ANTITRUST ASPECTS OF THE ITCF'S NEW PARALLEL FLOW DISCUSSIONS

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I. Introduction to the ITCF and Its Potential Liability for Price-Fixing

Although industry and government officials generally agree that the Federal Energy Regulatory Commission (FERC) should do all it can to promote regional electricity transmission planning, defining the precise contours such promotion should assume has proven a surprisingly divisive issue.[1] Perhaps the most prominent conflicts over the role regional transmission groups will play in our nation's energy policy is the controversy surrounding the Interregional Transmission Coordination Forum's (ITCF)[2] filing at the FERC seeking official endorsement of its electricity coordinating activities.[3] Founded in 1988, the ITCF was formed to use informal mechanisms to work out problems with the transmission of electricity, instead of resorting to formal FERC proceedings.[4] Alternatively, ITCF Chairman Robert Arnold described the group's mission as promoting "cooperation and coordination between the owners, operators, and users of

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1. *Parties Embrace RTG Proposal's Goal, But Dicker Over How to Proceed*, INSIDE FERC, Feb. 1, 1993, at 13.

2. The ITCF is a voluntary organization of electric power producers whose membership includes all the New England Power Pool utilities, major utilities from New York and most midwestern states, Ontario Hydro, Virginia Power, TVA, Entergy Services, Florida Power, and three independent power industry members including AES, Cogentrix and U.S. Windpower. *Transmission Group Seeking a Bigger Role in Mediating Wheeling Disputes*, ELECTRIC UTIL. WEEK, June 15, 1992, at 12.

3. Compare the reactions of electricity industry leaders from opposing camps. Viewing the FERC filing as a means by which the ITCF is seeking to gain protection from potential antitrust suits, a spokesman for Public System Intervenors, an industry group consisting of the Indiana Municipal Power Agency, the Michigan Municipal Cooperative Group, the Northern California Power Agency, the Virginia Municipal Electric Association No. 1, and American Municipal Power-Ohio, has been quoted as saying: "The proper means for ITCF to avoid antitrust liability is to conduct itself in an open manner under procedures that cannot result in coercion of members or non-members, with full opportunity for regulatory scrutiny and dissent, rather than attempting to use the commission as a shield for anti-competitive activities." *Public Power, Co-ops Echo APPA Call Against FERC Action on ITCF Filing*, ELECTRIC UTIL. WEEK, July 20, 1992, at 17. On the other hand, Robert C. Arnold, the Chairman of the ITCF "cannot imagine why any entity would challenge a totally voluntary organization that preserves the rights of investor-owner and publicly owned utilities, cooperatives, and [non-utility generators] . . . the ITCF is just what the doctor ordered to avoid expensive and time consuming litigation and protect everyone's interests." *Remarkable Remarks*, PUB. UTIL. FORT., Sept. 1, 1992, at 9.

4. *Transmission Group Asks FERC to Back Informal Dispute Resolution Guidelines*, INDEPENDENT POWER REP., Aug. 28, 1992, at 14.

regional interconnected transmission systems to assure system integrity and maximum reasonable use of facilities for economic benefit. . . ."[5]

In July 1992, the ITCF sought a declaration by the FERC that participation of its members in talks to develop detailed transmission and parallel flow proposals would be in the public interest.[6] This request reflected a proposed expansion of the ITCF activities, both in scope and level of detail. For example, these talks would include, for the first time, discussion of rate-related issues, thus raising the specter of horizontal price-fixing.[7] Although the FERC subsequently refused to issue a decision declaring that the ITCF's activities were in the public interest,[8] questions regarding the antitrust legality of the group's activities remain.

This article examines the antitrust aspects of the ITCF's new parallel flow discussions, focusing on the exposure of the ITCF to liability for violating section 10(h) of the Federal Power Act (FPA) and the Sherman Act's prohibition on horizontal price-fixing.[9] Part II reviews section 10(h) of the FPA and assesses the ITCF's potential liability under that statute.[10] Part III analyzes the ITCF's proposed expansion of activities under traditional antitrust principles. Part III, section A reviews the various bases the ITCF could rely upon to claim an exemption from application of the antitrust laws and, finding an express or implied antitrust exemption unlikely, concludes that the ITCF must indeed concern itself with potential liability for violating the antitrust laws. Part III, section B examines the applicability of the Keogh and Filed Rate Doctrines, and demonstrates that the protection these doctrines afford is strictly limited.[11] Finally, Part IV applies traditional antitrust analysis to the ITCF's proposed expansion of activities and suggests that federal courts are unlikely to apply the rigid per se rule of

5. *Groups Form to Tackle Transmission Access Issues*, PUB. UTIL. FORT., Aug. 1, 1992, at 7.

