Report of The Committee On Antitrust

I. Natural Gas

A. Recent Analysis of Gas Purchase Terms

Fear that operation of certain contractual provisions often utilized in pipeline-producer agreements might result in anticompetitive and substantial price increases at the point of "deregulation" provided in the NGPA (January 1, 1985) has prompted some initial analysis of such contract terms by the Federal Trade Commission.[1] In response to questions directed by Congressman Philip Sharp regarding the antitrust implications of the use of certain escalator provisions in gas purchase contracts, the Chairman of the Commission, James C. Miller, commented in his cover letter that the "contracts problems" presently being considered by Congress present "difficult problems in antitrust analysis because of the extremely complex regulatory environment affecting many industry relationships." Chairman Miller also noted his agreement with Congressman Sharp's suggestion that many (if not most) of the difficulties facing the gas industry may be the "legacy of years of pervasive federal regulation of both the production and transmission segments of this industry."

Congressman Sharp's letter asked a number of questions concerning the applicability of the antitrust laws to various contractual relationships which are common in the gas industry. The Commission's responses may be broadly summarized as follows.

While the inclusion of most-favored nations clauses could be circumstantial evidence of a horizontal agreement among competitors, the FTC asserted that such clauses are not *per se* violations of the antitrust laws.[2] Proof of conspiracy requires evidence of (A) an overall unlawful plan or "common design", (B) knowledge by each competitor that others were involved because of the competitor's knowledge of the unlawful nature and extent of the conspiracy, and (C) participation by each member of the conspiracy.[3] A horizontal conspiracy may be found where two or more competitors have consciously acted in the same way and there are "plus factors" indicating an agreement rather than merely parallel responses to the same external conditions.[4] No cases have inferred the existence of a conspiracy from most-favored nations clauses. If rational individual incentives exist to use such clauses, inference of conspiracy is less appropriate.[5] For instance, if a pipeline offers MFNs solely to compete more vigorously, or to avoid price discrimination among its suppliers, no inference of conspiracy should arise. The FTC added that "the fact that a passthrough is guaranteed is not proof of a conspiracy."[6]

The use of external price standards reflecting market conditions can be in the independent interests of each of the contracting parties.[7] Agreements between sellers and purchasers to provide price data necessary to fulfill MFNs would not be illegal if "individually justified on business grounds" and if no anticompetitive effect

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[1] The Commission responded to a letter dated March 25, 1983 from Congressman Phillip R. Sharp, Chairman, Subcommittee on Fossil and Synthetic Fuels, Committee on Energy and Commerce, by letter dated April 28, 1983.

[2] Appendix A to FTC Response (hereinafter "App. A") at 1.

[3] App. A. at 2.

[4] App. A. at 3.

[5] *Id.* at 3.

[6] *Id.* at 4.

[7] *Id.*

outweighing procompetitive results occurred.[8] Nonetheless, if the intent of an agreement found was to fix prices, it "could" be *per se* unlawful.[9] If the agreement's purpose and effect were not "properly characterized as price fixing," rule of reason analysis would apply.[10]

Two-party MFNs (where a purchaser pays the seller the highest price, or average of highest prices, paid by the purchaser to any single seller) may be more suggestive of a purchaser's intention to bargain hard in each of its negotiations because a price increase in one contract forces the purchaser to pay higher prices under all such MFNs. Where a purchaser agrees to a third-party MFN, its incentive to bargain hard may be decreased, because price will be impacted by what other purchasers offer.[11]

Neither a high degree of seller adherence to MFN pricing terms nor the identical nature of the pricing formulae utilized establish in and of themselves undue restraint of competition.[12] Conscious parallelism may be circumstantial evidence of an agreement in restraint of trade, but evidence of agreement remains a requirement.[13] Widespread use of indefinite escalators may be largely justified by the need for long-term contracts, by the federal pricing scheme provided in the NGPA, or by the respective bargaining positions of the parties.[14]

On December 6, 1983, responses to the same questions were sent to Congressman Sharp by the Antitrust Division of the Department of Justice. The Division's responses were generally quite similar to those of the FTC Staff with some notable additional remarks.

