Report of The Committee On Antitrust

I. Major Decisions

During 1981, there were six significant competition-related decisions on the relationship between electric utilities and their wholesale customers.

A. *Illinois Cities of Bethany, et al. v. FERC, No. 80-1633, D.C. Cir., Opinion issued August 17, 1981; Supplemental Opinion on Rehearing and Opinion as Modified on Rehearing, each issued October 30, 1981.*

In this appeal of a rate order under §205 of the Federal Power Act, the utility's wholesale customers made the price squeeze argument that the wholesale rate was so high vis-a-vis the utility's retail rate that competition with the utility "for retail, especially high-volume retail, customers" was impossible. In the Federal Energy Regulatory Commission ("FERC") proceeding below, the Staff had submitted a cost of service study which showed that the wholesale return was less than the return under a retail rate which became effective three months after the wholesale rate was first charged. Relying on that study, the ALJ rejected the price squeeze contentions, and the FERC summarily affirmed the ALJ's ruling (August 17, 1981 Opinion at 8).

In the D.C. Circuit, the customers argued unsuccessfully that only the retail rate in effect when the wholesale rate is first charged should figure in a price squeeze determination, and that any subsequently effective retail rates are irrelevant. The Court's view was that an average of the original and subsequently effective retail rates "weighted by their periods of incidence" would be a preferable price squeeze measure. However, the ALJ's reliance on the subsequently effective retail rate was sustained since that rate became effective very shortly after the wholesale rate and since there was evidence indicating that the use of an average of the two retail rates would not materially change the Staff finding. The customers also argued unsuccessfully that the Staff rate of return study, which was based on the test year, was irrelevant to the competition situation that existed in the post-test year period. That contention was rejected because there was no showing that post-test year changes in costs and sales invalidated the Staff study (August 17, 1981 Opinion at 10-12, 16 Fn. 47).

It was the Staff return study which caused the Court to modify its opinion on rehearing. The FERC defines price squeeze as a rate discrimination having an anticompetitive effect. It defines discrimination as a rate difference that is not justified by a cost difference.[1] A rate of return study is critical to that approach since it shows the extent that a rate is recovering the cost of providing service, and the FERC finding of no price squeeze in *Bethany* was bottomed on the Staff study which showed that the retail return exceeded the wholesale return. In other words, the retail rate was recovering a greater proportion of the retail cost of service than the wholesale rate of the wholesale cost of service. By that standard, any discrimination ran in favor of the wholesale customers and against the retail customers.

The customers countered the Staff rate of return study with a transfer price analysis which the Court described as measuring the prices a vertically integrated firm charges itself at different stages of its operations and as "a frontal assault on FERC's price squeeze guidelines" (August 17, 1981 Opinion at 13). According to transfer price theory, a case for anticompetitive discrimination can be made out if a vertically integrated firm charges a downstream non-integrated purchaser-competitor a higher price than it charges itself at the stage of purchase by the competitor. For example, in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2nd Cir. 1945), Alcoa, which controlled the supply of ingot, both used ingot to fabricate sheet and sold ingot to other sheet fabricators. One element of Alcoa's anticompetitive offense was that it unlawfully kept the ingot price above a fair price in order to suppress competition in the fabricated sheet market (*Id.* at 436-8; August 17, 1981 Opinion at 8-20).

According to the Court, the customers presented two versions of transfer price analysis: in one, the customers compared the revenues charged to them under the wholesale rate with the revenues which would have been charged to them under the utility's retail rate reduced by expenses associated with retail distribution; in the other, they calculated that the utility itself could not make a profit as the operator of the municipal distribution systems if the utility bought power under the contested wholesale rate, incurred the municipal systems' distribution costs and charged the customers under its retail rates. The Court's conclusions were that the customers' transfer price analysis satisfied the requirement of a *prima facie* case, that the fulfillment of that requirement entitled them to price squeeze relief (*Id.* at 13-20), that the customers *"are in fact being price-squeezed; the rate is having an anticompetitive effect"* (*Id.* at 19, emphasis in original, footnote omitted). The Court ruled that a rate of return study could not constitute a complete defense to a price squeeze claim in every case, and it limited the use of the study here to establishing the limits of the zone of reasonableness (*Id.* at 20-24). There was even a suggestion that a price squeeze reduction in a wholesale rate could be justified whenever the wholesale customer would be forced either to operate at a loss in order to compete or to raise its rates to uncompetitive levels in order to avoid operating at a loss (*Id.* at 18-20).

