Report of The Committee On Antitrust

I. Natural Gas

A. In Re New Mexico Natural Gas Antitrust Litigation,
MDL Docket No. 403 (U.S.D.C. New Mexico).

Consolidated actions brought by various users of natural gas against certain producers and suppliers resulted in a jury verdict for the plaintiffs entered March 26, 1982. The verdict was based on allegations that defendants conspired, through joint settlement of disputes over terms of gas purchase contracts, to increase the price of well-head natural gas in the San Juan Basin of New Mexico. The trial court instructed the jury that "a conspiracy to fix prices in or affecting interstate trade or commerce, if such a conspiracy is formed as alleged in the complaint, is in and of itself an unreasonable restraint of trade."

In the Memorandum Opinion entered January 26, 1982, supporting denial of various summary judgement motions, the trial court found "no purpose served by affording Noerr-Pennington protection" to the defendants' conduct in initiating, prosecuting and settling separate litigation between purchasers and producers where the settlement agreement was submitted to that Court and approved in an order of dismissal. Further, the Memorandum Opinion denied Noerr-Pennington protection to the submittal, by the purchasers, and the approval, by the Public Service Commission of New Mexico, of the settlement agreement, noting that the Commission has no authority to fix wellhead prices. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

The question of the extent of damages was not litigated in this bifurcated proceeding. The U.S. District Court Judge who presided over the initial portion of the trial has recused himself on grounds of a conflict of interest engendered by members of his immediate family being gas consumers.

On January 17, 1983, the newly-assigned District Court Judge, David K. Winder (from Salt Lake City, Utah), granted defendants' motion for new trial based on a juror's disqualification. Incorrect information was provided by the juror at *voir dire* regarding whether close relatives would benefit from the outcome of the litigation. A new trial, also expected to be bifurcated, would involve consideration of both liability and damage questions.

B. Hart-Scott-Rodino Act.

On January 6, 1983, the Antitrust Division of the Department of Justice announced it had reached agreement with Burlington Northern, Inc. concerning Burlington's cash tender offer for The El Paso Company of Houston, Texas. Burlington agreed to furnish all information the Department would need to complete its investigation and also agreed that, should the Department file a complaint under Section 7 of the Clayton Act, it would enter into a consent decree requiring divestiture of any coal reserves in the Northern Plains market acquired through acquisition of El Paso stock. The "Northern Plains" market includes Wyoming, Montana, North Dakota and South Dakota. The Department, in response, did not issue a request for further additional information under the Hart-Scott-Rodino Act, which could have delayed consummation of the tender offer. Assistant Attorney General William F. Baxter said that although the Department has not yet determined whether the proposed acquisition poses a competitive problem, the agreement resolves any potential concerns. "In the event that the Department determined that a problem existed in the Northern Plains coal market, divestiture of the acquired coal assets, as provided by the agreement, constitutes the relief which the Department would seek," said Baxter. He also noted that, while the Department ordinarily requires the resolution of any competitive problems prior to the consummation of a proposed acquisition, this transaction is not easily remediable in that manner because it is an unfriendly takeover. The agreement reached, while an unusual solution to potential problems, is appropriate in the circumstances presented here, he said, where easily identifiable assets capable of simple divestiture are involved.

Further, in a notice provided November 26, 1982 (47 Federal Register 53501) by the Federal Trade Commission and Assistant Attorney General Baxter, certain transactions were granted early termination of the waiting period provided by Section 7A of the Clayton Act, 15 U.S.C. 18a, as amended by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the premerger notification rules. Included therein was Northwest Energy Company's proposed acquisition of all voting securities of Cities Service Gas Company. The notice provided that neither agency intended to take any action with respect to the proposed acquisition during the applicable waiting period.

C. *Business Review Procedure.*

By letter dated June 18, 1982, Assistant Attorney General William Baxter advised that the Department of Justice has no present intention to indicate an enforcement action to challenge conduct proposed for Venture Resources, Inc., which provides consulting services for small independent producers of natural gas. VRI proposed to offer a subscription service providing current price information from other subscribing pipelines and producers. VRI asserted there is a need for such a service because of a substantial number of natural gas contracts that contain price redetermination clauses as a means of making periodic price adjustments. Baxter noted that the competitive effect of price information exchanges will depend in part on the structure of the market in which the exchanges take place. Consequently, the Department reserved the right to initiate enforcement action if it subsequently concludes that the exchange has an anticompetitive purpose or effect.