6. *APPA: ITCF Filing is 'Not a Filing': FERC Has No Power to Act On It*, ELECTRIC UTIL. WEEK, July 13, 1992, at 13.

7. Antitrust courts have often held that horizonal price-fixing is per se illegal (i.e., that no examination of the competitive effects of the price-fixing agreement is necessary before condemnation under the antitrust laws). *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

8. Interregional Transmission Coordination Forum, 64 F.E.R.C. ¶ 61,278 (1993). In the same decision, the FERC also refused to consider the ITCF as a Regional Transmission Group (RTG) under its recent policy statement on RTG's. *Id. See also* Policy Statement Regarding Regional Transmission Groups, III F.E.R.C. STATS. & REGS. ¶ 30,976, Fed. Reg. 41,626 (1993)(FERC policy statement encouraging the electric industry to deal with parallel flow problems in the context of Regional Transmission Groups).

9. Horizontal price-fixing refers to price-fixing agreements between or among independent entities which compete on the same levels of product or service distribution. EARL W. KINTNER, FEDERAL ANTITRUST LAW § 10.3 (1980).

10. Section 10(h) of the Federal Power Act (FPA) provides that: "[c]ombinations, agreements, arrangements or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain or increase prices for electrical energy or service are hereby prohibited." Federal Power Act, 16 U.S.C. § 803(h) (1988).

11. The Keogh Doctrine provides that "an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved, by [a regulatory agency] was the product of an antitrust violation." Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 422 (1986).

illegality to ITCF actions involving price-fixing;[12] instead, all reasonable restraints of trade incurred as a result of rate and charge discussions by the ITCF will be upheld.[13]

II. ITCF Liability Under Section 10(h) of the Federal Power Act

Section 10(h) of the FPA provides an immediately obvious source of liability for the ITCF with regard to potential price-fixing activities under its new parallel flow discussions. This section prohibits "combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain or increase prices for electrical energy or service. . . ."[14] This language appears in part I of the FPA, which deals with FERC licensing of hydropower plants subject to federal jurisdiction.[15] As a result, the ITCF members, subject to the FERC's part I jurisdiction, who take part in agreements found to constitute price-fixing must concern themselves with possible FERC sanctions for violating section 10(h).

This prohibition against monopolistic combinations appears in the section of the FPA outlining the conditions which must be met by an applicant before the FERC will grant a hydropower license.[16] As such, the ITCF members violating this prohibition could find that the FERC will revoke their licenses to generate power.[17] In the alternative, the FERC could exercise its statutory authority to fix the contracts and rates of the ITCF members violating section 10(h).[18] In any case, members should welcome a finding that ITCF activities might not be subject to section 10(h) so as to avoid the time, expense, publicity and burden of FERC proceedings and sanctions.

An analysis of the statute and relevant case law reveals that the applicability of section 10(h) to ITCF activities will be strictly limited. For example, some ITCF members are not subject to FERC regulation under part I of the FPA as they fall outside of the FERC's part I jurisdiction. Other ITCF members are subject to FERC jurisdiction only under part II

12. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

> [F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. *Id.* at 218.

13. The rule of reason states that the Sherman Act was intended to prohibit only unreasonable restraints of trade. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43 (1982). Justice Brandeis offered the following interpretation of the rule of reason which is often cited as the rule's classic statement: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

14. 16 U.S.C. § 803(h) (1988).

15. 16 U.S.C. §§ 791-823a (1988 & Supp. IV 1992).