In its October 30, 1981 opinion on rehearing, the Court substantially modified its earlier views, and in the process approved key elements of the FERC's price squeeze approach. The Court determined that under FERC procedures submission of a *prima facie* case merely justifies a price squeeze investigation and does not justify a price squeeze remedy (Modified Opinion at 10). The Court also repudiated any suggestion in its earlier opinion that price squeeze remedies were appropriate to promote competition even if there is no

[1]See *e.g., Missouri Power & Light Co.*, Docket No. ER76-539, Opinion No. 31-A, May 16, 1979, at 6-7, *aff'd sub nom., City of Marceline v. FERC,* No. 79-1740 (D.C. Cir. June 21, 1980); *Commonwealth Edison Co.*, Opinion No. 63, Docket Nos. E-9002 *et al.*, September 14, 1979 (at 36 *et seq.*); Rehearing Opinion No. 63-A, November 16, 1979, *aff'd, Cities of Batavia et al. v. FERC,* No. 80-1072 (D.C. CIr. February 9, 1982).

discrimination between wholesale and retail rates (Supplementary Opinion at 9). The Court further recognized that properly performed transfer price analysis should achieve approximately the same result as properly performed rate of return analysis and that the customers' use of a transfer price analysis was a direct attack upon the accuracy of the Staff rate of return analysis.[2] The Court then concluded that the FERC had the choice of selecting costing methods for determining price squeeze, that the FERC had the discretion to rely on the rate of return test where the transfer price test and the rate of return test produced different results and that the Commission finding of no price squeeze should be upheld (Modified Opinion at 18-21; Supplementary Opinion at 6-8).

B. *Cities of Batavia, et al. v. FERC, No. 80-1072, et al. (D.C. Cir. February 9, 1982).*

Like *Bethany, supra, Batavia* was an appeal from an FERC rate decision under §205 of the Federal Power Act and included the price squeeze claim that an alleged excess in the utility's wholesale rate over its retail rate precluded competition for large industrial business. In *Batavia,* as in *Bethany,* the FERC gained judicial approval for important elements of its price squeeze policies and procedures.

The Court repeated its *Bethany* endorsement of the FERC's requirement that a party complaining of price squeeze submit *prima facie* evidence as the initial step in the price squeeze procedure. It stated that the submission of a *prima facie* case triggers the agency inquiry, and shifts to the utility the burden, the degree of which is "defined by the quality of the *prima facie* case", to persuade the FERC that no price squeeze exists" (at 46).

The Court also endorsed the FERC's policy of deciding price squeeze questions (1) at the tail-end of a rate case after the cost of determinations have been made and (2) on the basis of the wholesale rate as reduced on cost of service grounds rather than the originally filed wholesale rate. Observing that this policy delays relief until an entire case is completed and creates risk that in some instances the price squeeze would have severely adverse effects on a customer, the Court discerned no such effects in the case before it and observed that the antitrust laws are available to provide remedies in such circumstances. It was assumed, though, that "if a case arises where the evidence of a severe price squeeze is strong, the Commission will react appropriately to reduce substantially the normal length of time between the effective date of the rate and final disposition of the price squeeze issue" (at 48).

In applying the rate of return test for price squeeze, the FERC had treated the wholesale customers and the retail industrial customers as constituting two different classes for cost allocation purposes. The wholesale customers claimed that this separation was improper and that they and the retail industrial customers should be deemed to be part of the same class. Of course, if part of the

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[2]One possible reason for the discrepancy between the Staff return study and the wholesale customers' transfer price analysis is that the latter was not based exclusively on the utility's costs, but imputed the customers' own costs to the utility (Modified Opinion on Rehearing at 19).

same class, the wholesale customers would be entitled to the same rate as the retail industrial customers. The Court disposed of that claim with the comment that the wholesale customers and the retail industrial customers are in different classes because their rates are set by different jurisdictions (at 49).