D. *Venture Technology, Inc. v. National Fuel Gas Distribution Corp.* (2nd Cir., July 26, 1982).

Venture sued National Fuel and Flint Oil and Gas Company alleging a conspiracy to prevent Venture from entering the western New York gas production business, relying in substantial part upon the operation of National Fuel's well-spacing policy. Pursuant to the policy, National Fuel established restrictions on the location of wells from which gas would be purchased.

A U.S. District Court jury (Western District of New York) found that defendants had violated section 1 of the Sherman Act, and $1.5 million in trebled damages were awarded (judgement entered January 13, 1981). The Second Circuit reversed, finding that the evidence submitted did not permit the inference that defendants had agreed to an unlawful arrangement. The U.S. Supereme Court, on November 8, 1982, denied Venture's petition for writ of certiorari. 51 USLW 3354 (No. 82-362, 11/9/82).

E. *Tennessee Gas Pipeline Co.*, RP80-97-015, *et al;*
Order Denying Stay in Part and Addressing Antitrust Concerns
20 FERC ¶ 61,096 (July 23, 1982).

Each of the involved rate cases raise the common issue of an appropriate allocation of transmission costs between natural gas and liquids and liquefiable hydrocarbons which are ultimately removed from the natural gas stream. On February 3, 1981, the Commission instituted a series of informal settlement conferences in all of the rate cases to resolve the allocation issue. The resulting "omnibus" liquids/liquefiables settlement proceeding continued actively until June 15, 1982, at which time it was adjourned for a number of reasons. According to the commission," [c]hief among the reasons for that adjournment was the concern that continued group discussion towards settlement between all involved (which included competitors) might place any resulting settlement in jeopardy of attack under the antitrust laws." 20 FERC ¶ 61,096 at 61,206.

In its July 23 Order, the Commission stated that it saw "no basis for concern that antitrust liability would attach to participation in settlement discussions that the Commission finds to be the best regulatory approach for resolving a matter within its jurisdiction," citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), and the state action doctrine, *Parker v. Brown,* 317 U.S. 341 (1943). The Commission went on to distinguish *United States v. Southern Motor Carriers Rate Conference,* 672 F.2d 469 (5th Cir. 1982) (rehearing *en banc* argued) by noting that the Commission is dealing "here with cost allocation rather than price fixing, [and] the settlement process is an integral part of our regulatory structure." 20 FERC ¶ 61,096, at 61,206 (n.6). A procedural schedule has been established for the "omnibus" proceedings while settlement negotiations in the individual proceedings are also underway.

II. Electric Utilities

A. *City of Kirkwood* v. *Union Electric Company,* 671 F.2d 1173 (8th Cir. 1982), *cert. filed,* No. 81-2278 (June 11, 1982) (U.S. views invited October 7, 1982).

Union Electric Company (UE), an electric utility that produces, transmits, and delivers power to wholesale and retail customers, has petitioned the Supreme Court for review of a 1982 Eighth Circuit decision which held that the company is not immunized from antitrust liability. The action was brought in the Eastern District of Missouri by the municipality of Kirkwood, Missouri, which purchases wholesale electric power from UE and sells it at retail to customers in approximately two-thirds of the Kirkwood geographical area. UE supplies retail electric service in the remaining one-third of the area.

Kirkwood claims that UE violated the Sherman and Robinson-Patman Acts by creating a "price-squeeze" in order to eliminate Kirkwood from retail competition in the area. According to Kirkwood, UE increased the wholesale rates it charged to Kirkwood so that the rates exceeded those charged for retail power to UE's large industrial service customers. Kirkwood alleges that, as a result, it was unable to attract large industrial customers to settle in its distribution area. The district court, in a decision which was overturned by the Eighth Circuit, held that the state and federal regulatory schemes covering electric utilities exempted the challenged activities from antitrust liability. It also ruled that the first amendment protected from antitrust liability UE's actions in petitioning the state and federal regulatory bodies for rate increases.