16. *Id.*

17. The FERC may revoke previously issued hydropower licenses under 16 U.S.C. § 799 (1988).

18. 16 U.S.C. § 813 (1988).

of the FPA, which deals with FERC regulation of electric utility companies engaged in interstate commerce.[19] Section 10(h) does not apply to electric utilities regulated only under part II, and part II does not contain any analogous provision. As a result, the ITCF members not subject to federal regulation under part I, or subject to regulation only under part II, should enjoy freedom from sanction under section 10(h).[20]

Federal court precedent indicates that ITCF members regulated under both part I and part II of the FPA will be immune from sanction under section 10(h) as well.[21] As stated above, the federal scheme for regulation of the bulk power market under part II does not contain a provision which is analogous to the prohibition on monopolistic combinations contained in section 10(h). This absence becomes especially conspicuous when considering that many of the provisions contained in part I find similar or identical provisions in the federal regulatory scheme of part II. This failure to include a provision similar to section 10(h) in part II of the FPA might not have occurred accidentally. Instead, the absence of a prohibition on monopolistic combinations for part II public utilities might evidence an attempt by Congress to exempt power producers regulated under both part I and part II from the requirements of section 10(h).

In the only case to deal directly with this issue, *Pennsylvania Water & Power Co. v. Federal Power Commission*, the District of Columbia Circuit came to precisely this conclusion.[22] In that case, Judge Bazelon specifically held that part II power companies which were simultaneously regulated under part I of the FPA did not need to comply with the prohibition against monopolistic combinations found in section 10(h).[23]

Although the decision is now more than four decades old, the logic of the decision seems as compelling today as it did when Judge Bazelon issued his opinion. First, Judge Bazelon noted that the prohibitions of section 10(h) appeared only in part I of the FPA.[24] For Judge Bazelon, this fact alone indicated that Congress did not intend to make licensees, simultaneously regulated under parts I and II of the FPA, subject to section 10(h).[25]

19. The FERC's jurisdiction to regulate electric utilities engaged in interstate commerce extends only to "public utilities" as defined in 16 U.S.C. § 824(e) (1988). Thus, the FERC does not have the jurisdiction to regulate municipally owned utilities, cooperative utilities financed by REA, federal power marketing agencies, qualifying small power production facilities, qualifying cogeneration facilities, the Tennessee Valley Authority or foreign utilities such as Ontario Hydro.

20. One other possibility exists which is not discussed in the text of this article: that of an electric utility which is regulated under neither part I nor part II of the FPA. Such a category of electric utility is represented in the ITCF membership by, for example, the Tennessee Valley Authority and Ontario Hydro. The FERC will treat this category of member as it would any utility not regulated under part I of the FPA, that is, that the utility is outside of the FERC's jurisdictional purview under section 10(h).

21. For example, the ITCF members who are investor owned utilities (IOUs) that operate hydroelectric facilities fall into this category.

22. Pennsylvania Water & Power Co. v. Federal Power Commission, 193 F.2d 230, 237 (D.C. Cir. 1951)(hereinafter *Pennsylvania Water & Power Co.*).

23. *Id.*

24. *Id.*

25. Section 10(h) does indeed virtually restate the Sherman Act. But it is found only in Part I of the Federal Power Act, which deals with water-power licensees, and not in Part II, dealing

Second, Judge Bazelon found that the precise object of the prohibition in section 10(h), that is, the combining licensees to limit the output of electrical energy constituted one of the primary objectives of part II of the FPA.[26] For example, section 202(a) of the FPA imposes a duty upon the Commission to encourage public utilities to combine for the interconnection of facilities.[27] Further, the FPA provides that the Commission may sometimes order interconnections of public utilities and regulate the rates and contractual arrangements.[28] In short, Judge Bazelon found it unlikely that Congress intended section 10(h), which appears in part I of the FPA, to prohibit precisely the activities which Congress authorized under part II.[29]

Thus, despite the fact that section 10(h) would at first seem to constitute an antitrust barrier which the ITCF members must hurdle prior to assuring the legality of their activities, it appears that section 10(h) has only limited applicability. Many ITCF members fall entirely outside of the jurisdictional scope of section 10(h) under part I of the FPA. Other members, regulated by the FERC under part I and part II, will find their liability precluded by Judge Bazelon's decision in *Pennsylvania Water & Power Co.* In sum, only a small class of the ITCF membership, those regulated by the FERC exclusively under part I of the FPA, must concern themselves with potential liability for violating section 10(h).[30]

III. The Scope of the ITCF's Potential Sherman Act Liability

Antitrust lawyers utilize a variety of legal weapons to deflect antitrust challenges to their clients' activities. In the context of antitrust challenges involving regulated industries, these tactics often include an attempt to claim an antitrust exemption or to invoke the Keogh or Filed Rate Doctrines. The following section analyzes the ITCF's situation under these principles and demonstrates that the ITCF members must expect the Sherman Act to apply fully to their activities.

