resisting meaningful change” to their rebate programs and resisting competitive bidding between demand-side and supply-side options. The court found that while the plaintiff’s complaint did not explicitly describe how the defendants resisted change, it was clear from the context of the allegations that the defendants’ alleged resistance was exercised through the defendants’ public positions made before the CPUC. Therefore, the court found that the plaintiff’s claims under section 2 of the Sherman Act were barred by the *Noerr-Pennington* doctrine.⁸⁰

In *Municipal Utilities*, the municipalities brought an antitrust action against rural electric cooperatives for conspiracy to suppress competition in retail electric markets. The plaintiffs argued that they alleged sufficient facts to trigger a “ratification exception” and a “public co-conspirator” exception to the *Noerr-Pennington* doctrine. The court, citing the Supreme Court’s decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*,⁸¹ held that there is no “public co-conspirator” exception to the *Noerr-Pennington* doctrine. The court also rejected the plaintiffs’ “ratification” exception, reasoning that:

[S]uch an exception would likely swallow the rule. It would permit the losers of legislative battles to claim that any coordination by their successful opponents amounted to a prior agreement which was then “ratified” by the legislature. If the *Noerr-Pennington* doctrine is to have any effect, plaintiffs’ cannot be allowed to use the mere existence of state legislation restraining trade to bootstrap an antitrust claim against the supporters of that legislation.⁸²

77. *Id.* at 71,045.

78. *Id.*

79. The *Noerr-Pennington* Doctrine protects the right of parties to petition the government even if the impact of their position is likely to have an anticompetitive impact. *Id.*

80. *Id.*

81. 499 U.S. 365 (1991).

82. *Municipal Utilities*, 934 F.2d at 1505.

E. Standing

In *Municipal Utilities*, the Eleventh Circuit granted antitrust standing to several municipalities for their claim of conspiracy against a group of electric cooperatives. The court held that in order for plaintiffs to possess antitrust standing, those plaintiffs must: (1) suffer antitrust injury; and (2) be efficient enforcers of antitrust standards. The court concluded that the plaintiffs suffered antitrust injury because the plaintiffs sufficiently pleaded that the defendants deprived them of the opportunity to compete for future customers by entering into a pre-existing, illegal anticompetitive agreement which divided the relevant market into exclusive retail electric service territories—an agreement which was eventually ratified by the state legislature and embodied in a series of state laws. Second, the court reasoned that because the defendants' conduct would injure consumers, such conduct would also directly injure the plaintiffs as competitors. In light of the above, the court concluded that the plaintiffs would be an efficient enforcer of the antitrust laws.⁸³

F. Mergers

In *Northeast Utilities Service Co. v. FERC*,⁸⁴ the First Circuit held that the FERC was not required by statute, or otherwise, to engage in a "standard" antitrust analysis before passing on a merger application under section 203 of the Federal Power Act.⁸⁵ The court began its analysis by examining the language of the statute. Under section 203, the FERC is required, after notice and an opportunity for hearing, to approve a proposed merger of utility facilities if it finds that the proposal "will be consistent with the public interest." The court noted that there is no explicit reference to antitrust policy or principles, nor was there any evidence that Congress sought to have the FERC serve as an enforcer of antitrust policy in conjunction with the Department of Justice or the Federal Trade Commission. The First Circuit therefore concluded that while "[a]ntitrust considerations are, of course, relevant to FERC's consideration of the "public interest" in merger proposals . . . [t]he statute, however, does not require the FERC to analyze merger proposals under the same standards as the Department of Justice or bank regulators must apply."⁸⁶ Moreover, the court held that while "the Commission must include antitrust considerations in its public interest calculus under the FPA, it is not bound to use antitrust principles when they may be inconsistent with the Commission's regulatory goals."⁸⁷ However, the First Circuit was quick to point out that if the FERC were to approve a utility merger which "ran afoul" of the antitrust laws or antitrust policies, "the utilities would be subject to either prosecution by the government officials responsible for policing the anti-

83. *Id.* at 1500.

84. 993 F.2d 937 (1st Cir. 1993).

85. *Id.* at 946.

86. *Id.* at 947.