A second classification issue was whether a subgroup of the utility's retail industrial class consisting of the larger industries with cost and demand characteristics similar to wholesale customers might be enjoying a lower rate than either the smaller industrial customers or the wholesale customers. If that were the case, there could be discrimination and price squeeze between that subgroup and the wholesale customer. The Court concluded that it could be appropriate to focus price squeeze analysis on a retail subgroup, but that here the wholesale customers' evidence was directed at the entire retail industrial market. Thus, the FERC's comparison of the wholesale rate with the retail rate as applied to the entire retail industrial class was found unobjectionable (at 49-51).

The Court reaffirmed the validity of the rate of return test for price squeeze. Although a rate of return test for price squeeze does not necessarily promote parity of pricing; it does promote parity in the wholesale and retail profit margins. According to the Court, that is an appropriate objective since the *Conway* doctrine was not intended to subsidize competitors, but rather to assure that a genuinely competitive wholesale customer would not be price squeezed out of a retail market by discriminatory practices (at 51-52)[3].

Bethany also recognizes that there are limits on the latitude to fashion a price squeeze remedy to protect competition. Using as an example a state commission's refusal to allow an adequate rate of return, the Court said the FERC could not follow suit for the sake of preserving competition, but must set a wholesale rate that falls within the zone of reasonableness (at 50, Fn. 52).

C. *City of Groton, et al. v. Connecticut Light & Power Co., et al., No. 80-7779 (2nd Cir., October 13, 1981).*

In this treble damage antitrust action, the Court of Appeals upheld in part and remanded in part the determination of a trial judge, sitting without jury, that a utility and its codefendants were innocent of alleged anticompetitive violations relating to conditions of service, wheeling, power pooling, alternative power supply and price squeeze. The Court of Appeals affirmed the trial judge on all issues but price squeeze which was remanded for a further hearing. The Court's ruling is significant because of the number of issues involved and the breadth of the Court's analysis.

The Court identified certain principles for evaluating the plaintiff's antitrust allegations. It agreed with the plaintiffs and with *City of Mishawaka* v. *American Electric Power Co., Inc.*, 616 F.2d 976, 986 (7th Cir. 1980), *cert. denied,* 449 U.S. 1096 (1968) that "[i]t is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor," that plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean

[3]*FPC v. Conway Corp.*, 426 U.S. 271 (1976).

after scrutiny of each", and that "the proper inquiry is whether, qualitatively, there is a 'synergistic effect' " resulting from the various acts of the defendant that give rise to the antitrust violations (at 13-14). Having agreed with the plaintiffs on governing legal principle, the Court sided with the defendants on the facts. It found three salient differences between *Mishawaka,* where the utility was found guilty of anticompetitive conduct, and the case before it, where the utility was exonerated. Unlike *Mishawaka,* in this case there was no demonstration of a long-term disparity between wholesale and retail rates, there was no utility threat of service discontinuation, and there were no ongoing policy of acquiring municipal systems. In the words of the Court, "[t]here was . . . no general intent to impede the municipalities' competitive position or to enhance the defendants-appellees' alleged monopoly power, and there was no anticompetitive or exclusionary conduct except, possibly, for [the] specific [remanded] price squeeze[s]." The Court concluded that even if the remanded "price squeeze claims are valid", the evidence as a whole failed to create a "synergistic effect" that "gives rise to violations of either section 1 and section 2 of the Sherman Act" (at 28-29).

The Court ruled that the *Keough* doctrine (that terms, conditions and charges embodied in a tariff on file with the appropriate regulatory agency cannot provide a basis for antitrust liability) did not apply to an anticompetitive practice embodied in a tariff if the practice either affects competitors as opposed to customers or has been disapproved by a regulatory agency (at 15-16).[4] According to the Court it was even improper for the District Court to infer from the utility's filing of the tariff with the Commission that the utility did not intend to use the tariff for an anticompetitive objective (at 20-21).

In a genuflection to the expertise of the FERC, the Court adopted the concept of competition fashioned by the FERC for price squeeze litigation under § 205 of the Federal Power Act. According to FERC, competition exists if a wholesale customer and the utility are in geographic proximity and the wholesale customer is, or could be, an altenative supplier of electricity to some of the customers presently served by the utility or *vice versa.*[5] In further agreement with the FERC, the Court discerned three possible competitive arenas: for individual customers, including large industrial or commercial loads, for the utility franchise, and for customers located on the fringe or borderline or rural electric utilities (at 17-18).

