REPORT OF THE COMMITTEE ON ANTITRUST

Significant developments in energy antitrust law in 1980 occurred primarily in the electric field in court litigation and in Federal Energy Regulatory Commission ("FERC" of "the Commission") proceedings.

I. SIGNIFICANT ENERGY ANTITRUST LITIGATION IN THE FEDERAL COURTS

A. Actions by Customers Against Suppliers

The decision of the United States Court of Appeals for the Seventh Circuit in *City of Mishawaka* v. *American Electric Power Co., Inc.*, 616 F2d 976 (1980), discussed in detail in this Committee's 1980 report, decided several issues of antitrust in the electric power industry, including the need to demonstrate specific intent and actual damages; and it rejected, on the facts of that case, defendants' contentions based on state action and the right of petition. On January 12, 1981 the Supreme Court denied the utilities' petition for certiorari. The utilities' petition for rehearing was denied on February 23, 1981. The case returns to the District Court for a hearing on injunctive relief and damages under standards established by the Court of Appeals' opinion. In an action that may have ramifications for the damage issue that will be before the District Court in *Mishawaka,* the Supreme Court has granted certiorari in *Jay Truett Payne, Inc.* v. *Chrysler Motors Corporation,* No. 79-1944 (*see Chrysler Credit Corp.* v. *Jay Truett Payne co.*, 706 F.2d 1133 (5th Circuit 1979)). There the Supreme Court is asked to set a standard on the sufficiency of evidence of plaintiff's lost sales and profits as a measure of antitrust damages.

In *City of Groton* v. *Connecticut Light & Power Company,* 497 F.Supp. 1040 (D. Conn. 1980), the Court, after a seven week trial, entered judgment for defendants on plaintiffs' antitrust complaint and for plaintiffs on defendants' counterclaim seeking attorney's fees. The Court rejected plaintiffs' challenge to defendants' practices relating to wholesale electric rates and conditions of service. It held that under the filed rate doctrine (*Keogh* v. *Chicago and Northwestern Railway Company,* 260 U.S. 156 (1922)) plaintiffs, having been required to pay the legal rate, sustained no antitrust injury. The Court also held that the evidence had failed to show that defendants refused to wheel power or to provide partial requirements service to plaintiffs, that a challenged wheeling provision was anticompetitive, or that plaintiffs had been subjected to a price squeeze or had been injured by any disparity in rates. The Court, following *City of Mishawaka* v. *American Electric Power Co., Inc., supra,* also held that plaintiffs had failed to prove specific intent to monopolize. On defendants' counterclaim seeking attorney's fees, the Court held that plaintiffs' litigation was not in bad faith or frivolous and that plaintiffs' participation in negotiations with defendant and litigation against the companies did not violate the Sherman Act. Plaintiffs' appeal is pending in the United States court of Appeals for the second Circuit (Case No. 80-7779).

In *City of Kirkwood* v. *Union Electric Company,* No. 77-947C(1) (E.D. Mo. December 31, 1980), the Court granted summary judgment in defendant's favor on

plaintiff's complaint that defendant monopolized the retail distribution of electric power by charging plaintiff more for wholesale electric power than it charged its larger retail industrial customers. The Court held that because any disparity between rates was regulated by federal and state agencies, those agencies had exclusive jurisdiction over the city's claims for relief. The Court held that defendant's retail rates were exempt from antitrust regulation by the state action doctrine (*Parker* v. *Brown*, 317 U.S. 341 (1943)) and that defendant company's wholesale rates were immune from antitrust challenge under the First Amendment and the *Noerr-Pennington* doctrine.[1] The City's petition for rehearing is pending before the Court.

In *North Carolina Electric Membership Corporation* v. *Carolina Power & Light Co.*, No C-77-396-G (M.D.N.C. April 30, 1980), the Court applied the *Noerr-Pennington* doctrine to discovery and issued a protective order allowing defendant and a non-party under subpoena to refuse to produce documents relating to the passage of legislation. Plaintiffs' interlocutory appeal from the order is pending before the Fourth Circuit.