According to the Antitrust Division, while the use of MFNs may be consistent with unilaterla decision-making by producers, it may also be consistent with an agreement to follow a "price leader," one means of implementing a price-fixing scheme. Further, third-party MFNs could have a more substantial anticompetitive effect among producers than two-party agreements depending upon the number of producers covered by the agreement, and they could be more susceptible to antitrust challenge. Third party MFNs also have a greater potential for inducing an agreement in unreasonable restraint of trade through agreements by purchasers or data exchange by competing pipelines. The linking of old gas with new gas in a sales contract, the Antitrust Division indicated, would not necessarily have an anticompetitive purpose or demonstrate that the seller had exercised market power.

B. *Business Review Procedure*

By letter dated December 16, 1983, Assistant Attorney General for the Antitrust Divison William F. Baxter advised that the Department of Justice has no

[8] In a separate attachment to the response, the Commission provided copies of two Advisory Opinions finding no present objections to the use of intermediary groups to collect price and contract term information. *See also* Letter from William Baxter, Assistant Attorney General, Antitrust Division to John L. Murchison, Jr., Vinson and Elkins (June 18, 1982) (Antitrust Division has no present intention to oppose provision by Venture Resources, Inc., of a data collection and distribution service regarding current price information to subscribing gas producers and pipelines).

[9] App. A, at 6.

[10] *Id.*

[11] *Id.* at 7. The Commission notes, at 15, that pipelines can avoid this disincentive by "simply refusing" to accept third party MFNs in new contracts.

[12] *Id.* at 8-10.

[13] *Id.* at 10.

[14] *Id.* at 11-12. When gas supplies were scarce, sellers had "bargaining power to obtain these non-price and post-regulation sweeteners." Further, gas industry MFNs do not operate as do those condemned by the FTC Order *In re Ethyl Corp.*, FTC Dkt. No. 9128 (April 1, 1983) (producer compelled by MFN to accept lowest price agreed to with any purchaser, thereby discouraging price cutting).

present attention to initiate enforcement action to challenge interstate gas pipelines' exchange of certain information regarding sixteen offshore drainage tracts. In order to reduce purchases of gas from the offshore tracts without incurring drainage liability, Transcontinental Gas Pipe Line Corporation proposed that the pipelines taking gas from the adjacent drainage tracts communicate with each other regarding each pipeline's rates of taking and levels of deliverability. The proposal would permit the pipelines, which are experiencing oversupply of gas on their systems, to take gas supplies at less than full deliverability without causing a drain of reserves to other producer interests in the offshore field.

Baxter noted that the exchange of information would affect each pipeline's decisions regarding the taking of gas from the affected tracts and that such action could be argued to lead to concerted determinations by competitors regarding how much they will purchase from particular suppliers. Baxter concluded, however, that the proposal was the direct result of the geological phenomenon of drainage and thus the exchange of information was essentially a response to the unavoidable interdependence among the purchasing pipelines, rather than an attempt to create such interdependence. Baxter further observed that should the pipelines attempt through their concerted behavior to force down prices by reducing takes, the affected producers could simply enforce the various price and quantity provisions in their contracts through appropriate legal action. Anticompetitive effects downstream were thought unlikely because the proposal involves tracts which collectively account for only a very small portion of the total gas reserves in any relevant market. As is customary in such business review letters, the Department reserved the right to initiate enforcement action if it subsequently concludes that the exchange has an anticompetitive purpose or effect.

C. *New Marketing Programs*

On November 10, 1983, the Commission issued a series of orders approving the establishment of industrial sales programs by Columbia Gas Transmission Corporation and Tenneco Oil Company and the extension of the industrial sales program by Transcontinental Gas Pipe Line Corporation.[15] On December 20, 1983, the Commission approved an industrial sales program for Tennessee Gas Pipeline Company.[16] Basically, each program creates a form of spot market for the sale of natural gas directly by producers to distributors or end-users from gas supplies formerly dedicated to the participating pipeline which releases and transports the spot market quantities. To provide for such sales, the Commission granted blanket certificates of public convenience and necessity authorizing for limited terms (1) the abandonment of current sales between the affected producers and pipelines and (2) any jurisdictional transportation necessary to accomplish the sales. It is beyond the scope of this Committee report to summarize fully the details of the foregoing programs or to explain differences between them, but one aspect of the Commission's orders is relevant here because of intervenors' claims that the industrial sales programs would upset competitive balance in natural gas markets.

