

ANTITRUST LAW REGULATION: A NEW FOCUS FOR A COMPETITIVE ENERGY INDUSTRY

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I. INTRODUCTION

Traditionally, the antitrust laws have played a small role in the evolution of the energy industry. The basic purpose of the antitrust laws is to protect competition and, thereby, to increase the welfare of, and ensure fairness to, consumers. In the energy industry, regulation largely took the place of competition in the markets for natural gas and electricity. Regulation by administrative agencies (such as state public utility commissions and the Federal Energy Regulatory Commission (FERC)) rather than competition served to ensure fairness to consumers. With the deregulation of both the electric and natural gas markets, however, the antitrust laws are rapidly gaining importance. Thus, avoiding violations must become part of future business planning.

This article is meant to be a "beginner's" look into some of the basic forms of behavior that could be the basis for antitrust claims by the government or lawsuits filed by private parties. The limited scope of this article does not lend itself to a detailed review of all aspects of the antitrust laws. Rather, it will focus on basic antitrust principles, including: (1) the purpose of antitrust laws in general; (2) a description of the main federal antitrust laws; (3) common types of antitrust violations; and (4) basic antitrust immunities and exemptions. Finally, this article will discuss the application of these general principles to current trends in the deregulation of the electric and natural gas markets, including several hypothetical fact situations and how the antitrust enforcers would view them.

As discussed below, the possession of market power is a key factor in determining whether particular actions constitute a violation.¹ Because incumbent utilities may retain significant market power during the initial stages of deregulation, they may be likely targets for antitrust scrutiny. The goal of this paper is to alert energy industry professionals involved in the day to day business operations of their companies to the kinds of actions that may give rise to a violation, and, equally as important, to enable those energy professionals to spot such illegal behavior on the part of their competitors.

II. THE CHANGING ROLE OF ANTITRUST LAWS IN THE ELECTRIC AND NATURAL GAS INDUSTRIES

Beginning in the early part of this century, with the passage of major energy legislation, such as the Federal Power Act (FPA)² and the Natural Gas Act (NGA),³ Congress chose not to let market forces rule in the electric and natural

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1. As will also be discussed, one can run afoul of certain important antitrust laws without possessing any real market power, e.g., competitors agreeing to fix their prices, rig bids, or divide market areas.

2. The Federal Power Act (Part II) (cited as Public Utility Act of 1935), ch. 687, 49 Stat. 847, was enacted in 1935 and is now codified at 16 U.S.C. § 824 (1994, Supp. 1999).

3. The Natural Gas Act was enacted in 1938, ch. 556, 52 Stat. 821, and is now codified at 15 U.S.C. §§

gas industries. There were several reasons for this action.⁴ First, electric transmission service and natural gas transportation were generally perceived as natural monopolies, because they can be provided more efficiently by one supplier. Also, because of the importance of electricity and natural gas to all segments of the economy, there was a strong need to ensure that these two services were reliable, *i.e.*, these industries were "affected with the public interest."⁵ As a result, until recently, the electric and natural gas industries were dominated by franchised vertically integrated public utilities and natural gas companies that were heavily regulated on both the state and federal levels. Regulators approved the types of services provided and the rates and charges permitted for such services, and to a large extent, dictated which customers must be served. Thus, in the energy industry, as with other industries directly regulated by federal and state agencies, the antitrust laws took a back seat as a device in consumer protection.⁶

Recently, deregulation of the electric and gas industries has fostered a larger role for the antitrust laws. Congress, and many states, have determined that competition may be the better method to ensure fairness to consumers in the form of lower costs and higher quality (*i.e.*, more reliable) service. As a result of ongoing deregulation, the industry no longer consists only of vertically integrated utilities and their customers. There are now multiple entities (such as producers, marketers, brokers, and retail aggregators) performing many functions that were previously performed solely by the vertically integrated utilities. As competition is introduced in the industry, these new entities are competing with the vertically integrated utilities at many stages of product development.⁷ Although over time many aspects of the electricity and natural gas markets will be governed by competitive forces instead of regulation by the FERC or the state commissions, this does not mean that the industry will be "unregulated." The competitive aspects of the energy industry will be "regulated" like all competitive markets – by the antitrust laws. Historically, experience with deregulation

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4. For an interesting discussion of the advent of government regulation in the United States, see EARL W. KINTNER, *AN ANTITRUST PRIMER, A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN* (1973) [hereinafter KINTNER].

5. For a discussion of the legal and economic rationales for regulation of public utilities and other industries, as well as the forces behind the "deregulation revolution" in the electric and gas industries, see ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 1-77 (1995).

6. For example, the Federal Communications Commission (FCC) has had primary jurisdiction over competition matters within the communications industry. In this industry, as with energy, the antitrust laws have only been deemed applicable when administrative remedies were inadequate to cope with a violation or when the acts involved were not regulated by the regulatory agency. KINTNER, *supra* note 4, at 130.

7. Electricity transmission and distribution, however, still remain largely regulated. Notice of Proposed Rulemaking, *Regional Transmission Organizations*, Docket No. RM99-2-000, F.E.R.C. STATS. & REGS. ¶ 32,541, 64 Fed. Reg. 31,389 (June 10, 1999) [hereinafter *RTO NOPR*]; see also Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (codified at 18 C.F.R. §§ 35, 285), Regulations Preambles, F.E.R.C. STATS. & REGS. ¶ 31,036 (1996) [hereinafter Order No. 888], *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), appeal docketed, *Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et. al* (D.C. Cir.).

in other industries shows that when regulation is removed to allow competitive market forces, mergers, acquisitions, and other types of arrangements among competitors become more prevalent, making awareness of antitrust laws crucial.⁸

Current changes at every level of the energy industry are raising antitrust concerns. Order Nos. 636 and 888, the emergence in electric transmission of independent system operators (ISOs), stand-alone transmission companies (Transcos), regional transmission organizations (RTOs),⁹ and state retail competition initiatives in electric and natural gas markets are creating new forms of competition at the wholesale and retail levels of the industry. What makes these changes especially complex is the uncertainty that exists during the transition period from pure regulation to pure competition. Portions of both electric and natural gas industries will continue to be regulated at the federal and state levels for the foreseeable future. Order Nos. 636 and 888 and the state initiatives will not abolish either the FERC or state Public Utilities Commissions (PUCs). Rather, there will be a shift away from prescriptive regulation toward "light-handed" regulation that aims to structure a competitive market and regulate it with rules that promote competition. This restructuring will inevitably expand the scope of activities that are subject to the antitrust laws, since the main antitrust immunities—state action and implied immunity, as well as the filed rate doctrine—all depend on substantial control by the regulator.

Antitrust issues in this industry are evolving through the tensions created by two opposing forces. On the one hand, less prescriptive regulation erodes antitrust immunity; on the other hand, more competitive market structures, encouraged by new regulations, tend to reduce the likelihood of undue market power and mitigate the risk of anticompetitive conduct. Antitrust issues will arise in situations where things do not work as perfectly as planned. For example, where a pocket of market power seems to remain despite regulatory change, or where market participants cooperate for an improper purpose and expose themselves to allegations of collusion. As a generality, antitrust risks will be highest when the regulations that provide immunity are removed prior to having a competitive market structure in place.

A. What is the Purpose of the Antitrust Laws?

The purpose of the antitrust laws is to control the exercise of private economic power by preventing monopoly, punishing cartels, and eliminating other conduct that weakens or destroys competition.¹⁰ It is generally agreed that the primary goal of United States antitrust enforcement is to maximize wealth and increase consumer welfare by assuring that markets remain open to entry and output can expand.¹¹ Our legal system is based on the policy that to maximize

8. Hon. Richard D. Cudahy, *The FERC's Policy on Electric Mergers: A Bit of Perspective*, 18 ENERGY L.J. 113, 113-114, 119-121 (1997); see also *Legislative and Oversight Hearing on Antitrust Aspects of Electricity Deregulation: Before the House Comm. on the Judiciary*, 105th Cong. (1997) (prepared statement of A. Douglas Melamed, Principal Deputy Asst. Attorney General, Antitrust Div., Dept. of Justice).

9. Order No. 2000, *Regional Transmission Organizations*, F.E.R.C. STATS. & REGS. ¶ 31,089, 65 Fed. Reg. 809 (2000), order on reh'g, Order No. 2000-A, 90 F.E.R.C. ¶ 61,201 (2000).

10. *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951); see generally, KINTNER, *supra* note 4, at 15.

11. ERNEST GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 1 (1994) [hereinafter

wealth and consumer welfare, power must not be concentrated in the hands of a few. This policy assumes that free market forces and competition will maximize the wealth of the nation as a whole.¹²

The U.S. Department of Justice (DOJ), one of the two federal agencies¹³ charged with enforcing United States antitrust laws, describes the antitrust laws as prohibiting "business practices that unreasonably deprive consumers of the benefits of competition resulting in higher prices for inferior products and services."¹⁴ Examples of such prohibited practices include instances where competitors agree to fix prices, allocate customers or territories, or rig bids. These practices cause prices to be artificially high (i.e., prices do not reflect costs) and distort the allocation of society's resources to the detriment of consumers and the economy.¹⁵

In addition to maximizing wealth and consumer welfare, another purpose of the antitrust laws is to ensure that business competition is conducted in a fair manner. For example, sections of the Federal Trade Commission Act expanded the antitrust focus to include "unfair or deceptive acts or practices in or affecting commerce."¹⁶ The rationale behind the Federal Trade Commission Act is that:

[h]onest competitors must be protected from predators and shielded from the temptation to adopt the tactics of tricksters in the battle for business survival. And consumers must be protected against commercial chicanery, not only because fairness requires that they receive an honest product honestly represented, but because consumers are citizens who will ultimately determine the degree of control that government will exercise over business.¹⁷

In this regard, the antitrust laws have been described as a "conservative" means of ensuring that competition is fair without undue restraints on business freedom—"they represent an undertaking by government designed to prevent still wider undertakings by government, for if competition is abused and monopolistic practices and business trickery become widespread, the public inevitably will demand more restrictive government control of the economy."¹⁸

Traditionally, public utilities have been exempt, to a great extent, from the antitrust laws because of legislative enactments that make administrative agen-

GELLHORN].

12. For a discussion of the economic principles supporting the premise that competition maximizes consumer welfare, see GELLHORN, *supra* note 11, at 42-90 (1986). Generally, sellers in a competitive market are "price takers" and will produce at a quantity of output such that their marginal cost equals the prevailing market price. *Id.* at 54. No one seller can affect the price or output of the product. Profits are maximized at the point where marginal cost equals the market price. Monopolists, on the other hand, can maximize profits by restricting output to the point where marginal revenue equals marginal cost. In a monopoly market, there exist barriers to entry, which prevent other firms from entering the market and taking sales away from the monopolist by lowering the price. *Id.* at 58. For a formal economic analysis of monopolies, see RICHARD A. POSNER, *ANTITRUST LAW, AN ECONOMIC PERSPECTIVE* 237 (1976).

13. The Federal Trade Commission (FTC) shares enforcement responsibility with DOJ.

14. U.S. Dept. of Justice, *Antitrust Enforcement and the Consumer*, (last modified Jan. 24, 2000) <http://www.usdoj.gov/atr/public/div_stats/1638.htm>.

15. *Id.*

16. 15 U.S.C. § 45.