A. *An Exemption from the Sherman Act is neither Express nor Likely to be Implied*

The United States' antitrust laws, including the Sherman Act, are premised on a belief in the beneficial nature of business competition.[31] Still,

with public utilities selling electric energy in interstate commerce at wholesale. This fact alone would indicate that Congress did not intend to make licensees which are also part II companies, such as Penn Water, subject to section 10(h). *Id.*

26. *Id.*

27. 16 U.S.C. § 824a(*a*) (1992).

28. *Id.* § 824a(*b*) (1992).

29. The court's conclusion was further bolstered by the fact that part II of the FPA is a statute which is later in time and more specific in application than part I, thus suggesting that Congress intended part II to supplement and supersede part I of the Act. *Pennsylvania Water & Power Co.*, 193 F.2d at 238.

30. The conclusion that section 10(h) will not impact most of the ITCF membership does nothing alone to suggest that the antitrust laws generally will not apply to the activities of that group. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

31. Phillip Areeda & Donald F. Turner, Antitrust Law ¶103 (1978).

competition enforced by antitrust laws is often considered to be impossible or inappropriate.[32]

Given the important role that the ITCF plays in assuring efficient and effective provision of electric power in this county, the ITCF might attempt to defend itself from an antitrust challenge by claiming exemption from antitrust laws. In these cases, an antitrust exemption can sometimes either be express or implied.[33]

Under an express exemption, Congress authorizes behavior that would otherwise violate the antitrust laws by exempting an industry or a type of behavior in the language of the statute.[34] A review of the FPA reveals no provision which serves as an express antitrust exemption.

Exemption from the antitrust laws may also be implied. Arguments for an implied antitrust exemption are generally speculative in nature. As two popular commentators have opined, implied exemption cases resist definitive harmonization.[35] To further complicate matters, antitrust courts examine a variety of non-doctrinal factors in reaching their decisions.[36] Courts are not likely to lightly imply antitrust immunity,[37] and will not do so absent a finding that such immunity is "necessary to make the [regulatory] Act work."[38] Finally, immunity is unlikely to be found where the agency has relatively little to do with the protection of competition, or where its responsibilities for the regulated industry are not "pervasive."[39]

Based on existing case law, ITCF members are unlikely to successfully argue that they benefit from an implied exemption from the Sherman Act. In *Otter Tail Power Co. v. United States*,[40] the Supreme Court found that a public utility regulated by the Federal Power Commission (FPC) that refused to wheel power was not immune from antitrust scrutiny.[41] The Court's finding rested in part on the fact that the FPC had no statutory

32. *Id.* ¶ 221.

33. *Id.*

34. *Id.* ¶ 224b.

35. *Id.* ¶ 224c.

36. Among the non-doctrinal factors an antitrust court may examine are: (1) the confidence the court has in the administrative agency, (2) the procedural posture of the case, or (3) the judicial understanding of the challenged conduct, its industrial setting and the implications of approving or disapproving it. *Id.* ¶ 223g.

37. *E.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57, (1945).

38. Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) [hereinafter *Silver*]. The *Silver* case has special applicability to the analysis of whether a possible implied antitrust exemption exists for the ITCF. In that case, the Supreme Court held that regulatory approval of activity which would otherwise constitute an unlawful price-fixing arrangement warrants application of a rule-of-reason analysis rather than the per se rule of illegality. In the matter of the ITCF, the FERC has specifically refused to endorse or determine that the ITCF's proposed expansion of activities is in the public interest. *See supra* note 8 and accompanying text. As a result, the ITCF cannot claim that the FERC's regulatory approval of its activities serves as a repeal by implication of the Sherman Act's applicability, as did the defendants in *Silver*.

39. *E.g.*, United States v. RCA, 358 U.S. 334, 351 (1959).

40. 410 U.S. 366 (1973).