Without referring specifically to the antitrust laws, the Commission attempted in the orders to create a balance between the conflicting goals of encouraging competition among gas suppliers and gas pipelines and limiting the "market-raiding potential" of special sales programs adversely to impact the customers of

[15] *Transcontinental Gas Pipe Line Corporation*, 25 FERC ¶ 61,219 (1983); *Tenneco Oil Company*, 25 FERC ¶ 61,234 (1983); *Columbia Gas Transmission Corporation*, 25 FERC ¶ 61,220 (1983).

[16] *Tennessee Gas Pipeline Company*, 25 FERC ¶ 61,398 (1983).

non-participating pipelines. To encourage price competition while at the same time protecting the captive customers of non-participating pipelines from shouldering the additional fixed costs that would befall them were other system customers to shift purchases to the new marketing programs, the Commisison limited the reach of the marketing programs to "marginal markets." Marginal markets were defined to include new loads not previously served by natural gas, those requirements which would in the absence of the marketing programs be served by alternate fuels, and markets previously served only by interruptible overrun service. The condition has the effect of reserving to pipelines their traditional "core markets."

A similar market allocation is created by the orders' grant of a right of first refusal to on-system producers to release their gas for sale through the marketing programs, a condition designed to effect a desirable reduction of take-or-pay exposure for participating pipelines. Again, however, this condition has the effect of allocating to the existing producer-suppliers of pipelines with the marketing programs a priority over "off-system" producers for sales to the special markets. In each instance, the Commission found it in the public interest to limit the full play of free market forces in recognition of other relevant policy considerations.

In rehearing orders issued on January 16, 1984, the Commission did specifically refer to the conflict between the marketing restrictions in the foregoing programs and "antitrust considerations." In response to claims that it had granted territorial allocations and established pipelines as monopolists in their core markets, the Commission reiterated that it had weighed the procompetitive benefits of unrestricted marketing programs against other recognized public interest factors, *e.g.*, the impact of supply switching on customers remaining on a given pipeline system. The Commission also emphasized that the new marketing programs are limited in duration and subject to monthly monitoring which can form the basis for assessing what less restrictive conditions may be feasible. The interplay of regulatory policy and antitrust doctrine which is occasioned by these marketing programs is anticipated to become an increasingly important and problematic area of law as the natural gas industry moves toward increasing competition. On January 16, 1984, the Commission issued a Notice of Inquiry addressing this subject.

D. *City of Florence, Alabama v. Tennessee Gas Pipeline Company, et al.*, 24 FERC ¶ 61,395 (1983)

The Commission here considered the propriety of a pipeline tariff restriction on resales of gas by customers. In 1982, the Commission had directed Alabama-Tennessee Natural Gas Company, pursuant to an approved settlement agreement, to construct and operate facilities and to sell natural gas to the City of Florence, Alabama. A dispute arose thereafter regarding the effect on the settlement of a provision in Alabama-Tennessee's tariff incorporating a restricted service area definition in Alabama-Tennessee's service agreement with Florence.

In its order, the Commisison decided that the tariff provision involved was properly considered in a section 4 proceeding because elimination thereof would likely affect the pipeline's sales volumes and hence its rates. The Commission then found that the primary effect of the resale restriction (to, or slightly beyond, municipal corporate limits) was to restrict the resale customer from competing for industrial sales outside the designated service areas.