17. KINTNER, *supra* note 4, at xiii-xiv.

18. *Id.* at xiv.

cies, such as the FERC, responsible for ensuring that businesses and consumers are protected. Antitrust laws do not apply where federal or state law supplants the competitive market.¹⁹ Certain aspects of the energy industry, as with other regulated industries such as broadcasting and common carriers, involve natural monopolies, where the geographical area will not support more than one firm of a particular type or the nature of the activity is such that it will not support more than one firm (e.g., electricity transmission lines). In industries where natural monopolies are found, the premise of the antitrust laws (that competition will ensure quality goods and services at the lowest price) does not apply, and regulation has typically taken its place.²⁰

B. What are the Main Antitrust Laws?

The main federal antitrust laws are: the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act) and the Federal Trade Commission Act (FTC Act). The Sherman Act is enforced solely by the DOJ, and the FTC Act is enforced solely by the Federal Trade Commission (FTC). The Clayton Act is jointly enforced by the DOJ and the FTC, although the FTC has had *de facto* exclusive responsibility for Robinson-Patman enforcement. In addition, most states have antitrust laws that mirror the federal laws for activities that occur wholly within a state. Violations of the antitrust laws can have severe consequences. For example, illegal behavior can result in the breakup of a company, imprisonment of its officers and employees, fines, treble damages to injured parties, seizure of goods, and orders regulating future conduct of the company and individuals.²¹ The Clayton Act and some state antitrust laws permit civil actions by private parties to redress injuries caused by antitrust violations and to recover damages, which are generally trebled in federal proceedings.

1. The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, and conspiracies that unreasonably restrain interstate trade.²² Actions prohibited by section 1 include agreements among competitors to fix prices, rig bids, and allocate customers. Section 2 of the Act prohibits efforts by a single entity to monopolize a product or service in interstate commerce, if achieved through anticompetitive conduct and not solely because of superior products or services. It also prohibits attempted monopolization and conspiracies to monopolize.²³

Read literally, section 1 of the Sherman Act prohibits all contracts, combinations, and conspiracies in restraint of trade.²⁴ If enforced this way, nearly all business contracts would be considered to violate this provision. The Supreme

19. Outside of the public utility area, other examples of state laws supplanting the competitive market include minority preferences and rent control ordinances.

20. GELLHORN, *supra* note 11, at 70.

21. The indirect costs of illegal behavior can also be substantial and includes long and costly litigation, attorneys' fees, lost employee time in discovery and trial preparation, and attendance.

22. The Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890), is now codified at 15 U.S.C. §§ 1-7. The Sherman Act is enforced both civilly and criminally.

23. 15 U.S.C. § 2.

24. 15 U.S.C. § 1.

Court has interpreted this provision to prohibit only those contracts, combinations, and conspiracies that *unreasonably* restrain trade, thus establishing the so-called *rule of reason* approach to analyzing Sherman Act violations.²⁵ Under the *rule of reason*, a court will evaluate the effect of a restraint on competition, considering factors such as the nature of the restraint and its effect, market conditions, and the history of the restraint before making a determination regarding its legality.²⁶

The *rule of reason* approach requires a determination as to whether, under all circumstances, the restrictive practice imposes an unreasonable restraint on competition.²⁷ A restraint is considered unreasonable if it has an adverse effect on competition and cannot be justified by redeeming procompetitive effects. Some restrictive agreements are not prohibited, such as joint research agreements because they provide benefits to consumers. In general, there is a presumption in favor of using a *rule of reason* approach.²⁸

In contrast, the *per se* rule of illegality is applied to practices that have no redeeming value and have such a "pernicious effect" on competition that they are considered illegal without inquiry into the precise harm they have caused or the reason for their use.²⁹ Practices considered to be *per se* illegal are practices that would always or almost always tend to restrict competition and decrease output, even if the practice turns out to have been harmless under a particular set of circumstances. *Per se* violations are those that are "plainly anticompetitive" and lack any "redeeming virtue[s]."³⁰ Two examples of activities that are usually considered *per se* illegal are price fixing (when two or more entities agree to increase prices by a certain amount or not to sell below a certain amount) and bid rigging (when two or more sellers agree not to bid or to bid at a certain level).³¹

Penalties for violating the Sherman Act can be severe. They may include significant jail time, substantial penalties, and asset forfeiture. Under the 1987 U.S. Sentencing Commission Guidelines, antitrust or "white collar" crimes are treated the same as "hard core" crimes. Sentencing guidelines are linked to the

25. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911); *Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985).

26. IRVING SCHER, ANTITRUST ADVISOR 1-14 (4th ed. 1998) [hereinafter SCHER]; *National Soc'y of Prof'l. Eng'rs v. United States*, 435 U.S. 679, 691-92 (1978); *Board of Trade*, 246 U.S. at 238.

27. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

28. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

29. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977).

30. *Catalano, Inc.*, 446 U.S. at 647, 650; *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (practices that have no effect except stifling of competition); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (practices that are plainly anticompetitive); SCHER, *supra* note 26, at 1-18.

31. The *per se* rule of illegality applies to price fixing even if the prices are reasonable or necessary to eliminate competitive abuses, or the violators have only a small market share and cannot set prices throughout the market. *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150, 225 n.59 (1940); *Catalano, Inc.*, 446 U.S. at 648. It applies to agreements setting minimum and maximum prices. *Maricopa Cty.*, 457 U.S. at 348. It also applies equally to arrangements between buyers and arrangements between sellers. *Mandeville Inland Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 n.16 (1948).

volume of commerce affected by the violation.³² One Justice Department official was quoted as saying: “[t]hey say that the only two things that are certain in life are death and taxes, but there is one more: if your employees violate the antitrust laws and are convicted, they *will*, absent extraordinary circumstances, go to jail.”³³ For corporations, fines can amount to 80% of the volume affected by the violation.³⁴ If additional felony counts are included in the conviction, such as mail or wire fraud, the fines could even be higher.³⁵

2. The Clayton Act

The Clayton Act is a civil statute that prohibits certain mergers or acquisitions, and other practices (such as price discrimination) that are likely to lessen competition.³⁶ The DOJ or the FTC will challenge any merger that is likely to substantially reduce competition by, for example, increasing prices to consumers. In addition, in an attempt to deter anticompetitive conduct, the Clayton Act permits a plaintiff to bring a private antitrust lawsuit and, if successful, to treble the damages awarded for injuries caused by the anticompetitive conduct.

3. The Robinson-Patman Act

The Clayton Act was amended by the Robinson-Patman Act (RPA) in 1936 to prohibit price discrimination that is aimed at substantially lessening competition.³⁷ It was enacted during the Depression in an effort to limit the purchasing power of large buyers, such as grocery chain stores, and thus preserve smaller independent firms.³⁸ A seller will violate the RPA if it charges different prices to two different buyers of essentially the same commodity or product with the effect of injuring competition.³⁹ The RPA also imposes liability on buyers for inducing unlawful price discrimination.

Courts will analyze an alleged violation by looking at the price differential

32. Constance K. Robinson, *Communications Among Competitors – When Does the Department of Justice Challenge?*, Remarks before the ABA Section of Antitrust Law, New York, N.Y. (Oct. 14, 1993) [hereinafter Robinson Remarks].

33. *Id.* at 14.

34. Robinson Remarks, *supra* note 32, at 15 (referring to the increased fine levels under the updated 1992 U.S. Sentencing Guidelines). For example, the DOJ recently obtained criminal penalties totaling \$750 million against two vitamin manufacturers for antitrust violations. *United States v. F. Hoffman-LaRoche Ltd.*, No. 99-CR-184-R (N.D. Tex. 1999) (settlement agreement wherein F. Hoffman-LaRoche agreed to pay fines in the amount of \$500 million); *United States v. BASF AG*, No. 99-CR-200-R (N.D. Tex. 1999) (BASF AG agreed to pay fines in the amount of \$250 million). See also David Segal, *Six Vitamin Firms to Pay \$1.1 Billion*, WASHINGTON POST, Sept. 7, 1999, at A1 (reporting that related civil claims against several other vitamin manufacturers will amount to \$1.1 billion in damages).

35. Robinson Remarks, *supra* note 32, at 15.

36. The Clayton Act, 15 U.S.C. §§ 12-27a, was initially enacted in 1914 (ch. 323, 38 Stat. 730) and has been subsequently amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)-(f), and the Hart-Scott-Rodino Act, 15 U.S.C. § 18(a).

37. 15 U.S.C. § 13(a)-(f).

38. GELLHORN, *supra* note 11, at 433.

39. A “seller” under the act is defined as a manufacturer, wholesaler, or distributor who sells a product for resale. 16 C.F.R. § 240.3 (1998). A “customer” is defined as any person who buys a product for resale directly from the seller, the seller’s agent or broker, or through a wholesaler or any other intermediate reseller. 16 C.F.R. § 240.4 (1998).

of at least two sales⁴⁰ that have occurred during the same time period.⁴¹ At least one of the sales must cross a state line.⁴² An entity charged with a violation of the RPA has several defenses to demonstrate why a price differential is not a violation: (1) the seller was acting in good faith to meet an equally low price from a competitor; (2) the price difference is to allow for differences in the cost of manufacturing, sale, or delivery (cost justification); and (3) the price difference is a reaction to conditions affecting the marketability of the goods, such as imminent deterioration of perishable goods, obsolescence of seasonal goods, and the seller's discontinuance of business in the goods.⁴³

The RPA applies only to the sale of goods or commodities, not real property, intangibles, or services.⁴⁴ While there have been some holdings to the contrary,⁴⁵ most courts now hold that electricity is a "commodity" for purposes of the RPA.⁴⁶ Actions in the electricity context have included claims that utilities were discriminating by charging higher rates to municipal customers than to large industrial or commercial users.⁴⁷ Other types of energy, such as coal,

40. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947).

41. *Atlanta Trading Corp. v. FTC*, 258 F.2d 365, 371-72 (2d Cir. 1958) (nonrecurring sales six months earlier or later are not contemporaneous).

42. See generally *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 202 (6th Cir. 1986) (holding that the district court did not err in granting summary judgment on RPA claim where plaintiff failed to show evidence that any of the discriminatory sales crossed state lines).

43. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979) (low price charged to meet an equally low price of a competitor); *United States v. Borden Co.*, 370 U.S. 460, 461 (1962) (lower price charged to allow for differences in manufacturing, sale and delivery costs); *Comcoa, Inc. v. NEC Tels., Inc.*, 931 F.2d 655, 659 (10th Cir. 1991) (lower price charged because goods were obsolete).

44. See, e.g., *Metro Communications Co. v. Ameritech Mobile Communications*, 984 F.2d 739 (6th Cir. 1993).

45. *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980), *aff'd in part and remanded in part*, 662 F.2d 921 (2d Cir. 1981); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979).

46. *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982) (the RPA does not cover sales of real property, intangibles or services — electricity does not fall into any of these categories), *cert. denied*, 459 U.S. 1170 (1983); *Town of Concord v. Boston Edison Co.*, 676 F. Supp. 396, 397 (D. Mass. 1988) ("this Court follows those decisions recognizing that electricity is a commodity"); *Cities of Batavia v. Commonwealth Edison Co.*, No. 76 C 4388, 1984 U.S. Dist. LEXIS 20,387, at *33 n.13 (N.D. Ill. Jan. 16, 1984) ("[i]t is now well established that electricity is a commodity for purpose of analysis under the Robinson-Patman Act"); *Borough of Ellwood City v. Pennsylvania Power Co.*, 570 F. Supp. 553, 561 (W.D. Pa. 1983) ("although the Robinson-Patman Act does not cover real property, intangibles or services, electricity does not fall into any of the above classifications"); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1282 (S.D. Fla. 1980) (concluding that electricity is a commodity under the Clayton and Robinson-Patman Acts, the court stated that "it would certainly be anomalous if such forms of energy as coal, natural gas, and gasoline were commodities under the Clayton and Robinson-Patman Acts, but electricity were not."); see also *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993) (distinguishing cellular phone service from electricity in denying plaintiff's claim under RPA: "cellular telephone service is very different from electricity. It cannot be produced, felt, or stored, even in small quantities").