The Court adopted from *Mishawaka* the precept "something more than general intent should be required to establish a Sherman Act violation" regulated utility which is entitled to recover its cost of service and to provide its investors with a reasonable rate of return. In *Mishawaka,* the Court found the requisite specific intent to inflict anticompetitive injury. In *Groton,* the Appeals Court agreed with the trial court that there was no showing that the defendants had either a specific or general intent to monopolize (at 19-20).

As to the plaintiff's specific contentions, the Court found that the contested tariffs and contract provisions were "not so devoid of reasonableness" to

[4] *Keough* v. *Chicago & Northwestern Railway,* 260 U.S. 156, 162-63 (1922).

[5] The FERC first announced this policy in *Connecticut Light & Power Company,* Docket No. ER78-517, Order issued August 20, 1979, at 8-15; Order on Rehearing issued December 10, 1979. This concept of competition dispenses with any requirement that the plaintiff prove competition on the basis of active business rivalry or at least establish that competition is feasible or realistically possible.

indicate that they were intended for an anticompetitive purpose (at 19). The Court also declined to find that the rejection or amendment of certain tariff provisions by the FERC meant that such a provision was, *ipso facto*, anticompetitive (at 21-22). On the alleged refusal to wheel power, the Court upheld the trial judge's finding that the utility never refused a specific wheeling rerequest by the plaintiffs. It also ruled that a general commitment to wheel was meaningless and that the utility was not required by law to include a provision for general wheeling in its tariff (at 22-23).

The Court affirmed the trial judge's reliance on FERC determinations that the power pool agreement, to which the defendants were a party, was not anticompetitive (at 24). Finding that it would be "exclusionary conduct constituting an unreasonable restraint of trade" for a utility to deny partial requirements service, the Court concluded that the utility had not denied that service (at 24-25).

The customers were more successful in the Court of Appeals on their two price squeeze claims: one a general price squeeze claim of over $1 million that spanned a period of five months, and the other based on a special rate charged to a particular industrial customer. The trial judge had rejected the former claim on the ground that five months was too brief a period to sustain a price squeeze claim, and he rejected the latter claim on the ground that there was no showing of competition either for the particular customers or for other customers with similar characteristics.

The Court decided that five months was sufficiently long to establish a price squeeze given the $1 million sum at issue, and it remanded that issue to the trial judge for further findings. The Court also remanded the price squeeze claim regarding the particular customer, and said that such a claim could be actionable in the light of the broad, FERC view of competition which it had adopted. In the remanded price squeeze proceeding, the defendant utility would have a special burden because the Court found that where "there is a discrepancy between the retail and wholesale rates, a rebuttable presumption arises that the differential has an anticompetitive effect, and the burden is on the monopoly utility to provide evidence that there is no reasonable probability that the differential will have an effect upon the location of such customers" (at 26-28). The Court here seemed to be taking another leaf from the FERC price squeeze book since the FERC's own price squeeze policy presumes that a rate difference which is not justified by a cost difference has an anticompetitive effect. *See Connecticut Light & Power Co.*, Docket No. ER78-517, Order issued August 30, 1979 (at 11-15) and rehearing order issued December 10, 1979.

D. *Alabama Power Company, NRC Docket Nos. 50-348A and 50-364A, June 30, 1981.*

This is a decision of the Atomic Safety and Licensing Appeal Board regarding the competition-related remedial conditions for the operating license of the Alabama Power Company ("the Company") Farley Units 1 and 2. In general terms, the rulings here follow the rulings of the Appeal Board's two prior comprehensive antitrust reviews in the *Midland* case, *Consumers Power Co.* (Midland Units 1 and 2), 2 NRC 29 (1975) and in the *Davis-Beese* or *CAPCO* case, *Toledo Edison Co.* (Davis-Beese Units 1, 2 and 3), 5 NRC 133 (1977).

The specific issue on appeal was the Licensing Board's determination that the Alabama Electric Cooperative ("AEC") should be sold unit power from the Company's nuclear plant, and that the members of the Municipal Electric Utility Association of Alabama ("MEUA") were not entitled to any benefit at all. The Appeal Board found that the Company should sell an ownership interest in the plant to AEC and that it should make its transmission system available for use by MEUA.