41. *Id.* at 374-75.

authority under the FPA to require involuntary wheeling.[42] This absence of statutory authority contrasted with a prior draft of the statute which would have included a common carrier provision making it the "duty of every public utility to . . . transmit energy for any person upon reasonable request."[43] This lack of power on the part of the FPC to require wheeling indicated to the Supreme Court that the regulatory scheme was not pervasive, and thus precluded the existence of an implied antitrust exemption.[44]

In reaching this conclusion, Justice Douglas cited an opinion he had written in a previous Supreme Court antitrust case, *California v. FPC*.[45] The Supreme Court also found that the FPC's regulation of the natural gas industry did not grant the regulated companies immunity from antitrust suit due to the lack of a pervasive regulatory scheme.[46] Thus, the notion that federal energy and antitrust law apply concurrently to the ITCF seems unassailable.[47]

The United States Congress recently reaffirmed this conclusion with the passage of the Energy Policy Act of 1992 (Act).[48] Title VII of the Act contains several provisions which represent an attempt by Congress to arm the FERC with new statutory authority to deal with parallel flow problems, including authority to begin a program of mandatory open-access electrical transmission.[49] In addressing these goals, Congress remained acutely aware of the continuing relevance of federal antitrust law. Section 722 of the Act specifically preserves antitrust remedies for parties claiming antitrust damage from utility transmission policies.[50] This recent legislation by Congress precludes any lingering doubts about the applicability of the federal antitrust laws to electric utilities subject to FERC jurisdiction.

B. *The Keogh Doctrine as a Shield to Antitrust Liability*

Representatives of regulated industries in antitrust cases sometimes seek to invoke the Keogh Doctrine[51] as a defense to antitrust liability. The Keogh Doctrine holds that "an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to and approved by [a regulatory agency] was the product of an antitrust violation."[52]

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42. *Id.*

43. *Id.*

44. *Id.*

45. California v. FPC, 369 U.S. 482, 485-86 (1962).

46. *Id.*

47. Significantly, no federal cases finding an implied exemption from the antitrust laws for a FERC-regulated power company have been found.

48. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

49. *Id.* §§ 721-22, 106 Stat. at 2915-66 (1992)(to be codified at 16 U.S.C. § 824k).

50. In amending the FPA, section 722 provides, in relevant part, that "Sections 210, 211, 213, 214, and this section shall not be construed to modify, impair, or supersede the antitrust laws." *Id.* § 722, 106 Stat. at 2916.

51. Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

52. *Square D Co.*, 476 U.S. at 422.

The Keogh Doctrine is not a species of antitrust immunity, but instead a doctrine which limits antitrust damages.[53] In *Square D Co. v. Niagara Frontier Tariff Bureau*,[54] the Supreme Court explained that the holding in *Keogh* was based upon the Filed Rate Doctrine which states:

> The legal rights of a shipper as against a carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.[55]

Thus, the Keogh Doctrine prohibits an antitrust court from taking any action that would permit recovery in excess of agency-filed rates in a suit for antitrust damages, including the recovery of trebled antitrust damages.

The Keogh Doctrine provides antitrust protection of a limited scope. For example, the Keogh Doctrine does not prevent the government from pursuing redress by criminal prosecution under section 3, by injunction under section 4, and by forfeiture under section 6 of the Sherman Act.[56] Thus, the ITCF could be subject to these types of antitrust actions for any horizontal price-fixing activities. In addition, the circuits are split with regard to whether *Keogh* bars antitrust damages for ratepayers only in cases where the party alleging the harm is not a competitor of the defendant.[57] Finally, the Keogh Doctrine does not apply where the anti-competitive conduct alleged is independent of that associated with the tariff.[58]

With regard to the antitrust liability of the ITCF as a group, the Keogh Doctrine will fail to provide antitrust protection against treble damages liability for the simple reason that the ITCF itself has not filed any rates with the FERC. Thus, the group has no rates which have been approved by a regulatory agency, a necessary prerequisite for a *Keogh* defense.[59] Similarly, many individual members of the ITCF do not file their rates or tariffs as well. The ITCF members included on this list are, among others, the Tennessee Valley Authority, Ontario Hydro, the qualifying small power

53. *Id.*

54. *Id.*

55. *Keogh*, 260 U.S. at 163, *cited in*, *Square D Co.*, 476 U.S. at 409, 416-17.

56. *Keogh*, 260 U.S. at 161-62.