47. *Cities of Batavia v. Commonwealth Edison Co.*, 1984 U.S. Dist. LEXIS 20,387 (holding that price differential between municipalities and industrial and commercial users was cost justified); see also *Town of Concord*, 676 F. Supp. at 398 (denying defendant utility's motion to dismiss claims that defendant utility charged its municipal distribution customers higher rates than its retail customers); *Borough of Ellwood City*, 570 F. Supp. at 562 (defendants motion for summary judgment on RPA claim denied).

gasoline, and natural gas, have also been treated as commodities under the RPA.⁴⁸

4. The Federal Trade Commission Act

The FTC Act, also a civil statute, prohibits unfair methods of competition and unfair or deceptive acts or practices in interstate commerce.⁴⁹ Section 5 of the FTC Act has been interpreted to include Sherman Act offenses. This interpretation effectively gives the FTC jurisdiction over violations of the Sherman Act.⁵⁰ The FTC Act has also been found to reach actions that may not have yet risen to the level of Sherman Act violations.⁵¹ Some deceptive practices found to have violated the FTC Act include commercial bribery (paying a disc jockey to overplay particular records), spying on competitors by planting paid spies posing as employees or customers, inducing employees to steal trade secrets, vexatious lawsuits, passing off goods as the product of a competitor, tampering with a competitor's goods to give a disparaging impression, lottery schemes requiring the purchase of a good to participate, and delivering goods not ordered.⁵² According to the Supreme Court, a specific definition of the type of practices covered by the RPA has not been developed and general language was deliberately left to the Commission and the courts because "there is no limit to human inventiveness in this field."⁵³ Section 5 has been said to extend past anticompetitive or antitrust activities to protect consumers as well as competitors.⁵⁴

C. What General Activities are Prohibited by the Antitrust Laws?

The specific types of activities that are prohibited by the antitrust laws fall into three general categories: horizontal restraints, vertical restraints, and monopolization. Historically, there are relatively few antitrust decisions involving the electric and natural gas industries because those industries have not traditionally been subject to the antitrust laws. The examples discussed below, however, state legal principles that apply to practices in the production and sale of almost any kind of product in a competitive industry. Thus, sales of electric power and natural gas in a newly competitive energy industry can expect the same treatment with respect to compliance with the antitrust laws in the future.

48. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (coal assumed to be covered under section 3 of the Clayton Act); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963) (automobile gasoline covered under section 2 of the Clayton Act); *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951) (automobile gasoline covered under section 3 of the Clayton Act), *aff'd*, 343 U.S. 922 (1952); *B&W Gas, Inc. v. General Gas Corp.*, 247 F. Supp. 339 (N.D. Ga. 1965) (natural gas assumed to be covered under sections 2 and 3 of the Clayton Act).

49. The Federal Trade Commission Act was enacted in 1914 and is codified at 15 U.S.C. § 45.

50. GELLHORN, *supra* note 11, at 278. There is no private right of enforcement under the FTC Act.

51. KINTNER, *supra* note 4, at 116.

52. *Id.* at 118-20.

53. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. R.F. Keppel & Bros. Inc.*, 291 U.S. 304, 312 (1934).

54. KINTNER, *supra* note 4, at 117.

1. Requirement of Concerted Action

Section 1 of the Sherman Act prohibiting contracts, combinations, and conspiracies in restraint of trade requires proof of an agreement involving more than one entity.⁵⁵ A violation does not require an explicit agreement or a formal agreement. Concerted action can be shown by a course of dealing and may be inferred from business behavior. The relevant inquiry in determining whether there is an agreement among competitors is whether the competitors had a rational motive to participate in the agreement and whether the competitors' conduct was consistent with each competitor's own independent interest.⁵⁶

In addition, the existence of illegal agreements can be inferred by showing the existence of "consciously parallel" conduct,⁵⁷ if coupled with other aggregating factors. Such factors can include evidence that a competitor's actions are contrary to its individual economic interests, a lack of a valid business reason for a competitor's business decisions, or the existence of meetings or information exchanges between competitors prior to the parallel behavior.⁵⁸

Opportunity to reach an agreement can then become a significant factor, and even informal discussions between corporate executives of two competing companies over dinner can be used as evidence of a concerted action to fix prices. For example, antitrust claims have been prosecuted based on evidence of conversations between chief executive officers (CEOs) at a trade association dinner. One CEO suggested to the other that he should personally supervise his company's pricing policies. The CEO on the receiving end of that statement testified that he interpreted the statement to mean that he ought to increase his company's prices.⁵⁹ Similarly, the existence of a "gentlemen's rule" precluding solicitation of a competitor's customers may constitute a violation of the antitrust laws.⁶⁰

Finally, the concerted activity must be between two legally distinct entities to establish a violation. The coordinated activity of a parent and a wholly owned

55. *Fisher v. City of Berkeley*, 475 U.S. 260, 270 (1986). In contrast, concerted action is not required under section 2 of the Sherman Act, prohibiting illegal monopolization or an attempt to monopolize. Concerted action, however, is required for a conspiracy to monopolize. *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991), *cert. denied*, 505 U.S. 1206 (1992).

56. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986).

57. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954); *see also* SCHER, *supra* note 26, at 1-12.

58. *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 554 (8th Cir. 1991) (meeting prior to parallel behavior), *cert. denied*, 502 U.S. 1097 (1992); *Ezzo's Invs., Inc. v. Royal Beauty Supply Inc.*, 94 F.3d 1032, 1036 (6th Cir. 1996) (no valid business reason); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) (actions contrary to individual economic interests).

59. Bridget O'Brian, *Northwest Air's Chief Testifies He Felt Pricing Pressure from AMR Chairman*, WALL ST. J., July 15, 1993, at A3.

60. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903 (9th Cir. 1987). The types of behavior can range from subtle to flagrant. *Compare* *United States v. Foley*, 598 F.2d 1323, 1334 (4th Cir. 1979) (announcement by realtor trade association president to a group of realtors that he would raise his commission to 7% was sufficient to convict the president and certain attendees of criminal conspiracy to violate the antitrust laws), *cert. denied*, 444 U.S. 1043 (1980), *with* *F. Hoffman-LaRoche and BASF AG*, *supra* note 34, (top managers of vitamin manufacturers met periodically to develop a set of rules and enforcement agreements to ensure that prices and market allocations stayed in place and to set the next year's prices).

subsidiary does not establish concerted activity in violation of the Sherman Act.⁶¹ The exception to this rule is where the corporate affiliation resulted from an acquisition that is itself illegal, such as one in which the affiliation is a means of effectuating the illegal conspiracy.⁶²

2. Horizontal Restraints

Horizontal restraints involve agreements between and among competing entities. The most common offenses in this category are price fixing and bid rigging. Examples include where competitors agree to charge a specific price or to refrain from bidding in order to reduce competition. Other types of horizontal restraints include agreements between competitors to allocate territories or customers, certain information exchanges or agreements on product standardization that lead to reduced competition, most favored nation or price protection clauses, and delivered pricing systems.⁶³ Some of these practices, taken by themselves, do not rise to the level of an antitrust violation. However, they may make it easier for competitors to reach a tacit or explicit agreement on pricing or output and have been referred to as "facilitating practices."⁶⁴

Certain types of group boycotts have been found to violate the Sherman Act, including: agreements among competitors to refuse to sell to particular customers or buy from particular suppliers;⁶⁵ restrictive membership provisions in a trade association;⁶⁶ and agreements to deal with customers only at certain

61. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984). Some lower court cases, applying *Copperweld* have refused to find antitrust liability in the case of agreements between a parent and a less-than-wholly owned subsidiary or between "sister" companies controlled by a common parent. *See, e.g., Bell Atlantic Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) (two sister companies under common control of parent are incapable of conspiring); *Direct Media Corp. v. Camden Telephone & Telegraph Co., Inc.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (fifty-one percent stock ownership, absent evidence of individual interests, renders two corporations incapable of conspiring under Section 1 of the Sherman Act).

62. *Id.* at 761.

63. *See e.g., United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Aquafredda*, 834 F.2d 915, 918-19 (11th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). Other types of agreements among competitors have been interpreted to be illegal forms of *indirect* price fixing. *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965) (agreements fixing the percentage of an ingredient contained in a finished product); *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992) (agreements to limit production); *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676, 692-93 (1965) (agreements to limit the period of time to conduct business); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406-07, *clarified*, 324 U.S. 570 (1945) (agreement to allocate product lines); *Palmer v. BRG of Ga., Inc.* 498 U.S. 46, 49-50 (1990) (agreement to allocate territories).

64. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978) (information exchange); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) (product standards), *cert. denied*, 488 U.S. 1007 (1989); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (delivered pricing).

65. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959) (in a case involving a department store chain that forced appliance manufacturers and their distributors to refrain selling appliances to plaintiff appliance store, the Court found that group boycotts are in the "forbidden category" and cannot be redeemed by a showing that they were reasonable in the specific circumstances).

66. Boycotts instituted solely to obtain social or political goals are generally protected from antitrust liability by the First Amendment. *SCHER, supra* note 26, at 1-37. *See e.g., National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 622 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994); *State of Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

prices or on certain terms.⁶⁷ Information sharing by competitors can also be illegal. For example, shared credit information cannot be used to create a blacklist or as a basis to jointly agree on credit terms or treatment of individual customers.⁶⁸

Not all agreements (including joint ventures and mergers) are considered illegal. These agreements require consideration of the market power of the competitors and the ability of the parties of the agreement to raise price or restrict output.⁶⁹ For example, antitrust law and policy encourage the formation of joint ventures that enhance competitive efficiency while condemning those that mask joint monopolization or act as a front for anticompetitive collusion. Where a joint venture has been formed for legitimate procompetitive purposes, the Supreme Court has held that legality is to be determined under the rule of reason analysis.⁷⁰ However, where a "purported" joint venture does not involve the integration of resources, but simply masks an attempt by competitors to restrict competition, the Supreme Court has treated the activity as unlawful *per se*.⁷¹

The Supreme Court has recognized two characteristics of bona fide efficiency enhancing joint ventures: (1) the participants in the venture have pooled their resources and are sharing risks;⁷² and (2) the venture is necessary to bring a product to market.⁷³ Generally speaking, where a joint venture results in increased efficiencies, it will be entitled to a rule of reason analysis. The FTC recently issued antitrust guidelines for collaborations and joint ventures among competitors.⁷⁴ The guidelines outline the approach of the FTC and the DOJ to analyzing antitrust issues in competitor collaborations to assist businesses in evaluating the likelihood of an antitrust challenge to a collaboration with one or more competitors.⁷⁵

67. *United States v. General Motors*, 384 U.S. 127 (1966) (agreements not to sell to customers who purchase from competitor that discounts).

68. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 n.12 (1980); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930) (joint agreement on standard form of licensing contract requiring a cash security payment was a violation); *compare Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (exchanging credit information to enable industry members to make an informed but independent decision about extending credit or credit terms is not a violation).

69. *Polk Bros., Inc. v. Forest City Enters., Inc.* 776 F.2d 185, 188 (7th Cir. 1985); *see also SCHER, supra* note 26, at 1-31.

70. *NCAA v. Board of Regents*, 468 U.S. 85, 100-04 (1984); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

71. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361-69 (5th Cir. 1980).

72. *Maricopa Cty.*, 457 U.S. at 356-57 (applying the *per se* rule to an agreement among competing doctors to set maximum fees for services provided under insurance plans, because of a lack of resource pooling and risk sharing between the parents to the venture).