In its petition for certiorari, UE presents three issues. First, the utility claims that the Eighth Circuit erred in its ruling that the implied-repeal and state-action rules do not bar antitrust liability where the alleged violation is based solely on its use of rates filed with the relevant state and federal regulatory agencies. The Eighth Circuit noted in its opinion that, unlike the antitrust laws where the interaction of the wholesale and retail rates which allegedly cause the price-squeeze situation may be addressed, Federal Energy Regulatory Commission regulation is limited to wholesale rates and state public service commission regulation is limited to retail rates. Thus, according to the court, neither agency has exclusive jurisdiction to remedy any anticompetitive effects caused by a relationship between wholesale and retail rates which results in a price-squeeze. Additionally, the court found that because a price-squeeze does not involve anticompetitive rates, but rather involves the legality of proposing a certain anticompetitive combination of rates, judicial consideraton of such a claim under antitrust law would not interfere with either regulatory scheme. UE's state-action defense was rejected because the court found that an anticompetitive price-squeeze was neither articulated and affirmatively expressed as state policy nor actively supervised by the state itself.

UE, in the second issue presented to the Supreme Court, claims error in the appellate ruling that the doctrine established in *Eastern Railroad Conference* v. *Noerr-Freight Co.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), does not protect UE's rate filing activities from antitrust liability. That doctrine recognizes first amendment rights to induce governmental action. In the Eighth Circuit's view, the *Noerr-Pennington* rule will not protect a utility which manipulates the federal and state regulatory processes to achieve anticompetitive results.

The third issue presented for the Supreme Court's consideration is whether the Eighth Circuit properly reinstated price discrimination charges against UE by holding that electricity is a "commodity" within the meaning of the Robinson-Patman Act.

B. *Borough of Lansdale* v. *Philadelphia Electric Co.*, CCH 1982-3 Trade Cas. ¶ 65,025 (3rd Cir. 1982)

This committee last reported that the Philadelphia Electric Company successfully defended antitrust charges before a jury in the Eastern District of Pennsylvania. The jury concluded that the utility lacked the requisite monopoly power to be held liable for violation of Section 2 of the Sherman Act. On November 8, 1982, the Third Circuit affirmed the district court's decision not to set aside the jury's finding with respect to the relevant geographical market.

The Borough of Lansdale, an operator of a small retail electric company, purchases electric power at wholesale from the Philadelphia Electric Company. The Borough brought this action for treble damages and injunctive relief contending that Philadelphia Electric's wholesale rates, in conjunction with alleged attempts to charge Lansdale for unnecessary back-up service and a refusal to wheel power to Lansdale, constituted an illegal monopoly. Wheeling power involves a transfer of electricity from one utility to another over the facilities of an intermediary utility. According to Lansdale, Philadelphia Electric used its dominance in the wholesale market to foreclose Lansdale, a retail competitor, from alternate wholesale markets and restricted Lansdale's ability to compete for retail customers by initiating a price-squeeze when it raised wholesale prices charged to Lansdale above retail prices charged to some of Philadelphia Electric's retail customers.

The determination of the geographic market is important in a monopolization case because, as the Third Circuit noted, if the market is defined broadly, a defendant is less likely to be found to possess the power, with respect to a particular product, to control prices or to exclude competition within it. Such power represents the hallmark of monopolization. Lansdale's contention that the market should be defined as a matter of law as the utility's service area because of the impracticalities of wholesale customers building their own transmission lines to alternate wholesale suppliers, was rejected by both the district and circuit courts.

On appeal, the Third Circuit found that the issue concerning the relevant geographic market had correctly been submitted for the jury's consideration and that although service areas of electric utilities rarely overlap, competition from other, geographically separate companies could be considered. According to the court, the record contained sufficient evidence to show that Lansdale could procure alternative sources of supply for wholesale power beyond the Philadelphia Electric's service area by building its own transmission lines or by wheeling. This reasoning further supported the court's ruling that the jury could have found that the Philadelphia Electric Company lacked monopoly power in the geographic market even though it now controls 100% of the transmission lines in its service area.