57. *Compare* City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) (holding that *Keogh* does not apply where the party alleging harm is a competitor or a customer-competitor), *with* Pinney Dock & Transp. Co. v. Pennsylvania Cent. Corp., 838 F.2d 1445, 1456-57 (6th Cir. 1988), *cert denied*, 488 U.S. 880 (1988) (holding that *Keogh* applies regardless of whether the party alleging harm is a competitor or a customer-competitor).

58. For example, in *In re New Mexico Natural Gas Antitrust Litigation*, the natural gas company defendants attempted to invoke the filed rate doctrine in arguing that the New Mexico Public Service Commission's approval of the rates charged the plaintiffs insulated them from antitrust liability in a case alleging price-fixing at the wellhead. The District Court in New Mexico rejected this broad claim of antitrust immunity. Since wellhead prices were an area not regulated by the public utility commission, the suit was held to fall outside of the purview of the Keogh Doctrine. In re New Mexico Natural Gas Antitrust Litig., 1982-1 Trade Cas. (CCH) ¶ 64,685 at 73,729 (D.N.M. 1982).

59. The ITCF is therefore similarly situated to the defendants in the case discussed *supra* note 58, where the prices charged by the utilities were not regulated by the public utility commission.

production facilities, and the qualifying cogeneration facilities. The *Keogh* defense will also fail for these utilities.

Still, the Keogh Doctrine promises to insulate one type of ITCF member from treble damages liability: the investor owned utilities. Federal law requires these utilities to file their tariffs under part II of the FPA. Thus, the results of agreements reached by the ITCF will be reflected in these utilities' filed rate schedules.[60] Further, the Commission will review these filed tariffs to assure that all jurisdictional rates and charges are just, reasonable, and non-discriminatory.[61] Thus, the Keogh Doctrine will insulate ITCF-member investor owned utilities from antitrust liability for their filed rate schedules, and the discussions preceding them, as the rates will have been submitted to and approved by a regulatory agency for purposes of invoking the doctrine's antitrust protection.

IV. Traditional Antitrust Principles Applied to the ITCF

The FERC recently refused to declare that the ITCF's planned expansion of duties to include dealing with contracts relating to the transmission of electricity was in the public interest.[62] Still, these newly proposed activities will likely impact electric rates and transmission charges. ITCF-fostered agreements on specific transmission parallel flow issues may eventually be incorporated into rate schedule filings of member utilities.[63] Thus, the ITCF could easily find itself the target of an antitrust suit for price-fixing if its proposed expansion of duties proceeds, since the FERC lacks the power to grant antitrust exemptions for regulated bodies and no express or implied antitrust exemptions exist.[64]

At first glance, ITCF activities bearing on rates for electricity may seem to violate established principles of antitrust law. For example, in *United States v. Socony-Vacuum Oil Co.*,[65] the Supreme Court stated that price-fixing agreements were per se illegal regardless of whether the con-

60. Part II of the FPA requires all jurisdictional electric utilities to submit schedules detailing all rates and charges applicable to jurisdictional transmissions or sales of electric power. Federal Power Act, 16 U.S.C. § 824d (1988).

61. The FERC is charged with assuring that all jurisdictional transmissions and sales of electric power are just, reasonable and non-discriminatory under 16 U.S.C. § 824d (1988). In addition, the FERC has the power to fix by order contracts that affect jurisdictional rates and charges to assure that they are just and reasonable under section 206 of the FPA. *See id.* § 824e.

62. *See supra* note 8 and accompanying text.

63. *Transmission Group Seeks FERC Okay; Could Affect Debate on Capitol Hill*, ELECTRIC UTIL. WEEK, July 6, 1992, at 1-2.

64. Conspicuously, the FERC does not have the power to grant regulated companies exemptions from the antitrust laws. This lack of power vested in the FERC contrasts with the powers of the Interstate Commerce Commission (ICC). The United States Code currently provides that rail carriers who engage in collective ratemaking shall be exempt from the antitrust laws so long as the agreement receives the prior approval of the ICC. 49 U.S.C. § 10706 (1988). This has not always been the case. For example, in *Georgia v. Pennsylvania R.R. Co.* the Supreme Court found that the defendants restrained trade through the use of rate bureaus to fix rates. 324 U.S. 439, 456-57 (1945). Justice Douglas stated that Commission approval of the agreement did not insulate the carriers from liability under the antitrust laws. *Id.* at 454-55.