73. *NCAA v. Board of Regents*, 468 U.S. at 103 (applying the rule of reason to restrictions on college football telecasts imposed by the NCAA, a joint agency that established rules of competition in college athletics, because the marketed product (*i.e.*, competition) could not exist without the competitors' agreement on rules to govern the games); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

74. *Antitrust Guidelines for Collaborations Among Competitors*, Issued in Draft by the FTC and DOJ, Oct. 1, 1999. A copy of the guidelines is available on the FTC's website at www.ftc.gov/ftc/antitrust.htm

75. *Id.* at 2. According to the FTC, the guidelines will enable businesses to evaluate proposed transactions with greater understanding of possible antitrust implications, thus en-

3. Vertical Restraints

Vertical restraints can involve agreements on price or non-price restraints between manufacturers and distributors of the same product. Vertical price restraints are agreements that limit a distributor's freedom to resell a product at a price independently chosen by the distributor, such as resale price maintenance. This kind of restraint limits competition between different suppliers of the same brand, and between brands because distributors are not free to change the price to compete with other brands. The Supreme Court has ruled repeatedly that it is a *per se* offense for a manufacturer or supplier to require its distributors to adhere to specific resale prices by agreement.⁷⁶ However, the Court has recently altered its position on setting maximum resale prices and now analyzes maximum price agreements under the rule-of-reason.⁷⁷

Vertical non-price restraints relate to a seller's non-price terms of sale. These restraints can include provisions that: (1) preclude a distributor from selling in certain areas or to certain customers (territorial and customer restraints); (2) limit a distributor's ability to purchase products from other sellers (exclusive dealing arrangements); or (3) require a distributor to buy more products or different products than it otherwise would have purchased from the seller (tying arrangements, or full line forcing). These types of restraints are discussed further below in the section dealing with potential violations in a deregulated energy industry.

In a tying arrangement, the seller conditions the sale of one product or service (the tying product) on the purchase of a separate product or service (the tied product). Tying arrangements are considered anticompetitive when they force the purchaser to take the defendant's tied product simply because the defendant has market power with respect to the tying product. Tying arrangements may be challenged under section 1 of the Sherman Act as *per se* illegal where four elements are shown: (1) the existence of a tying and tied product; (2) the seller conditions the sale of the tying product on the buyer's purchase of the tied product; (3) the seller possesses sufficient economic power with respect to the tying product to appreciably restrain competition in the market for the tied product; and (4) the tying arrangement affects a "substantial volume of commerce" in the tied market.⁷⁸ A tying arrangement also may be unlawful under the rule of reason even if the elements of *per se* illegality are not met.⁷⁹

Vertical mergers, such as a merger between a manufacturer and a company producing an input to the manufacturing process, can also be considered a vertical restraint, if the merging entities possess market power sufficient to foreclose

couraging procompetitive collaborations, deterring collaborations likely to harm competition and consumers, and facilitating the Agencies' investigations of collaborations.

Id.

76. *Business Elecs. Corp.*, 485 U.S. 717 (1988).

77. *State Oil v. Kahn*, 522 U.S. 3 (1997).

78. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992).

79. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17-18 (1984) (stating that "[w]hen, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market").

competition at one or more levels.

4. Monopolization

Monopolization under section 2 of the Sherman Act is defined as "willful acquisition or maintenance" of monopoly power in a relevant market and requires the possession of monopoly power and an element of conduct intended to acquire, use or preserve the power.⁸⁰ Being a monopolist, by itself, is not illegal.⁸¹ The monopolization prohibited under the Sherman Act is the possession of monopoly power along with the attainment of that power by unfair means or using that power unfairly.⁸² Some examples of monopoly conduct that has been challenged include: (1) unilateral refusals to deal by a firm that controls an essential facility and denies use of the facility to a competitor.⁸³ An essential facility can include sport venues, means of transportation, the transmission of energy, or the transmission of information, to the extent they are necessary for effective competition in a market;⁸⁴ (2) predatory pricing—defined as pricing below average variable cost for the purpose of eliminating competitors in the short run along with the probability of recoupment, *i.e.*, the ability to raise prices in the long run;⁸⁵ and (3) leveraging, or the use of monopoly power in one market to gain an advantage in another market, such as offering volume rebates on patented products that are linked to volume purchases of non-patented products, thus enhancing sales of the non-patented products.⁸⁶

These types of prohibited activities generally offer no benefits to consumers and deprive consumers of the benefits of competition. The test used by the courts to distinguish between illegal monopolization and simply aggressive competition is whether the conduct "has impaired competition in an unnecessarily restrictive way" and whether the firm has been "attempting to exclude rivals on some basis other than efficiency."⁸⁷ The willfulness element of a section 2 monopolization claim can be shown by behavior unrelated to antitrust actions, such as instituting sham litigation, false advertising, false disparagement, and

80. *Eastman Kodak*, 504 U.S. at 481; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03 n.28 (1985).

81. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951); *Schine Chain Theatres v. United States*, 334 U.S. 110, 130 (1948).

82. *United States v. Griffith*, 334 U.S. 100, 106-07 (1948).

83. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

84. See *e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1379-81 (9th Cir.), *cert. denied*, 506 U.S. 908 (1992); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647-49 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 1993-1 Trade Cas. (CCH) ¶ 70,264 (4th Cir. 1993).

85. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.9, 588-89 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 n.1, 224 (1993); *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989).

86. *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); see also *Berkey Photo, Inc v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

87. *Aspen Skiing Co.*, 472 U.S. at 605 (quoting R. BORK, *THE ANTITRUST PARADOX* 138 (1978)). See also SCHER, *supra* note 26, at 1-56.

knowingly enforcing an invalid patent.⁸⁸ Section 2 of the Sherman Act also prohibits attempts to monopolize. To demonstrate attempted monopolization a plaintiff must show that: (1) the defendant engaged in predatory or anticompetitive conduct; (2) the defendant had a specific intent to monopolize; and (3) the defendant had a dangerous probability of achieving monopoly power.⁸⁹ Satisfying the “dangerous probability” element of the test requires an inquiry into the relevant product and geographic markets and the defendant’s market power within those markets.⁹⁰

D. What are Antitrust Exemptions and Immunities?

Certain industries and activities are exempt from application of the antitrust laws, either by statutory or judicially-recognized exemptions and immunities.

1. Exemptions and Immunities

Many regulated industries, such as communications, energy, and transportation have historically enjoyed certain exemptions and/or implied immunities to the antitrust laws.⁹¹ These exemptions and immunities are generally based on the premise that the regulated industries involve natural monopolies subject to ongoing governmental regulation. These assumptions are changing, however, as many regulated industries, including the energy industry, are deregulated or quasi-deregulated.⁹²

Some federal statutes specifically state that certain activities are exempt from the antitrust laws.⁹³ In cases where the exemption is not explicit, industries that are regulated by federal agencies may be found to possess implied immunity from the antitrust laws to the extent necessary to make the regulatory scheme work.⁹⁴ Courts have held implied immunity applies where the federal regulatory scheme is so pervasive that Congress must have “forsworn the paradigm of competition,” and the defendant’s activities were required by the law or the

88. *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 937-38 (Fed Cir. 1995) (sham litigation), *cert. denied*, 519 U.S. 814 (1996); *American Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publishers*, 108 F.3d 1147, 1152 (9th Cir. 1997) (false advertising); *Brownlee v. Applied Biosystems, Inc.*, 1989-1 Trade Cas (CCH) ¶ 68,425, at 60,337 (N.D. Cal. 1989) (false disparagement); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.* 382 U.S. 172, 177 (1965) (enforcement of an invalid patent).

89. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-59 (1993).

90. *Id.* at 459.

91. GELLHORN, *supra* note 11, at 70, 480-484.

92. See, e.g., *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (break up of the Bell local operating companies); *Airline Deregulation Act of 1978*, 92 Stat. 1705, 49 U.S.C. § 1374.

93. For example, the “business of insurance” is exempt from the antitrust laws to the extent regulated by state law. 15 U.S.C. § 1012(b). In addition, certain labor union activities are exempt; section 6 of the Clayton Act states that nothing in the antitrust laws shall be construed to forbid the existence and operation of labor organizations (15 U.S.C. § 17), and the Norris-LaGuardia Act prohibits courts from issuing an injunction on grounds that persons involved in a labor dispute are engaged in an unlawful combination or conspiracy (29 U.S.C. § 101).

94. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973); *Cost Management Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 948 (9th Cir. 1996).

agency or scrutinized and approved by the agency.⁹⁵ Implied immunity arises where it appears to a court that a pervasive regulatory scheme would be disrupted by antitrust enforcement.⁹⁶ The mere existence of complex regulation, however, does not suffice to confer immunity. Courts will closely examine regulatory authority over the challenged activity to determine whether the statutory and regulatory framework is sufficiently comprehensive to displace the antitrust laws.

In the energy field, the FERC's regulatory scheme under both the NGA and the FPA do not specifically exempt utilities from the antitrust laws.⁹⁷ However, courts have interpreted these statutes so as to provide immunity to antitrust laws in a broad range of circumstances.⁹⁸ While the antitrust laws are thus often not directly applicable to matters regulated by the FPA and the NGA, the FERC nevertheless considers the antitrust policies in determining what is in the public interest.⁹⁹ Indeed, the FERC has utilized some of the same analytical tools used by the DOJ in determining whether utility actions are in the public interest.¹⁰⁰

2. State Action Immunity

State regulation can also provide an entity with immunity from the federal antitrust laws.¹⁰¹ The two requirements for state action immunity are: (1) that the challenged conduct must be "clearly articulated and affirmatively expressed" [as] . . . state policy"; and (2) that the policy must be "actively supervised" by

95. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1102 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States v. National Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694, 735 (1975).

96. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (holding that in light of regulatory rules, constraints and practices, the price squeeze at issue in this case was not ordinarily exclusionary and to the extent an integrated utility managed to set prices that severely squeezed a distributor, the FERC—pursuant to its authority under sections 205 and 206 of the Federal Power Act—may reduce the offending wholesale rate to within a zone of reasonableness), *cert. denied*, 499 U.S. 931 (1991); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 685-86 (1975) (holding that authority to alter Exchange rules, supplemented by the SEC's review of commission charges, was sufficient to confer antitrust immunity for brokers fixing commission charges).

97. *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982) (federal antitrust laws held applicable in a price squeeze claim), *cert. denied*, 459 U.S. 1170 (1983).

98. For a recent application of this doctrine in the natural gas and electric industries, see *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998) and *Municipal Utils. Bd. v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1992), *cert. denied*, 513 U.S. 1148 (1995).

99. See, e.g., *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 966-70 (D.C. Cir. 1968); *California v. FPC*, 369 U.S. 482, 489 (1962) (holding that FPC should not have acted on a proposed merger application before a ruling in a pending antitrust action against merger applicants was issued); see also *FPC v. Conway Corp.*, 426 U.S. 271 (1976) (Supreme Court directed the FERC to consider potential anticompetitive effects of price squeezes when evaluating proposed wholesale rate increases).

100. Order No. 592, *Inquiry Concerning the Commission's Merger Policy Under the Federal Policy Act: Policy Statement*, 61 Fed. Reg. 68,595, F.E.R.C. STATS. & REGS., Regulations Preambles ¶ 31,044, at 30,111 (1996), *order on reconsideration*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321 (1997).

101. The state action doctrine was first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), stating that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Also, invoking principles of federalism and state sovereignty, the Supreme Court held that competitive restraints qualify for antitrust immunity only to the extent that they constitute "state action or official action directed by a state." *Id.* at 351.

the State itself.”¹⁰² However, there are limits to state action immunity. Mere encouragement of the restrictive private conduct does not provide immunity in the absence of a clear mandate or ongoing supervision.¹⁰³

The filed rate or *Keogh* doctrine¹⁰⁴ also protects regulated industries from antitrust challenges to rates actually approved by a regulatory agency. The doctrine holds that any “filed rate” (i.e., one approved by a regulatory agency) cannot be challenged in an antitrust suit for damages.¹⁰⁵ This doctrine prohibits an antitrust court from taking any action that would permit recovery based on some fictional rate that the plaintiff contends would have been in place absent the antitrust violation.