The Commission noted that it views such resale restrictions "with suspicion given their inherent anti-competitive nature."[17] Indeed, "[a]lmost without

[17] Mimeo at 9.

exception, resale restrictions have been found to be contrary to the public interest and have been deleted from pipeline tariffs."[18] While the Commission had previously declared resale restrictions to be *per se* unlawful under the Federal Power Act,[19] the Commission noted that its experience with such restrictions in the context of the gas industry was not so clear or immediate. While declining to adopt a *per se* rule in this case, the Commission warned that a pipeline attempting to justify a resale restriction would have to meet a heavy burden of proof in order to overcome "a strong presumption that the anti-competitive provision is contrary to the public interest."[20]

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

On March 26, 1982, a jury verdict in favor of various users of natural gas was entered in the United States District Court for New Mexico against certain producers and suppliers based on allegations that defendants conspired, through joint settlement of disputes over pricing terms of gas purchase contracts, to increase the wellhead price of natural gas in the San Juan Basin of New Mexico. On January 27, 1983, defendants' motions for a new trial based on a juror's disqualification were granted. On July 1, 1983, after defendants' motion for a change of venue was granted, Chief District Court Judge Sherman Finesilver (U.S.D.C. Colorado) was assigned this case. Southern Union companies remain as sole defendants, with settlement agreements involving Conoco, Inc. and Consolidated Oil and Gas, Inc. having been approved. On February 2, 1984, Judge Finesilver denied plaintiff's motion to reinstate the jury verdict. Motions of both plaintiffs and Southern Union for summary judgement on the extent of alleged damages remain pending. Trial is scheduled to begin April 9, 1984, in Denver, Colorado, and will involve the trial of both liability and damage issues.

II. Electric Utilities

A. Alabama Power Co. v. Nuclear Regulatory Commission, 692 F.2d 1362 (11th Cir. 1982), *cert. denied,* 52 U.S.L.W. 3251 (U.S. Oct. 4, 1983)

Last year this committee noted this decision by the Eleventh Circuit. The court held that, in determining whether to impose conditions on the issuance of an operating license for a nuclear power plant, the Nuclear Regulatory Commission (NRC) 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 Eleventh Circuit had 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 Commisison in that it required it to consider the antitrust ramifications of licensing actions. Consequently, it was proper for the NRC's Atomic Licensing Board to hear evidence of alleged anticompetitive conduct on the part of the Alabama Power Company, and to order ownership access to the new plant to remedy antitrust concerns.

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[18] *Id.*
[19] *Gulf States Utilities Company,* 5 FERC ¶ 61,066 (1978).
[20] Mimeo at 11.

In October 1983, the Supreme Court denied review of the *Alabama Power Co.* decision, thereby allowing the Eleventh Circuit's ruling to stand.

B. *Borough of Ellwood City, Pa. v. Pa. Power Co.,* 570 F.Supp. 553 (S.D. Pa. 1983)

In this action, a federal district court denied part of a summary judgment motion by defendant Pennsylvania Power Company (Penn Power), in an antitrust suit brought by plaintiffs under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a).

Plaintiffs, Boroughs of Ellwood City and Grove City, Pennsylvania (Boroughs), sell electric power to consumers at retail. The Boroughs purchase power wholesale from Penn Power. The Boroughs alleged that Penn Power imposed an anticompetitive price squeeze upon Boroughs by manipulating the relationship between its wholesale rate to Boroughs and its retail industrial rates, in violation of the Section 2(a) prohibition against discrimination of price "between different purchasers of commodities of like grade and quality . . . ." 15 U.S.C. Section 13(a).

On its motion for summary judgment, Penn Power admitted that the rate differential existed, but contended that an earlier determination by the Federal Energy Regulatory Commission (FERC) precluded action by the court. FERC had found that factual circumstances existed that justified tolerance of the price squeeze. Conceding that FERC had decided the main issue before it, the court nevertheless held that the FERC determination did not have a preclusive effect, because Congress has placed antitrust jurisdiction in the district courts and because the courts can afford relief that FERC cannot provide. Consequently, the court denied Penn Power's motion for summary judgment.

C. *City of Cleveland v. Cleveland Electric Illuminating Co., appeal docketed,* No. 82-3053 (6th Cir.)

This litigation began in 1975 when the City of Cleveland filed suit in the North District of Ohio against Cleveland Electric Illuminating Co. (CEI) (an investor-owned electric company), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and Toledo Edison Company alleging that they had conspired to violate Sections 1 and 2 of the Sherman Act. Before trial all the defendants, except CEI, settled with the City. Among the allegations was that CEI has refused to wheel power to the plaintiff.