In *Almeda Mall, Inc.* v. *Houston Lighting & Power Company*, 615 F.2d 343 (5th cir. 1980), plaintiff shopping mall challenged defendant utility's refusal to sell it electricity through a single meter for individual resale to the mall's tenants at the same price. The Court held that plaintiff's resales at the same price would not constitute competition. In sustaining the District Court's directed verdict against plaintiff on all issues, the Court rejected plaintiff's claim of discrimination in prices and service, holding that exclusive jurisdiction of rates and services was with the state commission.

In *New York State Electric & Gas Corporation* v. *Federal Energy Regulatory Commission*, 21 F.P.S. 6-124 (2d Cir. 1980), the Second circuit reviewed a FERC decision which had held anticompetitive and void a restrictive provision in a contract between New York State Electric & Gas Corporation ("NYSEG") and the Power Authority of the State of New York ("PASNY"). The contract provision limited NYSEG's obligation to wheel power from PASNY's Niagara Project to the territorial limits of specified PASNY municipal and cooperative customers. The Second Circuit, in remanding to the FERC, decided that by eliminating the territorial restriction FERC had increased the amount of power that NYSEG is required to wheel beyond NYSEG's voluntary commitment and that under Sections 211 and 212 of the Federal Power Act the FERC must hold a hearing before it can order an expansion of a voluntary, pre-existing commitment to wheel. The Court rejected arguments challenging the FERC's jurisdiction and the Commission's right to consider the anticompetitive effect of the restrictive contractual provisions under the state action doctrine (*Parker* v. *Brown*, 317 U.S. 341 (1943)). Petitions for rehearing filing by the FERC, the United States Government, the Village of Penn Yan, New York, and the Municipal Electric Utilities Association of New York State are awaiting Court action.

The trial of *City of Cleveland* v. *The Cleveland Electric Illuminating Company*, Civil No. 675-560 (N.D. Ohio) in November 1980 ended with a hung jury.

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[1] *Eastern Railroad Presidents conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). the doctrine is that joint efforts to influence government officials do not violate the antitrust laws even if those efforts are anticompetitive.

The case is scheduled for retrial in May of 1981 on, among other issues, plaintiff's charge that the Company refused to wheel electric power for the City. The City is seeking treble damages totalling about $150,000,000.

The Court in *City of Gainesville* v. *Florida Power & Light Company*, Case No. 79-5101-Civ.-JLK (S.D. Fla. April 18, 1980) dismissed plaintiff Cities' claims based on alleged violations of the Federal Power Act and the Natural Gas Act, holding that neither statute implies a private right of action. On plaintiff's price-discrimination claim pursuant to the Robinson-Patman act, the Court, disagreeing with the decision in *City of Newark* v. *Delmarva Power & Light Company*, 467 F.Supp. 763, 772-74 (D. Del. 1979), held that electricity is a "commodity" within the meaning of the Robinson-Patman and Clayton Acts and denied defendant's motion to dismiss the Robinson-Patman Act claim.

In *Town of Norwood* v. *New England Power Company*, Civil Action No. 74-4104-T, May 12, 1980, a Master rejected defendant New England Power Company's ("NEP") argument that electricity was not a commodity under the Robinson-Patman act. The Master has also ruled that the doctrine of collateral estoppel, applied to the FERC rulings upholding the lawfulness of the New England Power Pool, precludes the plaintiff from relitigating the question of whether by entering into the Pool the defendant had violated the antitrust laws. The defendant NEP has requested leave to file a third-party complaint against Boston Edison Company ("Edison") for contribution in the event antitrust liability eventually is established. NEP's complaint states that both Edison, an ex-defendant which had settled its disputes with the plaintiff, and NEP were alleged co-conspirators and that Edison could be liable to NEP for all or a portion of any judgment against NEP. The question whether contribution is available against a co-conspirator in an antitrust case is pending before the United States Supreme Court in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 49 LW 3321, cert. granted, November 3, 1980.