3. *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine generally allows competitors to jointly collaborate for passage of favorable laws (federal, state, or local) or for desired agency action, without running afoul of the Sherman Act prohibitions on such conduct—even though the inevitable result of their collective action might be a reduction or elimination of competition.¹⁰⁶ This immunity, which derives from the First Amendment right to petition the government, also extends to efforts to influence administrative and judicial proceedings.¹⁰⁷ The immunity does not extend to competitors’ efforts to influence private bodies, such as a trade association’s standard setting activities,¹⁰⁸ or conduct that is merely a sham.¹⁰⁹ For example, sham litigation could be the basis to deny *Noerr-Pennington* immunity if the litigation is shown to have no merit and if the initiation of the litigation

102. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Alabama Power Co.*, 21 F.3d at 387 (state action immunity applied to agreements among retail electric suppliers to assign new customers among themselves); *Yeager’s Fuel v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267-68 (3d Cir. 1994) (state action immunity applied to an electric utility’s use of rebates and other incentive programs to increase the use of electric heat in new homes because the state legislature had directed utilities to consider conservation and load management and the anticompetitive effects of the incentive programs were a direct result of that legislation); *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 434-35 (9th Cir. 1992) (bad faith on the part of private parties does not destroy state action immunity), *cert. denied*, 508 U.S. 908 (1993); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (state policy must be clearly articulated and affirmatively expressed).

103. *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 103 F.3d 1446, 1459 (9th Cir.), *modified*, 111 F.3d 1427 (9th Cir. 1996) (express authorization is necessary).

104. *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423 (1986). *See also County of Stanislaus*, 114 F.3d 858.

105. Unlike the state action doctrine, which can provide complete immunity from antitrust claims, the *Keogh* doctrine does not prevent criminal prosecution under section 3, or claims for an injunction under section 4. *Keogh*, 260 U.S. at 161-62.

106. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (finding that the Sherman Act does not apply to a joint lobbying campaign by railroads designed to encourage the adoption of laws that hurt the trucking business); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (stating that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition”).

107. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).

108. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

109. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972) (denying immunity to defendants who filed baseless claims to delay a competitor’s operating certificate application proceeding).

was an attempt to interfere with the business relationships of a competitor through the use (as opposed to the outcome) of the litigation process.¹¹⁰

4. Immunities in the Context of the Energy Industry

While, in general, the comprehensive nature of the regulatory scheme in the electric and natural gas industries has shielded industry participants from the antitrust laws, not all activities involving electric and gas utilities have been found immune from antitrust laws in the past. For example, in *Cantor v. Detroit Edison Co.*, a utility was found liable for illegal tying in connection with its program for distributing free light bulbs to residential customers, even though the light bulb exchange program was part of the utility's approved tariff.¹¹¹ In the leading monopolization and essential facilities case involving the electric industry, *Otter Tail Power Co. v. United States*,¹¹² the Supreme Court, in 1973, upheld a finding of Sherman Act section 2 liability against a utility where: (1) the utility had monopoly power in the relevant market through control of transmission lines essential to competition; (2) the utility cut the municipalities off from a supply of wholesale power and refused to allow access to its transmission lines; and (3) these actions left the municipalities with no feasible alternative source of power because they could not reasonably or practically duplicate the thousands of miles of transmission lines owned and controlled by the utility.¹¹³

In a recent case involving Rochester Gas & Electric's grant of reduced rates to retain a customer, conditioned on the customer's agreement to forego the development of its own cogeneration project, the U.S. District Court sided with the DOJ that such conduct was not protected from antitrust attack by state action immunity.¹¹⁴ Although the New York State legislation had authorized reduced rates to "prevent loss of . . . customers," and the New York Public Service Commission had approved the reduced rate contract, the Court held that the state legislation did not foresee or intend the anticompetitive features of this arrangement.

Finally, the *Noerr-Pennington*¹¹⁵ doctrine was applied recently in the electric industry to immunize a utility's aggressive efforts to persuade the local gov-

110. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993).

111. In *Cantor*, a competing seller of light bulbs claimed that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. 428 U.S. 579, 596 n.35 (1976); see also *Gainesville Util. Dept. v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978), where competing electric power companies were held to have conspired to divide the Florida wholesale power market in violation of section 1.

112. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

113. Also, the utility raised no legitimate reason why it could not make essential transmission facilities available to the municipalities. *Id.* at 381 (upholding the district court's finding that the utility's "pessimistic view" advanced in its power "erosion study" was "not supported by the record").

114. *United States v. Rochester Gas & Elec. Co.*, 4 F. Supp. 2d 172 (W.D.N.Y. Feb. 17, 1998); but see *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996) (finding sufficient state supervision to cloak a territorial allocation of customers with state action immunity from federal antitrust attack); *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), modified, 86 F.3d 1028 (11th Cir. 1996) (also finding state action immunity).

115. *Eastern R.R. Presidents Conference v. Noerr Motors Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

ernment to deny a cogenerator's request to construct a separate transmission line bypassing a defendant's system.¹¹⁶

III. POTENTIAL ANTITRUST VIOLATIONS IN THE DEREGULATED ENERGY INDUSTRY

A. *Joint Conduct*

Historically, in the electric power industry, a high degree of voluntary cooperation was required of all participants, including direct competitors, in order for the system to function efficiently and reliably. Today, the advent of open access, power exchanges, RTOs, ISOs, and reliability organizations have, to some degree, replaced historical voluntary cooperation with a fixed set of service rules and reliability requirements. Nevertheless, there is still a significant amount of day-to-day system operation and long term planning that requires utilities to interact with each other in ways not characteristic of competitors in other industries. Yet, in a competitive environment, the antitrust laws place significant constraints on the ability of competitors to cooperate if the result of the cooperation is a reduction in competition. It is essential for industry members to understand the dividing line between legitimate, efficiency enhancing cooperation and illegal collusion. This area of antitrust law, dealing with agreements among competitors, already has figured in a number of prominent cases, and will be even more central to this industry in the future.

As discussed above, the Supreme Court has interpreted the Sherman Act as prohibiting only *unreasonable* restraints of trade,¹¹⁷ rather than proscribing all inter-firm agreements in "restraint of trade." Some types of conduct, such as horizontal agreements to fix prices, rig bids, or allocate markets are deemed so anticompetitive that they are presumed to be unreasonable restraints of competition in all circumstances, and accordingly have been held to be *per se* violations of section 1. Other categories of agreements, such as exclusive dealing arrangements or refusals to deal, may have procompetitive justifications in some cases. These activities are examined under the rule of reason analysis, which requires a balancing of the restraint's anticompetitive effects against its procompetitive effects.

1. Bid Rigging

A common form of price fixing is joint bidding or bid rigging. Joint bidding among competitors violates the Sherman Act where the bidding activity results in agreements among competitors to submit noncompetitive bids, to allocate successful bids among bidders, or to refrain from bidding entirely in an effort to "rig" the bids submitted to the benefit of the joint bidders.¹¹⁸ According to the DOJ, the tell-tale signs of bid rigging include: (1) fewer competitors than

116. *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified*, 86 F.3d 1028 (11th Cir. 1996).

117. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911).

118. See, e.g., *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567, 1577-79 (M.D. Tenn. 1984) (agreement not to bid *per se* unlawful), *unrelated remand*, 786 F.2d 227 (1986).

normal submit bids on a project; (2) competitors submit identical bids; (3) the same company repeatedly has been the low bidder who has been awarded contracts for a certain service in a particular area; (4) bidders seem to win bids on a fixed rotation; and (5) there is a large, unexplainable dollar difference between the winning bid and all other bids or the same bidder bids substantially higher on some bids than on others, and there is no logical cost reason to explain the difference.¹¹⁹

Bid Rigging Example:

Utility A and Utility B each own nuclear generation and participate in a power exchange. During low-load hours these utilities sometimes have to submit negative bids in order to avoid costly reductions in output from these resources.

A and B agree they will no longer bid below zero for nuclear energy, but will reduce output of non-nuclear resources instead, to ensure the nuclear capacity always runs at 100% capacity.

Is there an antitrust problem with this agreement?

YES. Bid rigging is illegal, regardless of whether or not the activity caused any harm to consumers.

2. Market Allocation and Collusion

Market allocation agreements among utilities to divide or allocate wholesale power markets have also been condemned under the *per se* standard.¹²⁰ These agreements, which include those among competitors to divide customers or territories, are analyzed by courts in the same way as direct price fixing conspiracies. Market divisions are *per se* illegal even in the absence of any agreed upon price restraints.¹²¹ In *Gainesville Utilities Department v. Florida Power & Light Co.*,¹²² for example, competing electric power companies were held to have conspired to divide the Florida wholesale power market in violation of section 1. The municipal utility system of Gainesville had tried to obtain an interconnection for its electric system from Florida Power & Light (FP&L). FP&L

119. U.S. Dept. of Justice, *Antitrust Enforcement and the Consumer* (visited Feb. 9, 2000) <<http://www.usdoj.gov>>.

120. *Gainesville Utils. Dep't. v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

121. In *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), the Supreme Court applied the *per se* standard to a horizontal market and customer division scheme, rejecting the defendant's claim that the division was procompetitive. Topco was a cooperative association formed by independent, regional supermarket chains to act as a purchasing agent and develop a private-label goods program to compete more effectively against the brand name goods of national chains. Topco granted a license to each member supermarket chain to sell Topco brand goods only in a designated territory. In addition, the members were prohibited from selling Topco brand name goods to other retailers. The district court, applying the rule of reason, determined that the restrictions were reasonable because they fostered competition between the regional members of the association and national supermarket chains. *Topco Assoc., Inc. v. United States*, 319 F. Supp. 1031, 1036 (N.D. Ill. 1970). The Supreme Court rejected the lower court's resort to rule of reason analysis and held that the market and customer restrictions were *per se* illegal, thus precluding the consideration of procompetitive justifications (*i.e.*, the introduction of new competition) for the restraints.

122. *Gainesville Utils. Dep't.*, 573 F.2d 292.

resisted establishing the interconnection with Gainesville on the ground that Gainesville's interconnection would be more economical with another utility, Florida Power Corporation (FPC). Gainesville alleged that FP&L's refusal to consider an interconnection was evidence of a conspiracy with FPC to divide the electric power market. Although FP&L and FPC denied these allegations, the court concluded that there was evidence of much more than parallel activity. The court focused particularly on the exchange of letters between high-level executives of both power companies. The court held that although the refusal to serve certain cities may have been influenced by economic considerations, "concerted action was contemplated and invited" by the correspondence.¹²³

Likewise, in *Columbia Steel Casting Co. v. Portland General Electric*, two electric utilities were denied immunity with respect to a customer allocation agreement, even though the state commission had approved part of the arrangement.¹²⁴ In that case, Portland General Electric (PGE) and Pacific Power and Light (PPL) entered into an agreement to establish exclusive territories and to sell and transfer certain duplicative facilities between them. The City of Portland approved the agreement only to the extent of the sale and transfer of the facilities. PGE and PPL later submitted the agreement to sell and transfer the facilities to the Oregon Public Utility Commission (OPUC), which approved the sale and transfer. The antitrust action arose when Columbia Steel, a PGE customer, requested service from PPL whose rates were lower. PPL declined to provide service to Columbia Steel because Columbia Steel was located in PGE's exclusive territory. The federal district court, and later the Ninth Circuit, found that PPL's and PGE's use of the state immunity defense was not adequate because the OPUC had not approved the exclusive territories or the displacement of competition in the City of Portland.¹²⁵

In contrast, courts have found some agreements to allocate markets and customers in regulated industries were protected from antitrust attack under one of several immunity doctrines. For example, the Eleventh Circuit held that agreements by twenty-two rural electric cooperatives and Alabama Power to allocate service territories and customers among themselves did not violate section 1. The Eleventh Circuit reasoned that each allegedly anticompetitive agreement had been reviewed and approved by the state legislature.¹²⁶

While there are state-approved territorial arrangements all over the country, the *Gainesville* and *Columbia Steel* cases are a warning that such agreements are illegal unless the state specifically approves the allocation of service territories.¹²⁷

123. *Id.* at 301 (citation omitted); see also *Montana-Dakota Utils. Co. v. Williams Elec. Coop., Inc.*, 263 F.2d 431, 436 (8th Cir. 1959).