The case has gone before a jury twice. The first trial resulted in a mistrial because of a divided jury and the second trial concluded in a jury verdict for the defendant. This judgment of the district court has been appealed to the Sixth Circuit. Oral argument in the appeal was presented in 1983, but no decision was rendered by the Court of Appeals by the end of the year.

Earlier court decisions in this litigation have included unsuccessful actions to disqualify CEI's counsel[21] and to disqualify the judge.[22] At one point in the litigation, the Sixth Circuit held that action by the FPC against the City to require it to make certain payments to CEI did not preclude CEI from counterclaiming in the antitrust case pending at the district court.[23] Various other issues for which there are reported decisions have also been dealt with by the district court.[24]

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[21] 440 F. Supp. 193 (1976), *aff'd,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978).
[22] 503 F. Supp. 368 (1980).
[23] 570 F.2d 123 (6th Cir. 1978).
[24] *See, e.g.,* 538 F. Supp. 1303 (1980); 538 F. Supp. 1336 (1981), and 538 F. Supp. 1328 (1981).

D. *City of Chanute v. Kansas Gas and Elec. Co.*, 564 F. Supp. 1416 (D. Kan. 1983)

Plaintiffs, Cities of Chanute, Fredonia and Iola, Kansas (Cities) were granted their motion for a preliminary injunction under Section 16 of the Clayton Act, in an antitrust action brought against Kansas Gas and Electric Company (KG&E).

Cities distributed electricity at retail to customers within their respective areas, generating some of the power they sell and supplementing their generation capabilities with power purchased at wholesale from KG&E to meet additional energy demands. KG&E owns or controls the only electric transmission facilities connected to Cities distribution lines, and is the only wholesale supplier of electric power to Cities. KG&E had previously entered into interconnection agreements with the Cities.

In 1981, KG&E adopted a policy towards its municipal wholesale customers under which KG&E would continue to furnish their current wholesale needs but would not build facilities to furnish additional power. Accordingly, each of the plaintiffs acquired an outside source of supplemental electricity. A condition to receiving the supplemental power was that Cities would secure necessary transmission arrangements. In this regard, Cities had two alternatives: (1) contract with KG&E to wheel the power through its transmission lines, or (2) use another utility to construct the lines, the nearest of which was located approximately 15 to 43 miles from the Cities. Because of the substantially higher cost of the latter alternative, Cities sought to contract with KG&E to wheel power. KG&E agreed to provide the necessary wheeling services, but on the condition that Cities enter into new interconnection agreements and accept different terms regarding the purchase of KG&E power. Such terms would include an increase in cost of power, and would allow more frequent rate increases than under existing agreements.

Consequently, Cities initiated this action under Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and Kansas law, alleging that conditioning wheeling on terminating existing interconnection agreements effectively amounted to an unreasonable refusal to wheel electricity. Cities premised their right to a preliminary injunction under Section 2 of the Sherman Act.

In granting the motion, for a preliminary injunction, the court held that Cities satisfied the prerequisites of injunctive relief. The issue of whether the condition imposed by KG&E on wheeling power to Cities is reasonable in light of the circumstances was, in the court's opinion, one that is "fair ground for litigation and more deliberate investigation." A more compelling case, the court continued, was stated under Cities "bottleneck" theory of market power, under which a business which controls a scarce facility has an obligation to give competitors reasonable access to it.[25] The court believed that Cities raised "more than a substantial question" as to whether KG&E controlled "an indispensable facility," constituting monopoly power.

The court also rejected KG&E's argument that Cities had an adequate remedy at law, being that they could petition the Federal Energy Regulatory Commission to order wheeling. Examining the legislative history of the Public Utility Regulatory Policies Act of 1978, the court found explicit congressional intent not to defer antitrust laws pending resolution of wheeling matters by FERC.

Balancing the hardships to the parties, the court held that the equities favored Cities. In the opinion of the court, if Cities were not to accept present allocations from alternative sources, this could affect its future availability. The court rejected KG&E's contention that Cities had an alternative, which would be to sign new

[25] *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

contracts with KG&E and safeguard their allocations, in which case KG&E claimed that any damages incurred later would be readily ascertainable. The court believed that "the proposed contracts are perceived by the Cities as sufficiently deletorious to threaten the loss of the [alternative] allocations."