B. Counterclaims by Suppliers

The District Court's decision in *City of Mishawaka* v. *American Electric Power Co., Inc.*, 465 F.Supp. 1320 (N.D. Ind. 1979) is significant in a respect not previously noted in this Committee's reports. The judgment in plaintiff municipalities' favor on defendant Indiana & Michigan Electric Company's '("I&M") five counterclaims is the first decision on the merits in a litigated antitrust claim made against a municipality since the Supreme Court's decision in *City of Lafayette* v. *Louisiana Power & Light Company*, 435 U.S. 389 (1978). The decision was based partly on the state action doctrine of *Parker* v. *Brown*, *supra*, on the *Noerr-Pennington* doctrine, *supra*, and on findings that the challenged municipal action was not a "product" or "goods", "wares, merchandise, supplies or other commodities" within the meaning of the Sherman and Clayton Acts. I&M did not appeal from the District Court's decision on its counterclaims.

In 1980, two other courts issued pretrial orders dismissing similar counterclaims. In *City of Newark* v. *Delmarva Power & Light Company*, 497 F.Supp. 323 (D. Del. 1980), defendant utility alleged that the municipalities had conspired with others to avoid state regulation of their rates and had instituted sham litigation before the FPC and the antitrust court in order to maintain the cities'

monopolies and to harass the defendant. The court held that the challenged activities were protected by the *Noerr-Pennington* doctrine, *supra*, and dismissed the counterclaim in its order of dismissal. (*Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Mountain Grove Cemetery* v. *Norwalk Vault Co.*, 428 F.Supp. 951, 956 (D. Conn. 1977) and *Outboard Marine Corp.* v. *Pezetel*, 474 F.Supp. 168 (D. Del. 1979)). Amended counterclaims have been filed and plaintiff's renewed motions to dismiss are awaiting decision. The Court in *City of Gainesville* v. *Florida Power & Light Company*, Case No. 79-5105-Civ.-JLK (S.D. Fla. April 18, 1980), dismissed defendant utility's counterclaim on similar grounds and refused to permit the defendant to pursue discovery on the issues raised by the counterclaim. (An amended counterclaim has been filed. Plaintiff's motion to dismiss was denied on April 18, 1980.)

In an unpublished order issued March 26, 1980, in *North Carolina Electric Membership Corporation, et al.*, v. *Carolina Power & Light Co.*, No. 79-1425, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal of defendant company's counterclaims. The District Court had held that it lacked ancillary jurisdiction over defendant's state law counterclaims that charged plaintiffs with abuse of process and tortious interference with defendant's business relations. (*North Carolina Electric Membership Corporation, et al.* v. *Carolina Power & Light Co.*, 85 F.R.D. 249 (M.D.N.C. 1979).

C. Settlements

The Town of Massena, New York and Niagara Mohawk Power Corporation after nearly eight years of litigation in several forums have reached a settlement of their District court and FERC litigation over Niagara Mohawk's obligation to wheel power from the Power Athority of the State of New York ("PASNY") to Massena after Massena supplants Niagara Mohawk as owner of the Town's retail distribution system. The settlement was filed with the FERC in mid-January 1981, in *Town of Massena, New York* v. *Niagara Mohawk Power Corporation and the Power Authority of the State of New York*, Docket No. E-9565.

The settlement follows a September 8, 1980 dismissal of Messena's federal district court antitrust suit filed in the Northern district of New York in *Town of Massena, New York* v. *Niagara Mohawk Power Corporation*, No. 79-CV-163. There, Massena sought an injunction ordering Niagara Mohawk to wheel electric power to the Town. The court found that Niagara Mohawk had not violated the Sherman act in refusing to wheel PASNY power to Massena. The settlement also came on the heels of an initial decision before the FERC in *Town of Massena, New York* v. *Niagara Mohawk Power Corporation and the Power Authority of the State of New York*, Docket No. E-9565, November 21, 1980, which found that the terms and conditions in the wheeling contracts between PASNY and Niagara Mohawk violated sections 10(h) and 205(b) of the Federal Power Act.

Another district court suit involving antitrust damage claims has been settled in principle among the parties in *City of Elbow Lake* v. *Otter Tail Power Company*, Civil Action No. 6-67-24 (District of Minnesota). The suit, filed in 1967, sought damages for lost profits, higher operating costs and the costs of facilities. Elbow Lake claimed that those damages resulted from Otter Tail's refusal to

wheel and refusal to provide wholesale electric service to Elbow Lake thereby delaying the City's entry into the electric business.