The Third Circuit also ruled that the relevant product market was the sale of electric power at wholesale and did not include retail sales.

C. *Alabama Power Co.* v. *Nuclear Regulatory Commission*, 692 F.2d 1362 (11th Cir. 1982)

On December 6, 1982, the Eleventh Circuit ruled that the Nuclear Regulatory Commission (NRC), in determining whether to impose conditions on the issuance of an operating license for a nuclear power plant, may consider the antitrust implications of activities other than those directly arising from the activity sought to be licensed, may look at potential anticompetitive results, and may remedy potential anticompetitive problems by ordering ownership access to the new plants. The action was appealed to the Eleventh Circuit by the Alabama Power Company (AP) from a decision by the NRC's Atomic Safety and Licensing Appeal Board which had found that unconditional licensing of the operation of the Joseph M. Farley Nuclear Plant, Units 1 and 2, would create or maintain a situation inconsistent with the anti-trust laws and their underlying policies.

The court found the NRC's actions to be consistent with the Atomic Energy Act of 1954, as amended in 1979. That Act gave new responsibilities to the Commission in that it required it to consider the antitrust ramifications of its licensing actions. The Licensing Board of the NRC conducted an extensive hearing and heard evidence of alleged anticompetitive conduct on the part of Alabama Power for decades prior to AP's license application. The Board found that AP had acted in an anticompetitive manner by precluding its purchasers from alternate sources of supply, engaging in exclusive dealing, refusing to offer fair interconnection and coordination and threatening to terminate services to the Alabama Electric Cooperative (AEC), a wholesale purchaser, if the AEC successfully competed to replace AP as a supplier to an Alabama municipality. On appeal from the Licensing Board, the Atomic Safety and Licensing Appeal Board of the NRC found additional instances of anticompetitive conduct. First, it found that certain wholesale rate reductions induced AEC not to build its own generating facilities. Additionally, it found that AP's failure to offer the AEC ownership participation in the Farley nuclear units was inconsistent with the antitrust laws. The Eleventh Circuit found that consideration of these factors, even though not necessarily relating to the specific activity sought to be licensed or not necessarily actual violations of the antitrust laws, was proper under the Atomic Energy Act.

Consequently, the Appeal Board determined and the Eleventh Circuit agreed that unless certain conditions were imposed in the license, the anticompetitive conduct would be maintained. Accordingly, the remedy the antitrust concerns, AEC was given owernship access to the new nuclear plant as well as access to Alabama Power's transmission lines.

D. North Carolina Electric Membership Corp. v. *Carolina Power & Light Co.*, 666 F.2d 50 (4th Cir. 1981) (interlocutory appeal)

Last year this committee noted a decision of the Fourth Circuit in *North Carolina Electric Membership Corp.* v. *Carolina Power & Light Co.* The court's opinion, which held that the *Noerr-Pennington* doctrine did not immunize from discovery certain documents related to a utility's attempts to influence the enactment of legislation, is now reported at 666 F.2d 50. The appellate court reversed a decision of the District Court for the Middle District of North Carolina wherein the court ruled that discovery of legislative material would chill the exercise of defendant's first amendment rights in contravention of the policy set forth in *Eastern Railroad Conference v. Noerr-Freight Co.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The case remains on the docket of the District Court for the Middle District of North Carolina, although upon joint motion of the parties the court has ordered the action stayed.

The material subject to discovery under the Fourth Circuit's decision, according to the plaintiffs, may lead to admissible evidence relating to their claim of monopolization of electric power markets in violation of Sections 1 and 2 of the Sherman Act. Plaintiffs in the case include sixteen rural electrical cooperatives which obtain most of their wholesale or "bulk power" from the defendants. Plaintiffs allege that the remaining defendant, South Carolina Electric and Gas Co. and others, illegally blocked their attempts to generate or to purchase wholesale power from other sources.