87. *Id.*

trust laws, or to suit by private citizens meeting the requirements of standing.”⁸⁸

IV. GAS

A. *Standing*

In *Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co.*,⁸⁹ a natural gas distributor sued its supplier and another distributor with which it had a contract for restraint of trade and monopolization. The federal district court granted the defendant’s motions for summary judgment, and the U.S. Court of Appeals for the Eleventh Circuit affirmed. The district court found that the distributor lacked standing because it could not show antitrust injury. The district court found that the distributor had not demonstrated that it was prepared to enter the gas distribution business and accordingly did not suffer an antitrust injury even if its allegations were proved. Moreover, the district court found there was no substantial evidence of an agreement that would allow a finding of a conspiracy in violation of sections 1 and 2 of the Sherman Act. Similarly, the district court dismissed an essential facilities claim on the grounds that the distributor had failed to show that it had no feasible alternative to the defendant’s facility.⁹⁰

On appeal, the Eleventh Circuit focused on the issue of the distributor’s evidence regarding its intention to enter the market. The Eleventh Circuit agreed that the plaintiff lacked antitrust standing because the court found that the distributor had not established that it had secured financing or consummated its contracts. The court held that the distributor’s activities—such as communicating with the licensing authority, investigation of costs and feasibility, and inquiry regarding FERC regulation and eminent domain rights—were mere preliminary steps that were insufficient to establish preparedness.⁹¹

B. *Bypass*

City of Chanute, Kansas v. Williams Natural Gas Co.,⁹² marked the fourth decision in four years regarding an interstate pipeline’s refusal to transport third party gas for certain of its customers.⁹³ In *Chanute*, cities

88. *Id.* at 948.

89. 996 F.2d 282 (11th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3451 (1994).

90. *See Gas Util. Co. of Alabama v. Southern Natural Gas Co.*, 825 F. Supp. 1551, 1569-75 (N.D. Ala. 1992).

91. *Southern Natural Gas*, 996 F.2d at 283.

92. 955 F.2d 641 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 96 (1992).

93. The earlier decisions were *City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517 (D. Kan. 1988) (“*Chanute I*” granting plaintiffs’ motion for a preliminary injunction); *City of Chanute v. Williams Natural Gas Co.*, 1990-1 Trade Cas. ¶68,967 (D. Kan. Feb. 16, 1990) (“*Chanute II*” granting defendant’s summary judgment motion on tying claim); and *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437 (D. Kan. 1990) (“*Chanute III*” granting defendant’s summary judgment motion and denying claims based on monopolization, attempted monopolization, monopoly leveraging and denial of an essential facility).

which purchased natural gas at wholesale from the defendant pipeline brought an antitrust action against the pipeline after the pipeline terminated a temporary gas transportation program. Under this program, the cities could purchase gas from third-party suppliers and transport this gas over the defendant's pipeline.

The cities challenged the pipeline's actions under sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act.⁹⁴ Under section 2, the cities claimed that the pipeline was an essential facility. The Tenth Circuit held that the defendant had not denied the cities' access to an essential facility because the pipeline at all times supplied reasonable access to the cities under the full requirements agreements at FERC-approved rates.⁹⁵ The court also rejected the cities' illegal tying claim under section 1 because the court found that there was no agreement between two or more parties to tie the sale of gas to the provision of gas transportation.⁹⁶ On the section 4 Clayton Act claim, the court found that the cities lacked standing to recover damages because they did not suffer an anticompetitive harm. According to the court, the cities were not anti-competitively injured because they had no right to receive transportation due to the provisions of the FERC-approved full requirements agreements in the first place.⁹⁷ Finally, the court rejected the cities' monopolization claim under section 2. The Tenth Circuit, citing *Illinois v. Panhandle Eastern Pipe Line Co. (Panhandle Eastern)*,⁹⁸ held that while the pipeline did, in fact, possess monopoly power in the relevant market, the pipeline nonetheless had a legitimate business justification for closing the pipeline to transportation gas.⁹⁹

In *Illinois v. Panhandle Eastern Pipe Line Co.*, the State of Illinois brought an antitrust action against a natural gas company, in its *parens patriae* capacity, on behalf of indirect purchasers of natural gas. The state argued that the pipeline monopolized the sale of natural gas by refusing to transport gas purchased directly from other suppliers to its captive customers. The Seventh Circuit held that under the Supreme Court's recent decision in *Kansas v. Utilicorp United Inc.*,¹⁰⁰ the state's case must be dismissed in so far as it involved the state as *parens patriae* for indirect purchaser customers.