65. 310 U.S. 150 (1940)(hereinafter *Sacony-Vacuum*).

spirators possessed power to affect prices or had any effect on the market price.[66] This finding of per se illegality is of special interest since the alleged conspiracy took place under the sponsorship of the federal government.[67] In addition, the Supreme Court has held price-fixing to be per se illegal in no fewer than four other cases.[68] A court strictly applying *Socony-Vacuum* would necessarily condemn any horizontal price-fixing activity engaged in by the ITCF as a per se violation of the antitrust laws.

Antitrust courts have not strictly followed *Socony-Vacuum* and sometimes consider other factors when passing on the antitrust validity of a price-fixing scheme. For example, when the challenged conduct arises in circumstances where the horizontal restraints are necessary for the product in question to be offered in the market at all, antitrust courts will abandon the per se rule and shift to a rule of reason analysis.[69]

A recent Supreme Court opinion by Justice Stevens[70] offered part of Justice Brandeis' opinion in *Chicago Board of Trade v. United States*[71] as the classic statement of the rule of reason. Justice Brandeis opined: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[72] According to Justice Brandeis' opinion, antitrust courts may examine a broad variety of factors in making this determination, including the history, the nature and probable effects of the restraint, the facts peculiar to the business in which the restraint is applied, and the intentions underlying the restraint.[73] The antitrust court will then weigh the negative effect of the restraint on competition against its economic or business justification.[74] Restraints which are found to be anti-competitive will be struck down under the rule of reason, whereas restraints that are neutral or pro-competitive will survive antitrust scrutiny.[75]

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66. Particularly salient language in the case stated that:

> [We do] not mean that both a purpose and a power to fix prices are necessary for establishment of a conspiracy under section 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. [But] conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *Id.* at 224 n.59.

67. The alleged conspiracy took place during meetings of the General Stabilization Committee, a body regulating the oil industry found at the time in the federal government under the Department of Interior's Petroleum Administrative Board. *Id.* at 172-77.

68. Citizen Pub. Co. v. United States, 394 U.S. 131, 135 (1969); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

69. The rule of reason states that the Sherman Act was intended to prohibit only unreasonable restraints of trade. *See,* Maricopa County Medical Soc'y, 457 U.S. at 342-43; National Society of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978); Chicago Bd. of Trade v. United States, 246 U.S. at 238.

70. *Maricopa County Medical Soc'y*, 457 U.S. at 335.

71. *Chicago Bd. of Trade*, 246 U.S. at 238.

72. *Id.* at 238.

73. *Id.*

74. *Id.*

75. *Id.*

These relatively vague criteria represent the best available sources to draw upon to project how an antitrust court will apply the rule of reason in the energy context. As two popular commentators have summarized: "Though these principles have been established for many years, the courts have not evolved any precise formulae or guidelines for applying the Rule of Reason to a particular situation. An arrangement unacceptable in one industry may pass muster in another due to special industry facts or regulatory considerations."[76] Thus, the precise contours of the rule of reason's applicability in the energy context are difficult to discern.[77]

This rule of reason, rather than the rule of per se illegality, has been applied in horizontal price-fixing cases in which the antitrust court viewed the restraint as necessary in order to bring the product to market. For example, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[78] involved an antitrust challenge against the licensing agencies for composers, writers, and publishers.[79] The plaintiffs alleged that the issuance of blanket licenses[80] to copyrighted musical compositions at fees negotiated by the licensing agencies constituted price-fixing and was thus per se unlawful under the antitrust laws.[81] Although the blanket licenses could have easily been considered a crude form of price-fixing, the Supreme Court refused to apply the per se rule of illegality enunciated in *Socony-Vacuum*.[82] Instead, after finding the blanket licensing scheme necessary to protect the artists' copyright rights and to create the commerce anticipated by the Copyright Act, the Supreme Court applied the rule of reason.[83] Ultimately, the scheme of blanket licensing survived antitrust examination, despite the fact it seemingly violated the holding of *Socony-Vacuum*.

Likewise, the Supreme Court applied the rule of reason in *NCAA v. Board of Regents*,[84] another case where the defendant's price-fixing activities appeared to merit per se condemnation. That case involved a challenge to the NCAA's restrictions on the bidding process for television rights to college football games.[85] Although the Supreme Court found that the plan constituted horizontal price-fixing, the Court refused to apply the rule of per se illegality since the restraints on competition were essential if

76. 4 DAVID J. MUCHOW & WILLIAM A. MOGEL, ENERGY LAW & TRANSACTIONS § 100.02[2][b](1992).