124. *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996).

125. *Id.* at 1440-41; compare *Columbia River People's Util. Dist. v. Portland Gen. Elec. Co.*, 40 F. Supp. 2d 1152 (D. Or. 1999) (district court found that unlike the *Columbia Steel* case, a 1963 OPUC order clearly allocated exclusive territory to PGE and thus PGE had state action immunity from antitrust violations).

126. *Municipal Utils. Bd. v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

127. See also *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (ordering summary judgment for electric companies in a challenge to a territorial allocation agreement, finding that state regulatory

Collusion Example:

Utility A and Power Marketer B both sell and buy power in a multi-state ISO. A enters a long-term bilateral contract to buy at wholesale from B on condition that B not sell to any retail customers in the ISO area.

Are there antitrust problems with this agreement?

YES. State action immunity, however, would apply if a state public utility commission expressly approves the arrangement as part of the state's restructuring efforts to protect a local utility from stranded costs.

While in the future there may be some increase in claims alleging illegal collusion, this risk should not deter utilities from legitimate conversations and agreements that promote efficiency and reliability in the operation of the electric grid system. This is an industry where some cooperation is essential to efficient operation. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,¹²⁸ the Supreme Court's analysis turned on the fact that the challenged licensing arrangement enabled individual composers to achieve market integration and to gain efficiencies in negotiating for and monitoring the use of compositions. The dividing line between permissible and illegal activities is where legitimate conversations spill over into anticompetitive agreements, such as agreements to fix prices or exclude competitors.¹²⁹

Deregulation has obvious implications for both long-standing relationships between competitors and new ones developed to capitalize on the changing regulatory structure of the electric power industry. The reduction of government supervision over the industry will in many instances translate to a loss of anti-trust immunities. Hence, established relationships must be reexamined to ensure their compliance with the antitrust laws. Furthermore, as discussed further below, while competitors consider engaging in new forms of joint behavior such as RTOs and reliability organizations, they must take particular care that they do not step over the line into the realm of impermissible conduct.

3. Joint Ventures

The "interconnectedness" of this industry has led to the creation of many formalized cooperative arrangements, such as joint ownership of power plants¹³⁰ and the formation of reliability councils, power pools, regional transmission groups, and ISOs. Such arrangements clearly can improve the efficiency and re-

commission approval in original agreement provided state action immunity), *cert. denied*, 517 U.S. 1190 (1996).

128. *Broadcast Music*, 441 U.S. 1.

129. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig.*, 759 F. Supp. 219 (E.D. Pa. 1991) (affirming \$638.5 million jury verdict against railroads whose executives, attending legally permissible rate meetings, illegally conspired to exclude self-unloading barges from the Great Lakes), *aff'd in part and rev'd in part, remanded*, 998 F.2d 1144 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994).

130. Some joint ownership arrangements have their origin in antitrust concerns dating back to the days when nuclear power was considered an essential facility. *See, e.g., Alabama Power Co. v. NRC*, 692 F.2d 1362, 1368-69 (11th Cir. 1982), *cert. denied*, 464 U.S. 816 (1983).

liability of the industry, and have been specifically endorsed by Congress and the FERC.¹³¹

Utilities that jointly own generation units or segments of an interconnected transmission system need to cooperate simply in order to operate their joint assets. And there is nothing wrong with that arrangement. Sometimes, however, joint procurement is an issue. Normally, joint buying and selling arrangements are permissible as long as they serve a legitimate, efficient purpose and do not foreclose too much of the market. Recently, the DOJ's Antitrust Division announced that it would not challenge a proposed joint purchasing and resource sharing venture by nuclear power plant owners.¹³² The fact that the founding members of the joint venture produced only 7% of the nuclear power generated in the United States controlled the DOJ's decision not to challenge the proposed plan.¹³³ Just last November, the DOJ gave its blessing to an electric purchasing association comprised of eight cement manufacturers and three steel product manufacturers located in California.¹³⁴ The members were not allowed to share competitively sensitive information on their businesses and an independent purchasing agent was required to collect such data and negotiate purchases.

B. RTOs/Reliability Organizations/Power Pools

Despite the endorsement of the FERC, Congress, and the DOJ,¹³⁵ pooling arrangements, RTOs, regional transmission groups (RTGs), and reliability groups are not immune from antitrust scrutiny. With respect to RTOs (*i.e.*, ISOs and Transcos), these entities require FERC approval for their creation, operation, and their membership and governance provisions.¹³⁶ As a result, to the extent their actions are in accordance with FERC-approved provisions, they would largely be protected from antitrust claims. RTOs, however, are not totally immune. The central inquiry is whether the restraint is reasonably related to the

131. Pooling arrangements were encouraged in 1978 in PURPA. PURPA of 1978, § 205, 16 U.S.C. § 824a-1 (1994). See also *Policy Statement Regarding Regional Transmission Groups*, F.E.R.C. STATS. & REGS. ¶ 30,976, 58 Fed. Reg. 41,626, 41,627 n.4 (1993).

132. *Utilities Serv. Alliance*, 6 Trade Reg. Rep. (CCH) ¶ 44,096 (Letter 96-18) (July 3, 1996). The venture's members would lend parts, equipment, personnel, and other resources to each other through a computerized trading system. The joint venture would also engage in joint purchasing for its members and allow members to consolidate some internal management functions. See, *e.g.*, United States Department of Justice and Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust* (Sept. 27, 1994) (similarly, in the health care antitrust guidelines, the Department of Justice endorses collaborative activities, such as hospital and physician joint ventures, which create procompetitive efficiencies that benefit consumers).

133. Other factors considered by the DOJ included a limit on total members of 38 reactors (35% of the operating reactors in the country) and a rule prohibiting members from exchanging pricing information or from discussing development plans.

134. Department of Justice Press Release, Nov. 20, 1997 on California Large Electric Power Purchasing Association. See also DOJ's business review letter clearing a new pricing mechanism proposed by the ten electric utilities that jointly own four power plants in Western Pennsylvania. PJM Power Pool Business Review Letter, Jan. 30, 1998.

135. Jade Alice Eaton, *Recent United States Department of Justice Actions in the Electric Utility Industry*, 9 CONN. J. INT'L L. 857, 865 (1994).

136. Section 203 of the FPA requires utilities to obtain FERC approval to transfer the operation or control of jurisdictional facilities. 16 U.S.C. § 824b (1994).

operation of the organization and is no broader than necessary to achieve its purpose.¹³⁷ In addition, in any area where the organization has discretion in its operation or governance, such conduct could be at risk.

RTO formation discussions would largely be protected from antitrust enforcement under the Noerr-Pennington Act, because such discussions inevitably lead to a request for FERC approval of the formation of the RTO.¹³⁸ RTO members must be careful not to implement any new rule or policy before obtaining FERC approval. Moreover, any discussions that lead to other agreements or rules that are not specifically approved by the FERC, such as agreements on generation prices, services provided outside the RTO, and policies toward entrants, are not likely to be protected from antitrust enforcement.¹³⁹

Other groups of competitors, such as reliability groups, power pools, and RTGs that do not need the same FERC approval to exist or operate do not enjoy similar immunities for their joint conduct. Historically, the FERC has held that operating practices fall, in the first instance, within the purview of the owners and operators of interconnected systems.¹⁴⁰ In addition, the FERC has typically deferred to regional reliability councils for the formulation of regional reliability standards, which were implemented successfully on a purely voluntary basis among owners of interconnected transmission systems. Antitrust immunity has historically not applied in these contexts.

More recently, however, the FERC has taken a larger role in enforcing reliability standards. The Western Systems Coordinating Council (WSCC) applied for FERC approval of its Reliability Management System, which would establish reliability criteria and impose sanctions for entities that do not comply.¹⁴¹ According to the WSCC, as competition grows and many new entities enter the market, some form of mandatory reliability system is required. The FERC approved the WSCC proposal because, unlike prior reliability standards, it *required* participants to adhere to reliability standards and it contained sanctions for failures to comply with the standards.¹⁴²

The WSCC filing may be the beginning of a trend in the United States, and reliability standards as a whole may soon be brought under FERC regulation and consequently enjoy antitrust immunity. Such immunity would be appropriate for enforcing reliability standards, given the important role reliability rules play in the successful operation of the interconnected transmission system. With many new competitors of all different types entering the marketplace, including gen-

137. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

138. Comments of the Staff of the Bureau of Economics of the Federal Trade Commission, No. RM99-2-000, at 31 (FTC issued Aug. 16, 1999) (submitted in response to FERC's RTO NOPR) [hereinafter *FTC Economic Staff Comments*].

139. *Id.* at 32 (stating that "[w]e encourage FERC to make this distinction known to participants in RTO formation meetings").

140. *Sierra Pac. Power Co.*, 86 F.E.R.C. ¶ 61,198, at 61,689 (1999), *reh'g pending*.

141. *Western Sys. Coordinating Council*, 87 F.E.R.C. ¶ 61,060 (1999).

142. *Id.* at 61,234. In addition, the DOJ issued a business review letter stating that it had no present intention to initiate antitrust enforcement action against the WSCC's reliability proposal. WSCC Business Review Letter, June 17, 1999.

erators, distributors, retail service providers, and others, some form of government oversight is needed to ensure successful implementation of reliability rules.

Example of Collusion in an RTO Context:

An RTO has a bid market for reserves. Participant A bids in low cost reserves from outside the ISO control area. Other participants in the ISO jointly propose a rule restricting imports of reserves.

Is there an antitrust risk?

RTOs require FERC approval for their operating procedures. If the FERC approved the proposal to restrict the supply of reserves to those inside the control area, the joint proposers (and the RTO) would most likely be immune from antitrust liability. The FERC presumably would only approve such a rule if there were a legitimate reliability reason for restricting the use of imported reserves. However, if the RTO, or its members acted on the proposed rule before obtaining FERC approval, there would be antitrust risks for the RTO and its members.

RTO antitrust questions will typically arise in four areas: (1) membership; (2) governance; (3) access to information; and (4) related bilateral agreements.

1. Membership

Generally, antitrust law does not require an organization to open up its membership to all interested in joining.¹⁴³ One exception is when membership is necessary in order to compete.¹⁴⁴ It is certainly arguable that in some cases membership in a power pool, RTG, or RTO would be necessary to compete. On the other hand, the whole thrust of Order No. 888 and several state restructuring plans is to require open and equal access regardless of RTO membership, and to require these owners and operators of transmission facilities to treat all customers equally. The current regulatory requirements for open membership may forestall some exclusionary conduct that might otherwise raise antitrust concerns; but to the extent the members in RTOs and other organizations, such as reliability groups, retain the power to establish membership criteria and use this power to deny competitors the right to participate, there is a danger of running afoul of the antitrust laws.

2. Governance

The same general antitrust principles apply to the governance of RTOs, pools, and RTGs that apply to membership. Antitrust law does not normally dictate how a joint venture is to be managed. However, if one group of members runs the organization in a way that places other members at a competitive disadvantage, the disadvantaged members may well pursue antitrust claims.¹⁴⁵ The

143. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-97 (1985).

144. *Id.* at 296.

145. The Supreme Court stated that the "procompetitive benefits [of the code-setting organization] depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by

FERC has taken a conservative approach to ensuring that no members are at a competitive disadvantage by approving governance structures that make it unlikely that any one group can dominate the governance of such organizations (at least to the extent the group's governance is regulated by the FERC).

