Report of The Committee On Antitrust

SIGNIFICANT ENERGY ANTITRUST LITIGATION

EARLY IN 1979 the district court decided the merits in *City of Mishawaka v. American Electric Power Company, Inc.*, 465 F.Supp 1320 (N.D. Ind. 1979). The court found that defendants had implemented a price squeeze in violation of Sherman Act § 2, awarded $12 million in trebled damages and granted injunctive relief. On appeal, the Seventh Circuit affirmed on the issue of liability, but reversed the award of damages, vacated the injunction and remanded for further proceedings according to its instructions. *City of Mishawaka v. American Electric Power Company, Inc.*, Nos. 79-1190, 79-1237, 79-1354 (7th Cir. Feb. 21, 1980). The decision promises to generate much debate concerning the meaning and ramification of its various holdings.

Briefly, the Seventh Circuit first rejected a *Noerr-Pennington* defense[1] as being unavailable in the face of the utility's pattern of wholesale rate filings before FERC (characterized as "an abuse of the administrative process"), its threats against the municipalities' continued future wholesale supply and its expressed intentions of preference for its own retail customers. The court compared these activities to those condemned in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), but, like the trial court, declined to label the utility's tariff filings a "mere sham."

On the merits, the court held that in determining the issue of price squeeze, the utility's effective retail rates (and not proposed retail rates) were pertinent, and that this did not read the concept of "intent" out of the law. The court accepted the utility's argument that "something more than general intent" should be required to establish a Sherman Act § 2 monopolization case against a dually-regulated utility, but the court concluded that the evidence (which showed other non-price squeeze anticompetitive activity) indicated specific intent as well.

As to the measure of damages, the Seventh Circuit rejected the finding that the overcharge was equal to the difference between the wholesale rates prior to Commission review and the retail rate actually charged. In light of the Federal Power Act's provision for overcharge refunds (with interest), the court held that damages would be limited to specific injuries, such as: money losses due to inadequate interest rate on refunded amounts, losses due to delayed or foregone capital improvements, and losses of customers, revenues and profits.

Additionally, the court awarded plaintiffs expenses incurred in litigating before the Commission "their attempt to prevent the utility's withdrawal of their wholesale supply as had been threatened" (but not expenses associated

[1] *Eastern Railroad Presidents Conference v. Noerr Water Freight, Inc.* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

with opposing utility rate applications generally). The context of this holding left unclear whether these litigation expenses were to be regarded as traditional Clayton Act § 4 expenses, or rather as an additional component of damages subject to trebling.

On March 12, 1980, the utility filed its motion for rehearing *en banc*.

Motions to dismiss antitrust actions were denied in three district court decisions. *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F.Supp. 1343 (W.D.Pa. 1979), involved allegations of price squeeze, refusal to wheel power, and other antitrust claims. In denying defendant's motion to dismiss, the court rejected two proffered defenses: first that an antitrust exception set out in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) afforded immunity; and second that the FERC had exclusive jurisdiction of the issues raised. The court stayed its proceedings, however, pending the outcome of Penn Power's rate case in FERC Docket No. ER77-277. In so doing, the court dismissed refusal-to-wheel and other refusal-to-deal claims on the ground that plaintiff had never specifically requested such services.

Two courts addressed the impact of *Parker v. Brown*, 317 U.S. 341 (1943), on antitrust claims and reached somewhat different results. In *City of Newark v. Delmarva Power and Light Co.*, 467 F.Supp. 763 (D. Del. 1979), the court expressly departed from the rationale of *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied* 436 U.S. 922 (1978), and held that an award of antitrust damages for alleged price squeeze was foreclosed by the immunity provided in *Parker*. Nevertheless, the court retained jurisdiction for the possible award of injunctive relief and declined to stay the district court action notwithstanding a claim that primary jurisdiction lay in the FERC which was simultaneously considerating similar issues in Docket No. ER78-414.