In *Central Power and Light Company*, Docket No. EL79-8, the Department of Justice ("DOJ") intervened and is opposing, on antitrust grounds, a settlement which had been reached among the parties. The case involves the central and southwest Companies' ("CSW") request that the commission order certain interconnections between the Electric Reliability Council of Texas ("ERCOT") and the Southwest Power Pool ("SWPP"). A settlement agreement was filed with the Presiding Administrative Law Judge for certification to the commission on July 28, 1980. If approved, the settlement would implement two DC interconnections that CSW requested be made. The Commission Staff supports the offer of settlement. However, the DOJ intervened on December 7, 1980 and opposes the settlement on the grounds that alternative AC interconnections might be more procompetitive and more in the public interest under Section 210(c)(1) of the Federal Power Act (as amended by PURPA) than the DC interconnections proposed in the offer of settlement. On January 28, 1981, the Presiding Administrative Law Judge ruled that DOJ had raised contested issues which prevented certification of the settlement for Commission approval but that the scope of the issues raised by DOJ was limited to competitive considerations.

II. Price Squeeze Cases Before the FERC

The most important Commission price squeeze decision of 1980 came in a November 12 order accepting a compliance filing in *Commonwealth Edison Company*, Docket Nos. E-9002 and ER76-122, *rehearing denied*, February 13, 1981. The Commission, deciding against the customers' contentions of price squeeze, endorsed the rate of return test for price squeeze and confirmed that an entire retail customer class (*e.g.*, the industrial class) could be used in testing for price squeeze in the absence of evidence that a sub-class of the entire customer class was benefitting from a discriminatory pricing arrangement. It also found that successively-effective retail rates during the wholesale rate locked-in period could be applied to test year sales and cost data to determine whether those rates created a price squeeze. The Commission approved the use of estimates in determining retail coincident demands. The Commission's order, which followed Opinion Nos. 63 and 63-A issued in 1979 in these dockets, represents the first Commission finding of a party's guilt or innocence on the price squeeze issue since the Supreme Court decided *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976).

In *Minnesota Power & Light Company*, Opinion No. 86, Docket No. ER76-827, and Opinion No. 87, Docket No. ER77-427, June 24, 1980, *affirmed*, Opinion Nos. 86-A and 87-A, September 15, 1980, the Commission reaffirmed that a rate of return test was the proper test for determining price squeeze. It found that the rates to be used in testing for price squeeze should be the retail rates finally determined by the state commission and the wholesale, cost-of-service rate approved by the FERC. The commission also found that the rate of return test must be made against the cost of service approved by the Commission in the cost of service phase of a case. Noting the need to examine the respective returns under the allowed rates on the basis of such a cost of service, the Commission made no finding as to the presence or absence of price squeeze. The Commission, largely on considerations of geographic proximity, ruled that competition existed and that the utility

had failed to rebut a presumption that a rate disparity would have an anticompetitive effect. The Commission disagreed with the Administrative Law Judge's rationale that potential competition, which the Judge thought looked to future events, could not be demonstrated by a past period of rate discrimination.

In *Pennsylvania Power Company*, Docket No. ER77-277, Initial Decision, April 25, 1980 the Presiding Judge found that a rate disparity existed and that the *Connecticut Light & Power Co.* presumptions of competition and competitive injury had not been rebutted.[2] He further found that the rate disparity was neither *de minimus*, a justifiable aberration caused by the dual regulatory system, nor the result of state action (which he seemed to reject as a price squeeze defense). By way of remedy, the Judge held that the utility's rate should be reduced to the lower end of the zone of reasonableness, but he did not define the limits of that zone. The Judge also imposed a condition on the utility's statutory right to file wholesale rates by ordering it to refrain from filing wholesale rates until it had first filed for retail increases. In a May 6, 1980 certification to the Commission, the Judge ruled that the intervenors had breached their obligation to comply with discovery orders and he recommended imposition of a sanction of $46,892.71. The Judge's rulings are pending before the Commission.