Under the preliminary injunction, KG&E is to provide wheeling services to Cities, who are to compensate KG&E at the prevailing rate it charges other municipal customers for wheeling power. KG&E has appealed.

E. *City of Hagerstown (Md), et al. v. Potomac Edison Company, et al.*, Civil No. 83-2990 (D. Md).

On August 17, 1983, Plaintiffs, Cities of Hagerstown, Thurmont and Williamsport, Maryland (Cities), filed a complaint in federal district court in Maryland, alleging antitrust violations by defendants Potomac Edison Company (PE), Allegheny Power System, Inc. (APS) and Allegheny Power Service Corporation (APSC). Cities seek declaratory and injunctive relief and treble damages.

Cities own and operate their own electrical distribution systems and distribute power at retail to customers in their areas. PE transmits and distributes electric power at wholesale and at retail throughout Maryland, Virginia and West Virginia, and supplies all of Cities' electric power requirements at wholesale. APS is a holding company, whose subsidiaries include PE and other power companies in the tri-state region. Cities claim that PE, APS and APS' subsidiaries dominate and control the distribution and sale of wholesale and retail electric power in this region, and the facilities for transmission of electric energy in the region. Cities also maintain that defendants own and control the only transmission facilities connected to Cities.

In this suit, brought under Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act, Cities allege, *inter alia,* that defendants have monopoly power over the transmission and sale of electricity in the region. Cities allege that defendants' anticompetitive acts include the filing of a proposed new wholesale rate resulting in projected increased charges of approximately 35 to 40 percent for Cities, while not providing for a corresponding increase for its retail customers. Cities claims that PE offered to accept a lower increase in rates with respect to any of its wholesale customers who agreed not to pursue their right to litigate further issues, including price squeeze, at the Federal Energy Regulatory Commission. Cities maintain that other of PE's wholesale customers so agreed, but that Cities continued to litigate. Cities assert that the effects of defendants' anticompetitive actions include, *inter alia,* that competition in the sale of electric power has been substantially lessened or eliminated, and that Cities are being denied the benefits of lower cost power and an expanded revenue base.

The defendants have moved for a stay of this action, pending a FERC determination on the price-squeeze action between the parties.

F. *City of Kirkwood v. Union Electric Company,* 671 F.2d 1173 (8th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3546 (U.S. Jan. 25, 1983).

The Supreme Court refused to disturb a 1982 Eighth Circuit decision (noted in the last committee report) which held that the Union Electric Company (UE) in an action against it brought by the municipality of Kirkwood, Missouri, is not immunized from antitrust liability.

UE produces, transmits, and delivers power to wholesale customers. Among UE's wholesale customers is the City of Kirkwood, which sells the power it purchases from UE at retail to customers in approximately two-thirds of Kirkwood. UE

supplies retail electric service in the remaining areas. Kirkwood claimed 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 retail customers. Kirkwood alleged that, as a result, it was unable to attract large industrial customers to settle in its distribution area.

The Eighth Circuit rejected UE's argument that the implied immunity and state-action exemption bar antitrust liability where the alleged violation is based solely on the use of rates filed with the relevant federal and state regulatory agencies. The court noted that Federal Energy Regulatory Commission regulation is limited to wholesale rates and the state public service commission regulation is limited to retail rates. Thus, neither agency has exclusive jurisdiction to remedy anticompetitive effects caused by a relationship between wholesale and retail sales resulting 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 consideration 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.

The court also rejected UE's argument that the *Noerr-Pennington* doctrine, whieh recognizes first amendment rights to induce governmental aciton, protected UE's rate filing activities from antitrust liability.[26] The court held that athis doctrine will not protect a utility which manipulates federal and state regulatory processes to achieve anticompetitive results.

Finally, the court held that electricity is a "commodity" within the meaning of the Robinson-Patman Act, ruling that electricity does not fall within exemptions from that Act for sales of real property, intangibles, or services.