E. United States v. *Kentucky Utilities Co.*, No. C81-0109-L (W.D. Ky., filed Feb. 26, 1981)

This action, initiated by the United States in 1981, remains pending before the District Court for the Western District of Kentucky. The government contends that Kentucky Utilities Company has attempted to monopolize and has monopolized in violation of Section 2 of the Sherman Act by refusing to wheel Southeastern Power Administration (SEPA) wholesale electricity to the defendants' "captive" wholesale customers. As defined in the complaint, such customers are those that are connected to electric transmission facilities which are owned and operated only by Kentucky Utilities and for whom it would be economically impractical to construct alternative facilities for transmission from an alternative source such as SEPA.

As a result of the refusal to wheel, the government alleges that Kentucky Utilities' wholesale customers have been deprived of alternative wholesale sources thus allowing the defendant to preserve its monopoly in the sale of bulk power to such customers. The government seeks an injunction against the utility's refusal to transmit electric power from other suppliers over its facilities and asks that it be required to file the pertinent tariffs with the Federal Energy Regulatory Commission.

This year, defendant's motion to stay the case on primary jurisdiction grounds was mooted when the Federal Energy Regulatory Commission refused to order the utility to wheel SEPA power under the Public Utility Regulatory Policies Act of 1978. Another developmnent in the case, which remains in the discovery stage, was a ruling wherein the court cited the *North Carolina Electric Membership* decision discussed above and held that the defendant was not entitled to withhold materials from the government under the *Noerr-Pennington* doctrine.

F. *State of California* v. *Pacific Gas & Electric Company*
No. 82-164 (E.D. Calif., filed February 2, 1982)

The State of California, at the request of its Department of Water Resources (DWR), brought this antitrust action against Pacific Gas & Electric (PG&E) for unspecified damages and injunctive relief. The DWR operates the California Water Project which is both a substantial user and producer of electrical power.

The state alleges in its complaint that PG&E violated Sections 1 and 2 of the Sherman Act by using its monopoly on high voltage transmission facilities in Northern and Central California to limit the ability of the DWR to acquire bulk power from potential competitors of PG&E. Additionally, the state claims that PG&E unlawfully restrained or prevented the DWR from selling power to customers such as the cities of Anaheim and Riverside by refusing the DWR transmission service under the Pacific Intertie agreement. The Intertie comprises alternating-current, extra-high-voltage transmission line service established in a contract between the State of California and California utility companies.

III. Oil

A. *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation State of California, et al., Plaintiffs-Appellants, vs. Standard Oil Company of California, et al., Defendants-Appellees,* United States Court of Appeals for the Ninth Circuit, 691 F.2d 1335.

Nearly a decade after the first salvos were fired at the U.S. domestic oil industry in the form of OPEC price leaps, the battle rages over the effects of the increases. Cases involving some sixteen major oil companies are currently pending in coordinated proceedings before the U.S. District Court for the Central District of California. The cases were brought by several states on behalf of themselves and their citizens to recover damages for allegedly inflated retail gasoline prices paid by plaintiffs.[1] The defendants allegedly conspired to raise prices of refined products in violation of the Sherman Act, 15 U.S.C. §§ 1 & 2.

The district court held, *inter alia,* that the *Illinois Brick* decision barred all claims based upon purchases made from sellers that competed with defendants but did not conspire with them.[2] It also held that plaintiffs must join some 35,000 retail dealers in order to pursue an alleged conspiracy claim arising between defendants and their retail dealers.

Before the Ninth Circuit, plaintiffs argued that defendants' successful price-fixing conspiracy created a "price umbrella" under which competing non-defendant sellers raised the price of gasoline to the fixed price, thereby injuring

[1]Clayton Act §§ 4 & 4C (15 U.S.C. §§ 15, 15C)

[2]*Illinois Brick* v. *Illinois,* 431 U.S. 720 (1977).