3. Access to Information

Pools, RTOs, RTGs, and reliability groups collect and distribute large amounts of data, much of which is competitively useful. Given the increasing competition in the electric industry, this information must be handled with care. The FERC's OASIS rule,¹⁴⁶ which requires specified data about the transmission system to be made available on-line, in real time, exemplifies one approach to make information equally available to everyone all the time. That is a sensible rule in support of an open transmission system, but making all competitively sensitive information public is no panacea. In fact, antitrust problems have arisen in the past when competitors used public information exchanges as a means to send price fixing signals to one another.¹⁴⁷ Moreover, substantial sensitive information is not reported in the OASIS. The FERC has not yet resolved the question of how competitively sensitive data should be handled absent an obligation to disclose. It also remains to be seen whether the FERC will impose an obligation on pool members to disclose the information more broadly, if information shared by power pool members gives them a competitive advantage over non-members.

4. Bilateral Agreements

Even a legitimate, procompetitive joint venture such as an efficient, well-run ISO does not necessarily immunize all of its participants' conduct from antitrust consequences. Agreements among participants must be reasonably related to the purposes of the venture in order to pass muster under the rule of reason. Thus, for example an agreement among ISO members limiting each other's ability to enter unilateral contracts with non-members would require careful antitrust analysis.¹⁴⁸

members with economic interests in restraining competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509 (1988) (standard-setting group's procedures allegedly used to exclude competitor's product); see also *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118, 122-23 (2d Cir. 1980) (members acting in the name of an industry association disparaged competitor's product), *cert. denied*, 456 U.S. 556 (1982).

146. Order No. 889, *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, 61 Fed. Reg. 21,737 (1996) (codified at 18 C.F.R. § 37).

147. *United States v. Airline Tariff Publ'g Co.*, 836 F. Supp. 9, 10 (D.D.C. 1993); *In re Coordinated Pre-trial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446-47 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991); see also FTC Economic Staff Comments, *supra* note 138, at 25, stating that in a market monitoring context,

making generators' otherwise confidential bid data publicly available (so that the academic community can perform a quality check on the efforts of RTO market monitoring offices) may raise antitrust concerns about abetting potential collusion or strategic bidding.

148. FTC Economic Staff Comments, *supra* note 138, at 31, highlighting the difference between RTO formation discussions among competitors and discussions among competitors regarding other commercial activities.

Bid Rigging Example in an ISO/RTO Context:

An ISO has a bidding market for operating reserves. A and B, owners of hydro and fossil generation, agree not to bid their hydro at night so they can maximize hydro generation during peak hours. The ISO is forced to run fossil resources on AGC at night. The result is lower market prices in the daytime and higher prices at night.

Is there an antitrust problem with this agreement, if consumers pay less overall?

YES.

What if A and B don't have a formal agreement?

A formal agreement is not required for an antitrust violation.

If there is a question as to whether a particular organizational structure or operation would be in violation of the antitrust laws, an entity can apply to the DOJ for a determination of legality under the DOJ Business Review process.¹⁴⁹ The DOJ recently reviewed an application by the Southwest Power Pool (SPP) for a proposed computerized power exchange trading mechanism called the Next-Hour Energy Exchange (NHEE) that would enable SPP members to buy or sell electric power and the transmission for that power on a next-hour basis.¹⁵⁰ According to the SPP's application, the prices offered for the power would be subject to the Western System Power Pool (WSPP) tariff, which was approved by the FERC and would allow for sales at market-based rates up to a regulated maximum rate. The SPP stated, however, that utilizing the WSPP tariff would also have the effect of limiting use of the NHEE to those SPP members who were also members of the WSPP. The SPP added that it was easy to qualify for WSPP membership, and members of the NHEE are free to buy and sell outside the NHEE and to transact with non-SPP members.

The DOJ issued its standard business review letter response stating that it had no current intent to challenge the proposed computerized energy trading system. The DOJ also stated that its findings were based particularly on the openness of the NHEE and the ability of SPP members to deal off the system. The DOJ found that "[m]aking real-time quotes available to those in a position to buy or sell the posted next-hour energy would not be likely to foster price collusion or otherwise impede competition."¹⁵¹ The DOJ clarified, however, that merely because the WSPP tariff contained maximum rates would not alleviate antitrust concerns about price collusion at below maximum rate levels. Accord-

149. 28 C.F.R. § 50.6 (1999). "A request for a business review letter must be submitted to the Assistant Attorney General, Antitrust Division." 28 C.F.R. § 50.6 (note 1). "The Division will only consider requests with respect to proposed business conduct, involving either domestic or foreign commerce." 28 C.F.R. § 50.6 (note 2). "After reviewing a request . . . the Division may": (1) "state its present enforcement intention with respect to the proposed business conduct"; (2) "decline to pass on the request; or" (3) "take such other position or action as it considers appropriate." 28 C.F.R. § 50.6 (note 8).

150. Letter from Anne K. Bingaman, Dep't of Justice, Assistant Attorney General, re Southwest Power Pool, Inc. (Feb. 22, 1996), available at <<http://www.usdoj.gov/atr/public/busreview/0542.htm>>.

151. *Id.*

ing to the DOJ, "[a]ny such collusion between or amongst private rivals would violate the antitrust law, notwithstanding the fact that maximum rate tariffs place some limit on the amount of harm that could be imposed on consumers."¹⁵²

C. *Tying and Bundling*

As competition increases, utilities are marketing more and more aggressively. Additionally, utilities are using various strategies to hold on to their existing customers and to obtain new customers. Most of these strategies are entirely legitimate. However, tying or bundling, monopoly leveraging, and some types of exclusive dealing contracts are variations on a theme of improperly using monopoly power either to maintain a monopoly or to gain an unfair advantage in another market. The antitrust risks can be significant. The existence of a FERC-regulated ISO in control of the transmission grid does not eliminate these antitrust issues.

Tying Example:

Power Company forms a joint marketing venture with Acme Heat Pump Co., and provides rebates only to homeowners and developers that install Acme Heat Pumps.

Is this an illegal tying arrangement?

MAYBE. Whether this kind of arrangement triggers antitrust liability would depend on the extent of Power Company's market power and the percent of the market for heat pumps affected by the arrangement.

In 1996, the DOJ filed suit against the City of Stillwell, Oklahoma, alleging violations of sections 1 and 2 of the Sherman Act.¹⁵³ The DOJ challenged Stillwell's "all-or-none utility policy," which was implemented by refusing to extend or connect water or sewer lines to premises unless the developer or owner also agreed to purchase electric service from the City. Stillwell had been the sole provider of water and sewer services in the relevant territory since at least 1985, and had a legal monopoly over such services. According to the DOJ's complaint, in order "to give [the policy] some teeth," the city began denying building permits to parties purchasing electricity from non-Stillwell sources. The Government's civil complaint charged Stillwell with illegal tying, monopolization, and attempted monopolization. The DOJ's action prompted Stillwell to agree to a final judgment enjoining it from requiring any customer to purchase electric service from the city as a condition of receiving water or sewer service.¹⁵⁴

One interesting aspect of the *Stillwell* complaint is that it implicitly assumes

152. Bingaman, *supra* note 150.

153. *United States v. City of Stillwell*, No. Civ. 96-196-B (E.D. Okla. filed Apr. 25, 1996).

154. *United States v. City of Stillwell*, No. Civ. 96-196-B, 1998 WL 1120779 (E.D. Okla. 1998). The final judgment also requires the city to include on any application for sewer or water service the following language, in part: "we do not require you to purchase electric service from us as a condition of receiving water or sewer service and we will not discriminate against you if you do not purchase electric service from us." *Id.* at *2.

no antitrust immunity applies despite the fact that Oklahoma authorizes cities to operate water and sewer monopolies—clearly a state action immune activity.¹⁵⁵ The message to a monopolist is that it runs a serious risk if it tries to tie or leverage a legal monopoly in one area to get or keep electric customers where the state has not provided for exclusive electric territories.

As the FERC and the states require electric services to be unbundled and sold separately, the use of potential tying arrangements may increase as a method of retaining market share. While most “package deals” are innocuous (and, indeed, may provide a convenience to customers), those that force customers to take services they would rather buy elsewhere are suspect.¹⁵⁶ Similar arrangements have been unsuccessfully attempted in the telecommunications and natural gas industries, among others.

In *United States v. El Paso Natural Gas Co.*, the defendant company entered into a consent decree with the DOJ to resolve charges that the utility had been unlawfully forcing gas well owners seeking to use the company’s gas gathering system to purchase meter installation services from the gas company as well.¹⁵⁷ Under the terms of the decree, El Paso was prohibited from tying its meter installation service/inspections to its gas gathering service and was required to inform all inquiring oil well owners of their option to purchase these services elsewhere.¹⁵⁸

In a similar case, the United Telephone Company of Missouri and the State of Missouri settled charges that the Missouri-regulated monopoly violated state and federal antitrust law and the state’s merchandising practice law in the provision of basic telephone service to residential customers. In a complaint filed by Missouri’s Attorney General, the state alleged that United Telephone continued to market its inside wire maintenance plans to customers, following the Federal Communications Commission’s deregulation of these services in early 1987.¹⁵⁹ The complaint alleged that, in an effort to maintain its position as the leading

155. See, e.g., *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Pinehurst Enters., Inc. v. Town of Southern Pines*, 690 F. Supp. 444, 449 (M.D.N.C. 1988), *aff’d mem.*, 887 F.2d 1080 (4th Cir. 1989).

156. See, e.g., *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83 (5th Cir.), *cert. denied*, 513 U.S. 963 (1994). In *Breaux Bros.* the plaintiff sugar growers alleged anticompetitive tying in connection with defendant’s conditioning the availability of leased land to grow sugar cane on contractual commitment to refine the sugar at the defendant’s mill. The court did not find that a tying arrangement existed in this case because the defendant controlled well under 20% of the land in the relevant area and thus lacked sufficient market power over the tying product. *Id.* at 87.

157. *United States v. El Paso Natural Gas Co.*, 1995 WL 623097, 1995-2 Trade Cas. (CCH) ¶ 71,118, at 75,362 (D.D.C. 1995).

158. *Id.* at 75,364.

159. *Missouri v. United Tel. Co.*, 1995 WL 792066, 1995-2 Trade Cas. (CCH) ¶ 71,234 (W.D. Mo. 1996); see Plaintiff’s Complaint For Injunctive and Monetary Relief, at 8. Prior to 1987, the telephone company held a state-regulated monopoly in the provision of inside wire maintenance service and was the only commercial provider of inside wire maintenance services to residential customers. Plaintiff’s Complaint at 3. Maintenance of residential inside wire was included in the basic telephone service charges. *Id.* at 4. In 1987, the FCC issued an order requiring that inside wire maintenance services could no longer be included in telephone bills. *Id.* at 4. United Telephone responded by sending a mailing to customers offering to provide the service for \$0.95 a month. *Id.* at 5-6. This service was communicated to customers as a negative option service, wherein United Telephone provided the service to those who failed to respond to the mailing, as well as to those who expressly requested it. *Id.*

provider of inside wire maintenance services, the company: (1) continued to bill its customers for such service where they did not affirm or clearly cancel the service through the use of negative options; and (2) failed to inform customers that most inside wire repairs could be performed in fifteen to sixty minutes, or that the customer or independent contractors could do the work.¹⁶⁰ According to the state, this conduct constituted monopolization and attempted monopolization of inside wire maintenance services in violation of section 2 of the Sherman Act.¹⁶¹ Under the terms of the settlement decree, United Telephone agreed to refrain from charging customers for inside wire maintenance where the customer did not affirmatively request or agree to coverage, or where either the customer was not informed of the charges in effect at the time of agreeing or requesting coverage.¹⁶²

D. Monopolization and Leveraging

Monopoly leveraging, a theory closely related to tying and bundling arrangements, occurs when a seller uses monopoly power in one market to gain an unfair advantage in another market. Such conduct is prohibited by section 2 of the Sherman Act.¹⁶³ The circuit courts are split, however, on whether a monopolist violates section 2 when it uses its monopoly power to achieve a competitive advantage in a second market without actually attempting to monopolize that market.¹⁶⁴

In theory, Order No. 888's "open access" rule and the newly-issued RTO final rule should prevent the leveraging of transmission market power. Those orders require all public utilities with control over interstate transmission facilities to provide competitors with access to such facilities and, in some instances, require independent operation of those facilities. These requirements will effectively eliminate a utility's ability to exercise market power over transmission,

160. Plaintiff's Complaint, at 5.

161. *Id.* at 7-8. The practice of billing customers for a service they did not expressly authorize, in the state's view, also violated the Missouri Merchandising Practices Act, MO. REV. STAT. § 407.020 (1995).