G. *Grason Electric Co. v. Sacramento Municipal Utility District,* 571 F. Supp. 1504 (E.D. Cal. 1983)

Plaintiffs, electrical contractors in the Sacramento, California area, were denied summary judgment under Section 2 of the Sherman Act in an action against defendant Sacramento Municipal Utility District (SMUD), a publicly owned electrical utility. Plaintiffs were proceeding under the "monopoly leveraging" theory propounded in *Berkey Photo, Inc. v. Eastman Kodak,*[27] the essence of which is that a firm violates Section 2 by using its monopoly power in one market to gain an unwarranted competitive advantage in another. The court concluded that plaintiffs failed to meet their burden of showing the absence of a genuine issue of material fact in regard to those elements.

In addition to engaging in the retail sale of electricity in the Sacramento area, SMUD installs and maintains electrical distribution systems and outdoor lighting systems on its customers' property. The crux of plaintiffs' complaint regarding the electrical distribution systems was that SMUD, being the sole seller of electricity in the area, used its monopoly power to encroach on what would otherwise be free competition for teh construciton of necessary distribution facilities. According to plaintiffs, this was accomplished because SMUD supplied all of the distribution

[26] See *Eastern Railroad Conference v. Noerr-Freight Co.,* 365 U.S. 127 (1961), *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

[27] 603 F.2d 263 (2nd Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980).

equipment connected to its customers' property, and because SMUD generally would not permit outside firms, such as plaintiffs, to perform this work.

The court held that plaintiffs satisfied one part of their monopoly leveraging claim by showing that SMUD possesses monopoly power over electricity in the Sacramento area. Plaintiffs, however, failed to demonstrate (at least for summary judgment purposes) that an electrical distribution system is separate from the product controlled by SMUD (electricity); the court held that the consumer had no interest in the system independent of the desire to obtain electrical power.

As for plaintiffs' claim regarding lighting systems, this failed "on the even more fundamental ground" that plaintiffs did not establish that SMUD's activities in this area constituted an unlawful use of monopoly power. Plaintiffs had asserted, *inter alia,* that SMUD illegally leveraged power by offering to construct and maintain lighting systems at no initial cost (but later charging a higher monthly rate), and by using its own utility poles for mounting lights without allowing plaintiffs to mount anything on these poles. The court held that any firm, including monopolists, can use regular contacts with its customers to promote new services. Similarly, any firm can offer goods and services and not immediately receive payment in full, without being liable for anticompetitive pricing. Finally, the court did not find evidence that SMUD controlled all or most of the poles in tis service area, nor that there were not alternative sites upon which lights could be mounted.

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

This action, noted in the last committee report, remains pending before the district court. The Government contends that Kentucky Utilities Company has attempted to monopolize and has monopolized electric power distribution in violation of Section 2 of the Sherman Act by refusing to wheel Southeastern Power Administration (SEPA) wholesale electricity to "captive" wholesale customers. As defined in the complaint, such customers are those that are connected to electric transmission facilities owned and operated only by Kentucky Utilities and for whom it would be economically impractical to contract alternative facilities for electric power transmission from sources such as SEPA.

As a result of the refusal to wheel, the Government alleges that Kentucky Utilities' wholesale customers have been deprived of alternate sources of power thus allowing the defendant to customers. The Government is seeking an injunction against the utility's refusal to transmit electric power form other suppliers over its facilities and asks that the utility be required to file pertinent tariffs with the FERC.

In 1983, there were several discovery issues raised by the parties which are now pending resolution by the court. No trial date has been set by the court.

I. *Wabash Valley Power Association v. Northern Indiana Public Service Company,* No. 83-0156 (N.D. Ind. filed April 14, 1983)

Plaintiff Wabash Valley Power Association (Wabash), representing twenty-four Indiana rural electrical membership cooperatives, filed suit against the Northern Indiana Public Service Company (NIPSCO) seeking in junctive relief and treble damages under the Clayton Act, 15 U.S.C. Sections 15 and 16.

Neither Wabash nor its members own transmission or electrical generating facilities, but instead purchase electricity wholesale from NIPSCO, which transmits the power to Wabash members through its transmission system. However, Wabash competes with NIPSCO for resale of electricity to retail residential and industrial

customers in Wabash, Indiana. In its complaint, Wabash alleged, *inter alia,* that "[b]ecause of NIPSCO's unconditional refusal to interconnect its transmission facilities with and to wheel lower cost power for Wabash Valley, NIPSCO has impaired, and continues to impair, the ability of Wabash Valley to compete with NIPSCO. . . ." Wabash also alleged that NIPSCO agreed to wheel power to other cities.