those persons purchasing the price inflated gasoline. The Court, in affirming the order below, concluded that in the context of a multi-tiered distribution system, *Illinois Brick* bars "umbrella" claims. First, the "umbrella" prices may result from a pass-on of the initial unlawfully inflated price and thus fall squarely within the ambit of *Illinois Brick.* Second, even if no pass-on occurred, defendants could face a claim from the non-conspiring but competing sellers for the entire amount of the unlawful overcharge, without set-off for plaintiffs' damages, resulting in multiple liability. Third, apart from questions of pass-on and multiple recovery, the Court reasoned that any proof of damage would be overly speculative and complex. Since the "umbrella" claim is essentially a consequential damage claim, the defendant price fixer could be liable for increased prices resulting from his conduct even though he received no benefit from the increase and was not directly involved in setting the increased prices charged by his competitor. Due to the multi-tiered distribution system present in the facts, the Court concluded that any intelligent inquiry into the pricing considerations would not be possible, and accordingly, the "umbrella" theory was not warranted.

Plaintiffs also argued that a resale price maintenance conspiracy might be proved between defendants and their retail dealers, thereby avoiding the limitations imposed by *Illinois Brick.* The Court, setting aside questions of ripeness in the interest of judicial economy, held that absent joinder of retail dealers, serious risks of duplicative recovery and inconsistent adjudications would ensue.[3] The rationale behind this holding is that should plaintiff purchasers recover damages resulting from a vertical price maintenance conspiracy between defendant sellers and non-party retail dealers, the dealer may subsequently bring suit to show lack of a conspiracy, and if successful, become direct purchasers from defendant sellers, thereby subjecting them to double liability for damages arising out of the same events. In *Illinois Brick,* the Supreme Court held this double recovery scenario to be unacceptable. 431 U.S. at 730-31.

Plaintiffs next argued that a double recovery was not possible in this case since there was no intervening market between defendants and their retail dealers. The Court noted that fifteen defendants in the instant case were parties defendant in litigation where a certified class of lessee retail dealers (direct purchasers of gasoline during the period covered by the complaints in this case) allege that defendants have eliminated horizontal competition at the wholesale level of distribution through the use of exclusive dealing arrangements forced upon their retail dealers. *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434, 447 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978). The Court concluded that double recovery would be possible due to the overlapping claims presented here and in *Bogosian,* and held that if a proper vertical conspiracy is alleged, in order to by-pass *Illinois Brick,* joinder of 35,000 retail dealers is required to prevent risk of multiple liability.

A second interlocutory appeal was taken from the district court's order denying plaintiffs' motion to certify a class of indirect purchaser retail customers pursuant to Fed.R.Civ.P. Rule 23(b) (3). The Court noted that the district court's order is reviewable only to the extent that it constitutes an abuse of discretion or resulted from application of impermissible legal criteria, citing *Patillo* v. *Schlesinger,* 625 F.2d 262, 264 (9th Cir. 1980), and *Yamamoto* v. *Omija,* 564 F.2d 1319, 1325 (9th Cir. 1977). They agreed with the district court that any theory upon which plaintiffs might rely would raise predominantly individual questions relating to the relationships between defendants and their retail dealers.

[3]*In Re Beef Industry Antitrust Litigation,* 600 F.2d at 1141.

Plaintiffs argued that the "control" exception to *Illinois Brick*,[4] could be proved on a classwide basis without examining the pricing decisions of the retail dealers, by showing the existence of common lease and supply agreements between defendants and their dealers, and marketwide price statistics. The Court noted that none of the leases or supply agreements at issue purport to allow defendants to fix retail dealers' prices to the public. Further, marketwide price statistics, the Court held, are not sufficient evidence to avoid the prohibitions of *Illinois Brick*. Reasoning that nationwide increases in gasoline prices may reflect the importance of wholesale price decisions, and even assuming arguendo that defendants engaged in a conspiracy to fix the wholesale price of gasoline, the Court nevertheless concluded that across-the-board increases in gasoline prices may be nothing more than the result of the retail dealers' decisions to pass on the wholesale price increase to the ultimate consumer. Finding that individual questions as to pricing decisions made by some 35,000 retail dealers predominate, the Court precluded class treatment.[5]

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[4] 431 U.S. at 736, n. 16. There the Court implied an exception to the rule barring indirect purchaser claims where the direct purchaser is owned or controlled by its customers.

[5] Fed. R. Civ. P. Rule 23(b) (3).