However, the court also addressed the merits of the remaining pending claims which rested on Illinois state antitrust statutes based on and interpreted in accordance with the Sherman Act. The court rejected the state's essential facility claim, finding that: (1) duplication of facilities was, in fact, feasible; and (2) the pipeline's refusal to waive the sole source clauses in its contracts with customers represented a legitimate business purpose. The court further found that the pipeline's willingness to trans-

94. 15 U.S.C. § 15(a) (1988).

95. *Chanute*, 955 F.2d at 649.

96. *Id.* at 650-51.

97. *Id.* at 652-53.

98. 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1169 (1992).

99. *Chanute*, 955 F.2d at 654-56.

100. 497 U.S. 199 (1990).

port non-system gas for customers without sole source contracts while not extending the opportunity to customers with those contracts was not discriminatory treatment as it was justified by the same legitimate business purpose.¹⁰¹

V. NUCLEAR

In *American Public Power Association v. NRC*,¹⁰² petitioners (power generators and municipalities that compete with nuclear power plants) sought review of the Nuclear Regulatory Commission's (NRC) regulations interpreting the antitrust review provisions of the Atomic Energy Act. The NRC regulations at issue provided for antitrust review only when new licenses are issued—not when licenses are renewed. The D.C. Circuit upheld the NRC's regulations, holding that while the NRC's ruling was not “wholly persuasive,” given the “imprecision in the statutory language and the [NRC's] plausible reliance” on the legislative history, the NRC's interpretation of the Atomic Energy Act was reasonable.¹⁰³

VI. OIL PIPELINES

In *Venta, Inc. and Energy Distributing Co. v. Frontier Oil & Refining Co. (Venta)*,¹⁰⁴ distributors of motor fuel and associated products sued their supplier under the Robinson-Patman Act for price discrimination and refusal to deal. Plaintiffs alleged that the defendant, a competitor for wholesale and retail sales of motor fuel and other petroleum products, sold to them at higher prices than to other customers. The judge rejected the defendant's motion to dismiss, holding that plaintiffs had sufficiently alleged under the Robinson-Patman Act that the defendant's “refusal to deal subjected Plaintiffs and their re-seller customers to *prohibitive* additional costs for transportation from more distant alternative sources of supply.”¹⁰⁵ The court also noted that while the plaintiffs must set out their claims more precisely, the judge found that the plaintiffs alleged just enough to withstand dismissal of their refusal to deal claims.¹⁰⁶

In *Greater Rockford Energy & Technology Group v. Shell Oil Co. (Rockford)*,¹⁰⁷ a federal district court denied antitrust standing to ethanol and gasoline blenders who wanted to sue several major oil companies under the Sherman and Clayton Acts. The plaintiffs alleged that, among other illegal actions, the defendant oil companies refused to transport in their pipelines products that competed with gasoline the defendants refined and sold. The court applied a six-part test for “antitrust standing”: (1) a causal connection between the alleged violation and the harm plaintiffs suffered; (2) the defendants intended to cause the harm; (3) whether the

101. *Panhandle Eastern*, 935 F.2d at 1482-85.

102. 990 F.2d 1309 (D.C. Cir. 1993).

103. *Id.* at 1312-13.

104. 827 F.Supp. 1526 (D. Colo. 1993).

105. *Id.* at 1529.

106. *Id.* at 1529-30.

107. 790 F.Supp. 804 (C.D. Ill. 1992).

injury was of a type that Congress sought to redress by providing a private remedy for antitrust violations; (4) the injury resulted directly from the violation; (5) the plaintiffs sustained concrete damages; and (6) granting relief would not lead to duplicative recovery.¹⁰⁸ The court found that the plaintiffs had failed to meet their burden under this test.

The court found the causal connection between the alleged antitrust violations and the harms claimed by the plaintiffs to be "weak" as national sales of the product during the alleged time period actually increased by 4000 percent.¹⁰⁹ Second, the court found that there was no evidence that the defendants intended to anticompetitively injure ethanol producers or gasohol wholesalers.¹¹⁰ Third, the court held that because the plaintiffs were not the defendants' *direct* customers or competitors, the chance that the plaintiffs actually suffered some antitrust injuries was "remote."¹¹¹ Finally, the court held that the plaintiffs failed to specify their damages and that potential for duplicative recovery existed.¹¹²

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108. *Id.* at 825.

109. *Id.*

110. *Id.*

111. *Id.* at 825-27.

112. *Id.* at 827.