In *Winters v. Indiana & Michigan Electric Co.*, Civ. No. F78-148 (N.D. Ind. May 31, 1979), a number of customers challenged on monopolization grounds the rental provisions and rates under a 35-year lease agreement between defendant and the City of Fort Wayne. With respect to the lease terms, the court denied a motion to dismiss based on *Parker*, finding that exempt activity was not involved. Nevertheless the court declined to review the rate portion of the claim inasmuch as the state regulatory commission had considered the rates and found them reasonable.

In *Central Iowa Power Co-operative v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979), the court rejected a claim that a power pooling agreement among thirty electric power systems designed to promote reliable and economic operation of the interconnected electric network violated the anti-trust laws. The Court held that the competitive efforts of Mid-Continent Area Power Pool (MAPP) were reasonably related to the valid purposes of the power pool and were in the public interest. In so holding, the court affirmed the FPC's determination that MAPP was lawful and rejected the claim that MAPP involved unlawful price fixing.

During February 1980, the court lifted its stay in the case of *City of Anaheim v. Southern California Edison Co.*, No. CV-78-810-MML (C.D. Cal. August 31, 1978), notwithstanding the continued active status of FERC

proceedings in Docket Nos. ER76-205, E-7777 (Phase II) and E-7796, whose pendency gave the original purpose to the stay. This case, which involves allegations of price squeeze, refusal to wheel power, and preemption of power sources, is at the initial discovery stage.

In *West Texas Utilities Co. v. Texas Electric Service Co.*, 470 F.Supp. 798 (N.D. Tex. 1979), two intrastate Texas electric utilities unsuccessfully brought a Sherman Act § 1 conspiracy action against two other Texas utilities which had severed their interconnections with plaintiffs when plaintiffs tied-in with out-of-state holding company affiliates. The district court held that defendants' actions did not constitute an unreasonable restraint of trade or unlawful boycott because their determination to retain intrastate status and avoid federal regulation was justifiable. The case is currently at the briefing stage on appeal. *West Texas Utilities v. Texas Electric Service Co.*, No. 79-2677 (5th Cir.).

Evolution of Price Squeeze Standards and Procedures Before the Federal Energy Regulatory Commission

During 1979 the Federal Energy Regulatory Commission (FERC) continued the development of its procedural and substantive price squeeze rules on a case-by-case basis. Following these decisions, the FERC on November 19, 1979, proposed procedural and substantial rules in Docket Nos. RM79-79 and RM79-80, which if adopted would supersede § 2.17, promulgated by the Federal Power Commission on March 21, 1977 in response to the Supreme Court's decision in *FPC v. Conway Corp.*, 426 U.S. 271 (1976).

In *Conway*, the Supreme Court held that the Commission had authority to alter rates[2] where undue discrimination would otherwise result, and directed the Commission, whenever it undertakes the determination of just and reasonable rates, to answer allegations that proposed rates are discriminatory and anticompetitive in character. The Commission's response in § 2.17 provided that an intervenor alleging price discrimination as a result of proposed wholesale rates must support its allegation by establishing a *prima facie* case. The five elements of a *prima facie* case are:

> (1) Specification of the filing utility's retail rate schedules with which the intervening wholesale customer is unable to compete due to purchased power costs;
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> (2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;
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> (3) A showing that the retail rates are lower than the proposed wholesale rates for comparable service;
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> (4) The wholesale customer's prospective rate for comparable retail service, i.e. the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs;[3] and
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> (5) An indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged.

Once a *prima facie* case is established, the burden of proof to rebut the alle-

[2] "[A]t the very least . . . to put wholesale rates in the lower zone of reasonableness . . . in view of the utility's own decision to depress certain retail competition of its wholesale customers." 426 U.S. at 279, quoting with approval the Court of Appeals opinion, 510 F.2d at 1274.

[3] This element has since been eliminated. *Southern California Edison Co.*, Op. No. 62 (August 22, 1979).

gations rests upon the utility proposing the rate. In *Missouri Power and Light Co.*, Op. No. 31 (October 27, 1978), the Commission reiterated the three prong test of a price squeeze case: (1) *price discrimination* against a utility's wholesale customer (2) an *anticompetitive effect* (3) *undue discrimination* (presumed upon affirmative findings as to the first two issues, absent countervailing circumstances). The Commission also rejected "anticompetitive intent" as a necessary element to a price squeeze case.