162. *Missouri v. United Tel. Co.*, 1995 WL 623097, 1995-2 Trade Cas. at 75,971, *cf.*, *Wojcieszek v. New England Tel. & Tel. Co.*, 977 F. Supp. 527 (D. Mass. 1997).

163. See *United States v. Griffith*, 334 U.S. 100, 108 (1948); *In Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1356 (1999), the Eleventh Circuit affirmed the dismissal of a Sherman Act claim by Aquatherm, a manufacturer of solar powered heating systems for swimming pools, against FPL, an electric utility and regulated monopoly that did not sell swimming pool equipment. FPL promoted the use of electric pool heating pumps over solar powered ones. The court rejected Aquatherm's claims: (1) that FPL wrongly attempted to prevent erosion of its electric power monopoly; and (2) that FPL wrongly interfered with the pool heater market to increase its profits. The court found, among other things, that Aquatherm's claims must fail because FPL did not participate in the pool heater market and did not have an intent to monopolize that market.

164. Compare *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) (holding that proof of attempt to monopolize second market is not required in a monopoly leveraging claim), *cert. denied*, 444 U.S. 1093 (1980) with *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992) (holding that plaintiff bringing a monopoly leveraging claim must demonstrate threatened or actual monopolization in second market), *cert. denied*, 507 U.S. 921 (1993); see *Alaska Airlines Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) (expressly rejecting *Berkey Photo* and holding that unless a monopolist uses its power in a first market to acquire and maintain a monopoly in a second downstream market, or to attempt to do so, no section 2 violation has occurred), *cert. denied*, 503 U.S. 977 (1992).

and should therefore eliminate a utility's ability to condition the sale of transmission services upon the purchase of other products or services the utility may offer.

Monopolization Example:

In a certain geographical location, at certain peak times during the year, generation becomes scarce and spot prices for energy increase significantly for brief periods of time.

GenCo can roughly predict the time when generation will be scarce and decides to withhold a portion of its generation from the market (1) to potentially accelerate the onset of the price increases and (2) to thereafter sell the withheld generation at the significantly higher prices. GenCo does not own or control any transmission facilities.

Is GenCo's behavior an attempt to monopolize in violation of the antitrust laws?

No. Assuming that GenCo does not have monopoly power at most times during the year, its behavior is aimed at taking a short-term advantage of market circumstances rather than an attempt to monopolize. A violation of section 2 of the Sherman Act requires the possession of market power and actions to attain or maintain that power by unfair means. In the absence of monopoly power, GenCo has not engaged in unfair actions or attempted to exclude competitors from the market simply by not selling its product. Arguably, the high prices and short supply of power would have the opposite effect – to encourage entrants in the market.

Compare with Another Monopolization Example:

Assume that GenCo owns a high cost generator on the outskirts of Markettown at a crucial point on the regional transmission lines that serve Markettown, which, because of its high cost, normally does not run during normal dispatch procedures. GenCo has several other lower cost units within Markettown itself, with which it can serve Markettown more cheaply. However, GenCo knows that if it runs its high cost generator out of merit order and sells at a loss, it can cause congestion on the transmission lines into Markettown and thereby purposefully preclude other sellers from serving customers in Markettown. By precluding other sellers from selling to Markettown, GenCo can sell more of its own generation than it otherwise would have sold.

In this scenario, is GenCo engaging in illegal behavior under the antitrust laws?

Possibly, depending on the correct definition of the relevant markets and of GenCo's market power; its behavior is aimed at eliminating competitors, which may be an illegal attempt to monopolize under section 2 of the Sherman Act.

Undoubtedly, someone will argue that these orders do not always prevent utilities from employing market power over transmission service to acquire competitive advantages in other product or service markets. For example, market power over services that are not explicitly covered by those orders may still give rise to monopoly leveraging or tying allegations. Similarly, the existence of market power in local or regional markets where transmission is constrained may

make it easier for unsuccessful competitors to allege that successful firms have engaged in monopoly leveraging or tying.

On the natural gas side, a recent private antitrust case filed in June 1999 illustrates how potential monopolization-related antitrust claims can arise in connection with newly-developed retail access programs. In *Consumer Services Associates v. KN Energy, Inc.*,¹⁶⁵ the plaintiff, Consumer Services Association (CSA), a purchaser, seller, and marketer of natural gas to wholesale and retail customers, filed a complaint against KN Energy, Inc. (KNE), a natural gas company that markets, transports and distributes natural gas, and its subsidiary, KN Retail. CSA alleged that KN Retail engaged in antitrust violations, including monopolization, attempted monopolization and *per se* tying, in connection with KN Retail's program in Nebraska, to unbundle the supply of natural gas from the distribution service for residential users.

According to the complaint, as a condition of becoming an alternative natural gas supplier, KN Retail required suppliers to accept assignments of firm transportation capacity held by KN Retail on the interstate pipeline of KN Interstate, KN Retail's affiliate, in an amount that exceeded the amount needed to reliably serve retail customers. In addition, KN Retail required alternative natural gas suppliers to obtain letters of credit in the amount of \$5,000,000 payable to KN Retail in case the supplier were to default on its service obligation. According to CSA, because of these requirements, it was precluded from using lower cost alternatives to firm transportation capacity to meet its service obligations, such as purchasing capacity in the secondary capacity market and utilizing natural gas storage facilities, peak shaving facilities and facilities that can inject heat energy from liquefied petroleum gases.

Based on these facts, CSA alleged that KNE committed two antitrust violations. First, KNE engaged in unlawful tying by conditioning the use of KN Retail's local distribution services (the tying product) to the agreement by the third party supplier to acquire firm transportation from KN Interstate (the tied product). In other words, in order for an alternative natural gas supplier to participate in the retail choice program and compete for former KN Retail customers, the alternative natural gas supplier was required to purchase (accept assignment of) KN Retail's capacity on KN Interstate's pipeline. Second, CSA alleged that KNE engaged in monopolization (exclusionary acts to maintain its monopoly) and attempts to monopolize in the sales of natural gas to residential, commercial, and agricultural customers in connection with the retail choice program, by engaging in practices that have the effect of maintaining KN Retail's market power in the relevant market, such as requiring alternative suppliers to obtain costly lines of credit and use KN Retail's customer billing services.

In answering the complaint, KN claimed, among other things, that its activities in the retail choice program were authorized and supervised by Nebraska municipal officials and the Nebraska Municipal Oversight Committee and are thus entitled to state-action immunity. Whether KN's state action immunity defense will protect it from the violations alleged in the complaint will depend on whether the state or a regulatory agency acted with sufficient clarity in exempt-

165. *Consumer Servs. Assocs. V. KN Energy, Inc.*, No. 99-S-761 (D. Colo. filed June 1999).

ing the program from competition, based on the analysis described above in the *Columbia Steel* and *California Retail Liquor* cases.¹⁶⁶

E. Exclusive Dealing

Exclusive dealing arrangements can be used by a firm with market power to foreclose a large part of the market. In an exclusive dealing arrangement, a buyer agrees to purchase a product or service exclusively from one supplier, typically under a long-term contract. These agreements may foreclose the supplier's competitors from marketing their products or services to the same purchaser, raising significant anticompetitive concerns. To differentiate between procompetitive, long-term exclusive dealing arrangements and those that are anticompetitive in nature, the Supreme Court first formulated the "quantitative substantiality" test.¹⁶⁷ This test focuses on the percentage of the market foreclosed by the arrangements. A foreclosure of as little as 6.7% of the relevant market has been held to be sufficiently substantial to warrant antitrust condemnation.¹⁶⁸ In *Tampa Electric Co. v. Nashville Coal Co.*,¹⁶⁹ another test emerged. Using the "qualitative substantiality test," the Supreme Court focused on the percentage of the market foreclosed, the need "to weigh the probable effect of the contract on the relevant area of effective competition . . . and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein."¹⁷⁰ Noting the public's interest in ensuring that utilities are furnished a steady supply of fuel, the Court held that the contract did not violate the antitrust laws and further found that foreclosure of 128 million tons of coal sales by a utility's twenty-year requirements contract was not substantial.¹⁷¹

Exclusive dealing and monopolization claims against an electric power supplier were the subject of a federal antitrust case in Pennsylvania. In *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*,¹⁷² oil dealers brought a section 1 suit against Pennsylvania Power & Light (PP&L) challenging a cash incentive

166. For some recent examples of courts applying the state action immunity in a retail access context, see *North Star Steel Tex., Inc. v. Entergy Gulf States, Inc.*, 33 F. Supp.2d 557, 563 (S.D. Tex. 1998) (finding that Entergy's action in refusing to transmit retail power from another supplier was entitled to state action immunity because Entergy acted pursuant to the Texas Public Utility Regulatory Act's express policy to displace competition in retail electric service with state regulation and because the Texas Public Utility Commission actively supervised that policy); see also *North Star Steel Co. v. MidAmerican Energy Holdings Co.*, 184 F.3d 732 (8th Cir. 1999), in which the court held that North Star, operator of a steel mill cannot bring an antitrust suit against its state-designated exclusive supplier of electricity, MidAmerican, for refusing to wheel cheaper power from other generators. The court found that MidAmerican was entitled to state action immunity under the two-part test in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, because the state of Iowa has "clearly articulated," "affirmatively expressed" and "actively supervised" its policy displacing retail competition with regulation. According to the Court, the state's policy applies to generation as well as transmission and distribution.

167. *Standard Oil Co. v. United States*, 337 U.S. 293, 298 (1949).

168. *Id.*

169. 365 U.S. 320 (1961).

170. *Tampa Elec. Co.*, 365 U.S. at 329.

171. *Id.*

172. 22 F.3d 1260 (3d Cir. 1994).

program developed by PP&L to promote energy conservation. PP&L offered cash incentives to builders and developers to install electric heat pumps in new homes. The Third Circuit concluded that PP&L's "all-electric development agreement," which conditioned a builder's receipt of cash incentives on its agreement to build an entire development consisting of only electrically heated units, stated a section 1 claim.¹⁷³ On remand, the trial court granted defendant's summary judgment on many issues but, as to exclusive dealing (developers agreed to install only electric heat in all their projects), found factual issues for a jury.¹⁷⁴ Monopoly leveraging also was found appropriate for the jury, where the utility was charged with using its power as the sole supplier of electricity to increase sales in the residential submarket. The case settled before commencement of the jury trial.

IV. CONCLUSION

Increasing concern about the antitrust laws should be welcomed as a sign of new competitive opportunities. The entities that should be the most sensitive to antitrust issues are those that are making pricing and strategic marketing decisions without having to get regulatory approval. This is, of course, exactly what the FERC intends as a direct result of Order No. 888, and the RTO rule, and what several states are proposing at the retail level. From an antitrust perspective, the only adverse outcome in the deregulation movement would be if the regulators stopped regulating before setting up a competitive market structure. This would leave utilities vulnerable to antitrust claims without the immunities provided by regulation. It would also leave other market participants exposed to the exercise of market power and other anticompetitive conduct that is not kept in check by regulation.

173. The conduct was not immune, the court concluded, because the PUC had not been aware of the exclusivity requirement and therefore had not approved it. *Id.* at 1268 n.9.

174. 953 F. Supp. 617 (E.D. Pa. 1997).