The Appeal Board rejected the Company's claim that the "pervasive regulation" to which it was subject precluded a finding that it possessed "monopoly power" (at 14-21). The Board also rejected the Company's argument that remedial licensing conditions could not be based on past behavior, but could be solely justified in terms of events likely to occur in the period after the license was issued (at 22-26). Finally, it rejected the Company's contentions that any anticompetitive license condition must be predicated on a finding of actual violation of the antitrust laws. The Appeal Board ruled that a finding of utility conduct that is counter to the policies underlying the antitrust laws warrants the imposition of remedial conditions in nuclear plant operating licenses (at 26-29).

The Licensing Board had found that there was a competitive market for wholesale power. The Appeal Board endorsed that finding and further found that there was a "coordination services market" consisting of an amalgam of different services which, "in terms of trade realities" represented a single product line. It also found that the geographic bounds of the markets corresponded to the applicant's service area. The finding of monopoly power in the coordination service market was based on the utility's predominant ownership of the generation and transmission facilities. Monopoly power in the retail area was based on the utility's 88% share of retail sales in its market area (at 30-85).

The Appeal Board concluded that the Company was a dominant business enterprise wielding power over the entire range of its business activities, and accordingly, adopted an extremely stringent antitrust standard. The Appeal Board confirmed the Licensing Board's several anticompetitive findings that the Company had been unwilling to coordinate its operations with certain utilities, had insisted on contractual provisions precluding customers from turning to alternative sources of power and requiring Southeastern Power Administration ("SEPA") customers to purchase all their non-SEPA power from the Company, and had threatened to refuse to sell power for resale to a particular customer. The Appeal Board found two additional incidents of anticompetitive behavior—that the Company had lowered its wholesale rates on different occasions for the purpose of discouraging AEC from investing in its own generating facilities and that the Company's policy was to deny AEC ownership in the Farley unit. In other words, the principal issue in the appeal itself, involving Alabama's right to retain full ownership of its new generating plant, seems to have partly formed the basis for a finding of anticompetitive behavior against the utility (at 86-112).

In deciding the antitrust remedy, the Appeal Board considered its findings of market power and anticompetitive conduct and it also considered the procompetitive purposes of the Atomic Energy Act. It refused to find either that the Company should be held to a lenient antitrust standard because its application to build the Farley unit preceded the 1970 amendments to Section 105(c) of the Atomic Energy Act concerning competition or that the cessation of past anticompetitive activity was a mitigating factor favoring the Company's position. The Appeal Board concluded that allowing AEC access to unit power from the Farley unit was an inadequate competitive protection, that AEC should be given the right to purchase an ownership interest in the facility and that it should be given access to the Company's transmission system (at 135-159).

MEUA did not fare as well as AEC. The Appeal Board did not regard the municipal customers as in competition with the Company for resale of wholesale power. The Board also rejected the contention that the MEUA members were potential entrants in the wholesale market since (1) they were not capable of entering the market on their own and (2) they were not currently influencing competitive market conditions. The Board concluded that MEUA could not enter the wholesale market without access to the Farley facility and that MEUA's capability to enter the market must be assessed without regard to the Farley facility.

Although the Appeal Board found that MEUA competed with Alabama in the retail market, it also found that MEUA was not harmed by any of the Company's practices. MEUA was not harmed by restrictive contract terms or conditions because MEUA had no demonstrated past interest in developing its own power supply, and because the municipals were holding their own in terms of franchise competition with the Company. The Board also rejected MEUA's contention that a price squeeze existed whenever a wholesale customer could not earn a profit while competing with the Company. Regarding that standard as overly protectionist, the Appeal Board said that the true test for price squeeze is whether the utility's wholesale and retail prices adequately reflect production costs and that there was no evidence to indicate either that the Company's retail rates were unfairly low or that its wholesale rate unfairly high. The Board refused to grant MEUA ownership or unit power participation in the Farley unit. However, it did require the Company to grant MEUA access to the Company's transmission facilities as part of the Farley license (at 112-132, 159-163). A court appeal of this decision is pending.

E. *Florida Power & Light Company v. FERC, 660 F.2d 668 (5th Cir. 1981).*

This case involved an effort by the FERC to compel a utility to file a tariff that committed the utility to offer common-carrier transmission service to all customers. The FERC argued on appeal that the wheeling requirement was justified as a remedy for the utility's asserted anticompetitive conduct and as part of the Commission's duty to enforce the antitrust law.