In two 1979 decisions, the Commission provided additional guidance as to how price squeeze allegations will be handled. In *Arkansas Power and Light Co.*, Docket No. ER79-339 (August 6, 1979), a § 205 proceeding, the Commission held that in all newly docketed cases where price squeeze was alleged, the ALJ has the discretion to phase the proceedings so that all other issues would be considered and decided prior to consideration of the price squeeze issue. Where phasing is ordered, a preliminary Commission decision could order refunds to the rate specified in the first-phase decision. If the intervening party remained unsatisfied, it could renew its price squeeze allegations in the second phase. The purpose of such phasing is twofold: (1) to eliminate the need to litigate complicated price squeeze issues in cases where the alleged unjustified disparity is mitigated in a conventional rate order issued in the first phase; and (2) to permit refunds at an earlier date.

By way of contrast, the Commission in *Public Service Company of New Mexico*, Docket Nos. ER79-478 and ER79-479, declined to adopt phased procedures in a § 206 proceeding because the FERC's lack of authority to award retroactive relief undermined some of the rationale for phasing. Absent the utility's objection, and in the discretion of the ALJ, phasing could be ordered.

Proposed § 35.30(e) codifies the above decisions making phasing automatic (but subject to the ALJ's discretion) in § 205 cases and § 206 cases initiated by complaint. In other § 206 cases, phasing is available absent the utility's objection.

With respect to ongoing proceedings, the Commission ordered phasing in *Ohio Power Co.*, Docket Nos. ER79-332 and ER79-333 (September 24, 1979), but not in *Wisconsin Power and Light Co.*, Docket No. ER 77-347 (September 18, 1979), in view of the advanced procedural status of that case.

As noted, the FERC originally defined price discrimination to include situations where a utility's wholesale rates exceeded its retail rates (in cases of similarity of service characteristics among wholesale and retail customers). In *Missouri Power and Light Co.*, Op. No. 31-A (May 16, 1979), the FERC expanded its concept of price discrimination to include cases where there is no disparity in a utility's wholesale and retail rates, but where the costs of serving wholesale customers is less than the costs of serving retail customers. Proposed § 35.32(c)(2)(ii)(B) and (C) codifies this expanded concept to permit intervenors to establish the *prima facie* case by way of cost analysis where its supplier's wholesale prices do not exceed the supplier's retail prices. "Price discrimination" itself will be defined (at § 35.32(b)(2)) as the situation where the relationship of wholesale rate to wholesale cost ex-

ceeds the relationship of relevant retail rate to retail costs. ("Relationship" is either the ratio of rates to costs or the difference between rates and costs).

Exactly which wholesale and retail rates (effective, proposed, or other) are appropriate for a price discrimination analysis was considered in *Southern California Edison Co.*, Op. No. 62 (August 22, 1979). There the Commission decided that, with respect to *retail* rates, the appropriate rate is the *effective* rate with which its wholesale customer must compete during the relevant time period. With respect to wholesale rates, the appropriate rate is the "just and reasonable but for price squeeze" wholesale rate, to be determined on resolution of cost of service issues, but before resolution of the price squeeze issue. The interim "but for" rate is the product of the two-phase proceeding developed in *Arkansas Power and Light*, *supra*, for rate proceedings in which price squeeze is alleged. This holding is proposed to be codified at § 35.32(c)(2).

In *Commonwealth Edison Co.*, Op. No. 63 (September 14, 1979), the Commission endorsed a "rate of return" methodology to test the existence of price discrimination. Under this analysis, anticipated rate of return under the "just and reasonable but for price squeeze" wholesale rate is compared to the utility's retail rate of return as to the class of retail customers with which alleged competition exists. Retail rate of return equal to or exceeding the wholesale rate of return establishes an affirmative defense. If any of the retail rates produces a lower rate of return than does the wholesale rate, the Commission will then determine whether the price discrimination is undue.