The Commission, in *Southern California Edison Company*, Opinion No. 62-A, Docket No. ER76-205, March 20, 1980, affirmed a 1979 decision (Opinion No. 62) that the utility had failed to rebut the intervenors' *prima facie* case of price discrimination. However, the Commission reasoned that considerations of equity in this evolving area of the law warranted giving the utility an opportunity to rebut the discrimination and to cost-justify the rate disparity which the Commission had found in Opinion No. 62.

In *Southern California Edison Company*, Docket No. E-8570, an initial decision was rendered on May 23, 1980, upon the Company's motion for summary disposition. The issue was whether the customers had failed to meet one of the *prima facie* price squeeze requirements establishing that the wholesale rate was higher than the retail rate. The customers contended that only the base rates without the fuel adjustments should be compared. Rejecting that position, the Presiding Judge held that a "meaningful comparison" of wholesale and retail rates could not be made without including fuel costs. The Presiding Judge also ruled that the retail rates to be compared are the effective retail rates charged during the locked-in wholesale rate period without regard to subsequent state agency adjustments that were not foreseeable when the original retail rates were actually charged. This ruling will give the commission an opportunity to reevaluate its finding in *Minnesota Power & Light Company*, Opinion No. 86, *supra*, that a state agency's retroactive revisions of retail rates are to be included in price squeeze analysis.

In the Commission's price squeeze rulemaking proceeding, Docket Nos. RM79-79 and RM79-80, utilities and customers filed comments in February 1980 on the Commission's proposed price squeeze rules. There has been little discussion of the proposed rules and there is a possibility that the rules may be modified or that withdrawal of the rulemaking proposal is being considered.

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[2]Docket No. ER78-517, August 20, 1979; *see also* the proposed price squeeze rules discussed *infra*.

In *Southern California Edison Company*, Docket No. ER79-150, the Presiding Administrative Law Judge on January 26, 1981 rejected an attempt by the Company to engage in discovery aimed at demonstrating the "franchise viability" of its wholesale customers. The Judge, citing *Minnesota Power & Light Company*, Docket No. ER77-427, Opinion No. 87, June 24, 1980 and *Commonwealth Edison Company*, Docket Nos. E-9002 and ER76-122, Opinion No. 63, issued September 14, 1979, found that the proposed franchise viability demonstration and the related discovery were irrelevant to the issue of anticompetitive effect. According to the Judge, the relationship of the utility's wholesale and retail rates determined whether the wholesale rate was lawful. By this standard, the profitability of a wholesale customer's own business has no bearing on the validity of a price squeeze complaint.

III. MISCELLANEOUS

In 1980, Congress created a Synthetic Fuels Corporation ("SFC") under the Energy Security Act of 1980 ("ESA"), Public Law 96-294. The SFC is to assist the private sector in the financing of certain synthetic fuel projects. In providing financial assistance, the SFC is obligated under § 131(h) of the ESA to foster competition. But it appears that, under § 167, suits to compel the SFC to foster competition may only be brought by the Attorney General or the Comptroller General. Although the SFC is a quasi-governmental entity, it is deemed to be an agency of the federal government for purposes of the antitrust laws.

An area of law with antitrust implications that bears watching in 1981 is the marketing of conservation and energy devices by electric and gas utilities. The National Energy Conservation Policy Act of 1978 ("NECPA") 42 U.S.C. § 8201, *et seq.* requires that a waiver be obtained before a utility may become involved in the supply, installation or financing of energy conservation devices or renewable resource measures. Regulations under the NECPA were adopted in late 1979 that reflect a concern for antitrust law and unfair competition. The ESA revises NECPA prohibitions against utility marketing of conservation and energy devices and turns much of the decisionmaking responsibility over to the states.

Another area of potential antitrust impact for 1981 concerns the cogeneration and small power production activities encouraged under the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 2601, *et seq.* The provisions of sections 201 and 210 of PURPA reflect a concern on Congress' part that utilities might dominate the relationship between utilities and cogenerators. There is a question raised, at least by some, whether those provisions establish adequate guidelines for the parties to the cogeneration relationship.