The Court reversed the FERC decision. It agreed that wheeling could be required as a remedy under the antitrust laws. *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), but questioned whether such a remedy was permitted under the Federal Power Act. The Court noted the view of the District of Columbia Circuit that the FERC could order wheeling based on specific showings of discrimination and anticompetitive conduct, *Richmond Power & Light* v. *FERC,* 574 F.2d 610, 623 (D.C. Cir. 1978). On the other hand, it observed that the Supreme Court's *Conway* statement that the need to fashion an anticompetitive remedy did not expand the FERC's authority to afford such a remedy, *FPC* v. *Conway Corp.*, 426 U.S. 271, 276-77 (1976). The Court also noted the Second Circuit's suggestion that, absent compliance with the PURPA wheeling provisions (§§ 211 and 212 of the Federal Power Act), the FERC could not order wheeling "even upon a finding that a utility has engaged in anticompetitive activities in violation of antitrust policy", 660 F.2d at 678. *See New York State Electric & Gas Corp.* v. *FERC,* 638 F.2d 388 (2nd Cir. 1980).

The Court concluded that the FERC's wheeling order was not intended as an antitrust remedy, but was intended merely to foster competition. While the Court was sympathetic to the FERC's objective, it held that "in the absence of findings of specific anticompetitive activities or antitrust violations, the Commission is without authority under the FPA to compel wheeling". The Court explicitly stated, however, that it was *not* deciding whether wheeling could be ordered "as a remedy for specific findings of anticompetitive activities or antitrust violations" (660 F.2d at 679).

F. Louisiana Power & Light Co., Initial Decision, 17 FERC ¶63,019, November 2, 1981, adopted and affirmed, Commission Order issued December 11, 1981, Docket Nos. ER81-457-000, et al.[6]

In this duty to serve proceeding, the utility offered to continue its service to a municipal wholesale customer, but under a new rate reflecting incremental fuel cost. If the Commission would not permit the customer to be served immediately at the proposed incremental cost rate, the utility proposed that it serve the customer at an average cost rate for a five-year period after which the customer would either terminate service or take service under the incremental cost rate. According to the ALJ, the utility regarded the issue in the proceeding "as a test of whether the public power advocates in Louisiana can require LP&L, an investor-owned utility, to sell publicy-owned municipal and cooperatives base load power at average system cost" (at 65,035).

This case was decided almost entirely on competitive grounds. The principal evidence underlying the decision was that the utility had the generating capacity in place to serve the customer and that the customer lacked immediately available power supply options. The utility would have served the customer's load at retail on an average cost basis. The utility served other wholesale customers on an average cost basis. The proposed incremental rate would have placed the customer in a price squeeze and at a competitive disadvantage vis-a-vis the utility and the utility's other wholesale customers who were served at an average cost rate. It appeared that the utility's only reason for denying the customer an average cost rate was that the customer was evaluating changing its power supply in the future (at 65,044-49). On those facts, the

[6]The Commission order modified the initial decision in a respect that was unrelated to antitrust considerations.

ALF found that the utility should be required to continue service to the customer "at rates based on Staff's cost of service which uses average fuel costs" (at 65,048).

G. *Comments On The Major Cases*

The foregoing cases uphold to a significant extent the price squeeze policies which the FERC has been implementing on a case-by-case basis since *FPC v. Conway Corp.*, 426 U.S. 271 (1976). The Courts have upheld the FERC's view that the chief concern in price squeeze analysis should be the relative profitability of the wholesale and retail segments of a utility's business rather than the ability of a wholesale customer to compete with its power supplier. This represents an administrative as well as doctrinal success for the FERC since the determination of relative profitability can be accomplished through conventional cost of service analysis which the FERC routinely utilizes in electric rate cases. Other important elements of the FERC price squeeze policy gaining judicial approval include the deferral of the price squeeze determination until the completion of the cost of service phase of the case and the determination of price squeeze based on (1) the wholesale rate reduced on cost of service grounds and (2) the retail rates which become effective at different stages of the wholesale rate's effective period. The *City of Groton* case, although not an appeal of a FERC decision, gives strong support to the FERC's views of competition and market. That Court's determination that proof of a wholesale/retail rate disparity shifts the price squeeze burden of proof from the party claiming the price squeeze to the party defending against it is also in line with the FERC view.