In *Connecticut Light and Power Co.*, Docket No. ER78-517 (August 20, 1979), the Commission resolved several issues connected with the *prima facie* case element of anticompetitive effect. First, the Commission held that a showing of active rivalry between alternative suppliers for customers need not be made, but that it was sufficient to demonstrate that "a wholesale customer and the filing utility are in geographic proximity and that the wholesale customer is or could be an alternate supplier of electricity to some of the customers presently served by the company [or vice versa]." Second, the person alleging price squeeze is obligated to identify the form of competition allegedly harmed, which could be competition for individual customers or groups, franchise competition, or fringe area competition. Finally, the Commission, in reliance upon antitrust law principles, held that a showing of potential anticompetitive effect or a "reasonable probability" of anticompetitive effect would suffice in lieu of a showing of actual anticompetitive effect. This holding is proposed to codified at § 35.32(c)(3).

In that decision, the Commission also adopted procedural rules governing Staff participation in price squeeze proceedings. Where intervenors both raise the issue and establish the *prima facie* case, staff is relieved from that burden and may participate as a matter of course. In any other case, Staff may raise the issue by motion to the ALJ. If the Motion is granted, Staff must establish the *prima facie* case. This procedure is also proposed to be codified at § 35.30(h).

Other FERC Developments

In *Commonwealth Edison Co., supra*, the Commission reserved the price squeeze issue due to lack of sufficient evidence. Upon submission by the utility of rate of return data for the test year, the Commission will re-examine undue discrimination issues. Although the intervenors criticized the postponement as burdensome, the Commission, in its opinion and order denying applications for rehearing, found it necessary as a matter of fairness and due process to allow the utility an opportunity to rebut price squeeze allegations, given the evolving and unsettled state of FERC procedure during the period in which the case developed. *Commonwealth Edison Co.*, Op. No. 63-A (November 16, 1979).

In *Florida Power & Light*, Op. No. 57 (August 3, 1979), the Commission rejected most of the utility's proposed tariff revisions, holding that certain limitations on the availability of wholesale requirements service, along with notice of cancellation of such service to specific wholesale customers, did not meet the just and reasonable Federal Power Act standard. The decision relied heavily on monopolization concepts to conclude that the proposed availability limitation would be anticompetitive in denying certain municipalities a source of economically priced base load power, and would be otherwise unjustifiable.

Initial decisions in matters involving antitrust issues were announced in several proceedings. In *Minnesota Power & Light Co.*, Docket No. ER77-427 (May 3, 1979), the ALJ found that no remediable price squeeze existed, where the record lacked a "convincing picture of a competitive situation" because the Commission lacked power to remedy price differentials in superseded rates. The parties had agreed that the price squeeze, if any, was limited to a locked-in period and was not alleged under either the currently effective rates or proposed rates under consideration. Similarly, in *Kansas Gas & Electric Co.*, Docket No. ER77-578 (May 29, 1979), intervenors were unable to show price discrimination in the relevant period, and hence failed to sustain their price squeeze claim. In *Central Illinois Public Service Co.*, Docket No. ER78-80 (July 26, 1979), the FERC staff sided with the rate petitioner in defense against price squeeze allegations. The ALJ found that intervenors did not make out a *prima facie* case of price discrimination, and that Staff had established an affirmative defense. The Commission summarily affirmed on the price squeeze issue in Op. No. 75 (February 21, 1980). And in *Union Electric Company*, Docket No. ER77-614 (August 7, 1979), the ALJ found that neither intervenors nor the utility have been or are likely to be competing for the same customers, and hence the element of actual or potential competition prevented a finding of price squeeze.

An initial decision was reached on cost of service issues in *Pennsylvania Power Co.*, Docket No. ER77-277 (November 7, 1979). Price squeeze allegations are to be addressed in an upcoming second phase of the proceedings.

ALJs issued orders preserving price squeeze issues for later determination in *Central Maine Power Co.*, Docket No. ER79-539 (September 28, 1979); *Kentucky Utilities Co.*, Docket No. ER78-417 (October 18, 1979);

and *Delaware Power & Light Co.*, Docket No. ER78-414 (October 11, 1979). In the latter case, the ALJ declined to phase the proceedings.

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