77. Still, it must be noted that more vigorous antitrust scrutiny is applied to challenged arrangements which control large shares of the relevant market, rather than small shares. This conclusion flows from the observation that as a firm's market power increases, the potential for the challenged conduct to impact adversely on consumer welfare increases as well. Since ITCF members control large parts of the relevant market, they will likely be subject to heightened antitrust scrutiny. *See generally id.*

78. 441 U.S. 1 (1979)(hereinafter *Broadcast Music Inc.*).

79. *Id.* at 4.

80. Blanket licenses "give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term." *Id.* at 5.

81. *Id.* at 4.

82. *Id.* at 23.

83. *Id.* at 24.

84. 468 U.S. 85 (1984).

85. *Id.* at 91-94.

the product was to be available at all.[86] Instead, the Court proceeded to apply the rule of reason, which did ultimately condemn the NCAA's restrictions on television bidding as violative of the Sherman Act for, among other reasons, being more restrictive than necessary.[87]

The above-mentioned cases, including *Broadcast Music, Inc.* and *NCAA v. Board of Regents* suggest that the ITCF may enjoy considerable latitude in its activities bearing on the price for electric power and the resolution of pricing disputes. This conclusion follows from the Supreme Court's willingness to depart from a per se rule of illegality for certain horizontal price-fixing activities so long as the restrictions are viewed by the Court as essential for the product to be offered in the market. In such cases, precedent indicates that these situations are better judged through an application of the rule of reason.

At the present time, the contours of the ITCF's proposed expansion of activities continue to emerge. No antitrust analysis can yet be applied to specific ITCF actions. Still, it is useful to consider that ITCF antitrust liability will hinge upon the federal courts' perception of its activities. Should the ITCF's electricity coordinating functions be viewed as pro-competitive or neutral, then the court will be more likely to diverge from its history of analyzing price-fixing activity under the rule of per se illegality. Instead, the court may be more likely to view the restriction as necessary for the ITCF members to provide efficient and reliable electric power service and judge the restriction under the rule of reason. On the other hand, should the court view the ITCF's new activities as self-aggrandizing or anti-competitive, then such activities will probably not survive antitrust scrutiny under either the per se analysis of *Socony-Vacuum* or the rule of reason described above.

V. Conclusion

With its September 3, 1993 policy statement urging the electric power industry to resolve parallel flow problems through the use of RTGs, the FERC has seemingly assured that RTGs will play an increased role in America's energy policy for the remainder of the century.[88] Although the

86. The Court stated:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. *Id.* at 120.

87. The NCAA's restrictions were found unreasonable because: 1) the record did not support the proffered justification for the television plan that it constituted a cooperative "joint venture" which assists in the marketing of broadcast rights and is hence pro-competitive; 2) the plan did not protect live attendance since games were televised during all hours that college football games are played; and 3) that the interest in maintaining a cooperative balance among amateur athletic teams was not related to any neutral standard or any readily identifiable group of competitors and there was no evidence that equality was attained more effectively than it could have been by less restrictive alternatives. *Id.* at 113-21.

88. *See supra* note 8 and accompanying text.

FERC declined to accord full RTG status to the ITCF, antitrust courts most likely will analyze the potential antitrust liability of both the ITCF and organizations afforded full RTG status in similar ways.

This article has reviewed the antitrust aspects of the ITCF's recent proposed expansion of activities, focusing on the potential for antitrust liability for price-fixing. An examination of case law and federal statutes suggests that section 10(h) of the FPA, a possible source of antitrust liability for some public utilities, will not serve as a major antitrust barrier for the ITCF. In addition, antitrust liability under the Sherman Act appears equally improbable. Although ITCF members will not be able to defend an antitrust suit by claiming an exemption or the benefit of the *Keogh* limitation on treble damages, the more lenient rule of reason approach will replace the traditional rule of per se illegality as the framework for analysis. Thus, so long as the ITCF in specific, and RTGs generally, can convince antitrust courts that their pricing restrictions or price-fixing activities are necessary for the efficient provision of reliable electric power, such restrictions will likely receive relaxed antitrust scrutiny.