The FERC was unable to persuade the Court of Appeals of the reasonableness of its transmission service policy. The *Florida Power & Light* decision stands for the proposition that FERC may not compel a utility to include a general wheeling provision in its tariffs if there have been no anticompetitive violations. The decision also casts doubt on whether the FERC may force a utility to include a wheeling tariff provision even if anticompetitive violations have been established. The *City of Groton* case makes clear that a refusal to provide transmission service for specific transactions could give rise to an antitrust claim. However, the Court explicitly states that it is not an antitrust violation for a utility's tariff to omit general wheeling provisions. The *Florida Power & Light* and *Groton* decisions considered in tandem strengthen the position of those utilities which are unwilling to assume transmission obligations that are unrelated to specific power transactions.

Turning to District Court antitrust litigation, it is difficult to describe *Groton* as a victory either for utilities or for customers. In *Groton*, the utility prevailed in nearly all its factual allegations, and achieved a stalemate on the remaining factual issues (involving price squeeze). But *Groton* also resolved a number of legal issues against the utility including rejection of the utility's *Keough* defense and adoption of the FERC price squeeze views on competition, market and burden of proof. If the *Groton* price squeeze principles are followed by other courts, it will have serious implications for utilities engaged in defending treble damage antitrust actions. That latter effect is offset to a degree by the ruling in *Groton,* which follows that in *Mishawaka,* that a finding of specific anticompetitive intent is necessary to sustain an antitrust violation against a regulated electric utility company.

The NRC case involving access to unit power and the FERC case involving the duty to serve applied the established doctrines of those agencies in resolving the matters at issue. The duty to serve case, however, is noteworthy in that it may be a precursor to extensive duty to serve litigation which the FERC may face in the future as a result of the heavy curtailment of electric utility construction programs during the last several years. As indicated by the *Louisiana Power & Light* decision, the antitrust law provides ready-made standards for dealing with duty to serve disputes.

II. Other Developments

Since this committee's last report was prepared, two utilities, Cleveland Electric Illuminating Company and Philadelphia Electric Company, successfully defended against antitrust charges at the trial court level. *City of Cleveland* v. *Cleveland Electric Illuminating Co. at al.,* Civil No. C-75-560, N.D. Ohio, October 8, 1981 and *Borough of Lansdale* v. *Philadelphia Electric Company,* Civil No. 78-2533, E.D. Pennsylvania (1981). In both cases the jury found that the utility lacked the requisite monopoly power. In the *City of Cleveland* case an appeal is pending. In *Borough of Lansdale,* there is a pending motion for judgment notwithstanding the verdict, or alternatively for a new trial.

In *City of Anaheim, et al.* v. *So. Cal. Edison Co.,* No. CV-78-810-MML, Central District of California, December 18, 1981, involving price squeeze, the Court denied the utility's request for summary judgment based on the *Noerr-Pennington* doctrine and the *Keough* doctrine. In *North Carolina Electric Membership Corp., et al.* v. *Carolina Power & Light Company, et al.,* No. 81-1057 (4th Cir., December 7, 1981), the Fourth Circuit Court of Appeals decided that the *Noerr-Pennington* doctrine did not immunize from discovery certain documents related to utility attempts to influence the enactment of legislation. Citing an alleged refusal to wheel Southwestern Power Adminstrating power to municipal customers, the United States has instituted an antitrust action against Kentucky Utilities Company, *United States* v. *Kentucky Utilities Co.,* Civ. No. 81-52, E. D. of Kentucky.

Among the antitrust cases in which settlements were reached since this Committee's last report are *City of Mishawaka* v. *American Electric Power Co., Inc.* and *Gainesville Utilities Department* v. *Florida Power & Light Company* (between FP&L and the City of Gainesville). Both cases had been the subject of Court of Appeals decisions, *City of Mishawaka* v. *American Electric Power Co., Inc.,* 616 F.2d 976 (7th Cir. 1980), *cert. denied,* 449 U.S. 1096 (1981) and *Gainesville Utilities Department* v. *Florida Power & Light*

Co., 573 F.2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978). Both settlements occurred as the parties were preparing for new trials in accordance with Court remand orders.

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