The case is now pending.

J. *Wagner v. Central Louisiana Electric Co., Inc.*, 1982-3 Trade Cas. (CCH) ¶ 65,705 (E.D. La. 1983)

In this case, brought under Section 1 of the Sherman Act, the court denied plaintiff's motion for certification of a class action under Rule 23(c)(1) of the Federal Rules of Civil Procedure.

Defendants are the Central Louisiana Electric Company, Inc. (CLECO) and the Washington-St. Tammary Electric Cooperative (Co-op), both of which supply electricity to the city of Slidell, Louisiana. Plaintiffs alleged that in 1966 the defendants executed an agreement purportedly dividing Slidell into two parts, constituting a conspiracy in restraint of trade in the form of a horizontal allocation of territory. This arrangement, plaintiffs, contend, violates federal antitrust law in that plaintiffs have been deprived, to their detriment, of free and open competition in the distribution and sale of electric power. Plaintiffs sought to represent past and present customers of CLECO in a class action. The only issue before the court was whether the class should be certified.

In denying certification, the court held, *inter alia,* that common issues did not predominate the action, as required by Rule 23(b)(3). Louisiana state regulatory provisions prohibited electric utilities from competing for existing customers and imposed restrictions on the ability of utilities to compete for new customers. Consequently, plaintiffs could not show on a class-wide basis that, in the absence of the alleged agreement, Co-op could have been authorized to serve CLECO's customers (members of the class) or that, had CLECO and Co-op competitively served the members, the rates would have been lower.

Plaintiffs have reapplied for certification, having added additional members.

III. Oil

A. *California v. Standard Oil of California,* 671 F.2d 1335 (9th Cir. 1982), *cert. denied,* No. 82-1938 (January 16, 1984)

The U.S. Supreme Court has denied the petition for writ of certiorari filed by five states (Arizona, California, Florida, Oregon and Washington) seeking review of the circuit court's decision in *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation State of California, et al. v. Standard Oil Company of California, et al.*, 671 F.2d 1335 (9th Cir. 1982). Charged by the states in their proprietary capacity and on behalf of their citizens as *parens patriae,* the defendant oil companies successfully moved dismissal of portions of the complaint on the ground that the states are indirect purchasers within the rule of *Illinois Brick Co. v. Illinois.*[28] The Ninth Circuit affirmed the district court's rulings that (1) *Illinois Brick* barred claims based upon purchases from sellers competing, but not conspiring, with defendants, and (2) plaintiffs must join some 35,000 retailers in order to pursue an

[28] 431 U.S. 720 (1977).

alleged conspiracy between defendants and retailers. (For a full summary of the Ninth Circuit's opinion, see 1983 Report of the Committee on Antitrust, 4 *Energy Law Journal* No. 1 (1983) at 101-03).

B. In the Matter of Ethyl Corporation, Federal Trade Commission Docket No. 9128, Final Order, Issued March 22, 1983.

The case involved companies producing "lead antiknock compounds," and an FTC complaint alleging four types of practice having the effect of reducing competition by "facilitating" uniform, supracompetitive prices: (1) use of advance notice of price change clauses in sales contracts and providing notice in excess of 30 days; (2) providing advance notice of price changes to the press and others; (3) use of "most favored nation" price clauses in sales contracts; and (4) use of uniform delivered pricing. The Commission ordered respondents (a) to cease distributing or communicating in any manner to any person outside their companies (other than persons under contract in connection with marketing or sales) notice concerning any change in the list price of anti-knock compound in advance of the period contractually required, and (b) to cease entering into, or complying with, any contract, for sale to any customer, containing a most favored nation agreement.

The most favored nation clauses involved required a seller to offer the benefits of a lower price to all customers if it offered the price to any. The Commission found the most favored nation clauses to have made a "significant contribution to reduced price competition when used in conjunction with the other practices we find anticompetitive." The Commission relied upon the "particular circumstances of this industry" in so concluding, noting that a different conclusion might be appropriate in other industries with different structural and operating characteristics.

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