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THE APPLICABILITY OF ANTITRUST LAWS TO PRICE SQUEEZES IN THE ELECTRIC UTILITY INDUSTRY

INTRODUCTION

The Federal Energy Regulatory Commission (FERC or the Commission)\(^1\) is empowered to approve rates charged for electric power sold at wholesale in interstate commerce.\(^2\) State agencies, on the other hand, regulate the prices that utilities can charge for intrastate sales at retail.\(^3\) A consequence of this dual regulation is the possibility that wholesale rates may exceed retail rates.\(^4\) Since municipally-owned electric utilities usually do not have their own generating facilities, they must buy power at wholesale from investor-owned utilities.\(^5\) Although municipal electric utilities generally are not constrained by the state-established retail prices,\(^6\) the two-tiered price system affects the municipal utilities because the investor-owned utilities also provide retail services and therefore


> The provisions of [sections 824-824h] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy. . . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy. . . .

*Id.* at 824(b); see FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964); Foster, Garfield & Herz, *FPC Regulation of Sales of Electric Energy at Wholesale*, 51 Va. L. Rev. 76 (1965); notes 21-29 and accompanying text *infra*.

\(^3\) See notes 132-137 and accompanying text *infra*.


When the wholesale rates paid by a municipal company are higher than the retail prices that private utilities charge, a "price squeeze" occurs, placing the municipal utility at a competitive disadvantage. Since neither the state nor federal regulatory agencies have afforded an adequate solution to this problem, several municipal utilities have sought redress under the federal antitrust laws.

Section 2 of the Sherman Act prohibits "every person" from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person . . . to monopolize any part of the trade or commerce among the several States . . . ." Despite the breadth ascribed to "persons," certain regulated industries and professions have been exempted from compliance with the antitrust laws pursuant to judicially created or express statutory grants of immunity. In the electric utility industry, no express statutory

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8 See cases cited in note 4 supra. In addition to "price squeezes," poor management, line losses in excess of those typically experienced in the industry, and outdated equipment also may explain why municipal systems cannot compete effectively with the larger, more efficient investor-owned systems. See generally, Fairman & Scott, supra note 7, at 1163 n.19.

As of 1973, municipally-owned power companies were operating in 44 states. 1973 FPC Regulatory Survey, supra note 6, at 2. The total number of municipally-owned electric utilities in the United States in 1975 was 2,224. Pub. Power Jan.-Feb. 1978, at 36. Recently, however, the number of municipal systems being taken over by investor-owned utilities has exceeded the number being formed. From 1960 to 1969, 72 municipal systems were purchased by investor-owned companies while only 23 new systems were formed. Fairman & Scott, supra note 7, at 1163 n.20.

13 Statutory exemptions stem from two sources. Some are contained in the antitrust laws themselves. E.g., Robinson-Patman Act, § 4, 15 U.S.C. § 13c (1976); Clayton Act, §§ 6, 7, 15 U.S.C. §§ 17, 18 (1976). Other exemptions can be found in trade regulation statutes. E.g.,
immunity exists and it has been clear since the Supreme Court decided *Otter Tail Power Co. v. United States*\(^4\) that some anticompetitive activities may give rise to antitrust liability despite the highly regulated nature of the industry.\(^5\) Whether the existence of a "price squeeze" gives rise to liability or even establishes a prima facie violation of the antitrust laws, however, is currently an open question.

This Note briefly describes the rate-making functions of the federal and state regulatory agencies in the electric utility industry and the price squeezes that occur as a result of the gap inherent in the dual regulatory system.\(^6\) Two recent attempts by municipal utilities caught in price squeezes to seek redress under the antitrust laws and the issues raised by the defendants—the doctrines of exclusive jurisdiction, primary jurisdiction, and state action immunity—are then examined.\(^7\) In discussing these doctrines, the Note comments upon their apparent inapplicability to the utility price squeeze antitrust action.\(^8\) The Note then analyzes two key issues which arise in establishing that a price squeeze is a violation of section 2 of the Sherman Act: whether the allegation of a mere disparity between wholesale and retail rates is sufficient to state a cause of action and whether federal antitrust remedies are applicable to such price squeeze situations.\(^9\) Finally, recent legislative proposals which could obviate the necessity of antitrust litigation are explored.\(^10\)

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\(^{10}\) See notes 177-183 and accompanying text infra.
FERC vs. The State Regulatory Agencies—The Price Squeeze

The standard employed by both the federal and state agencies in approving retail and wholesale electric utility rates is one of reasonableness. Price squeezes do not necessarily represent the product of arbitrary or unreasonable rate-approval practices on either the state or federal level. Rather, the price squeeze constitutes the “synergistic” effect born in certain geographic areas from the interaction of the state-approved retail rate and the federally-approved wholesale rate.

The FERC

Congress, having declared that the sale and transmission of electricity affects the public interest, delegated to the FERC the power to regulate rates charged for electric power sold at wholesale in interstate commerce. The Federal Power Act (the Act) provides that the rates must be just, reasonable, and not unduly discriminatory and that utilities may not charge other than the filed rates. If rates are found to be unjust, unreasonable, or unduly discriminatory, the FERC may determine and set just rates. Although Act requires electric utilities to file current rates with the Commission, approval is not necessary. The FERC may delay the effective

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22 Id. § 824(b). The Supreme Court’s decision in FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964), greatly expanded the scope of the Commission’s regulation of electric power sold at wholesale. Rejecting the view that the Commission’s jurisdiction should be determined on a case-by-case basis, the Court stated that the Federal Power Act gave the Commission jurisdiction over “all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.” Id. at 216.

Subject to its jurisdictional limits, the FERC is authorized, inter alia, to order the interconnection of generating facilities, 16 U.S.C. § 824a(a) (1976), as amended by Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3142 and the wheeling of power to preserve competition, 16 U.S.C. § 211 (1976), although it was not so authorized prior to 1978. See id. §§ 824-824h. For an overview of the FERC’s authority in regulating electric utilities, see 7 J. Von Kalinowski, supra note 13, § 44A.08(2).
23 16 U.S.C. § 824d (1976) provides in pertinent part:
   (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not . . . is hereby declared to be unlawful.
   (b) No public utility shall . . . (1) . . . subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates . . . either as between localities or as between classes of service.
date of new rates for up to seven months to determine their lawfulness, but once the period has expired, the rates automatically become effective regardless of whether the Commission has completed hearings on the matter. If the suspension period expires with no determination made, the rates are subject to refund should the Commission conclude that such rates are unlawful. Once the Commission approves the rates, however, it does not have power to invalidate the rates retroactively or award reparations if the rates are later found to be unreasonable.

The rate-making process is complicated and time consuming.

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23 16 U.S.C. § 824d(d) (1976), as amended by Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617 §§ 207(a), 208, 92 Stat. 3142. Section 205(d) of the Act requires that a utility wishing to change a rate schedule give 60 days notice to the Commission and the public prior to the time it is to go into effect. Id. At any time before the effective date, the Commission may order an investigation to examine the lawfulness of the proposed rates either upon receipt of a complaint or upon its own initiative, and suspend the effectiveness of the proposed rates up to 5 months from the date they should have gone into effect. 16 U.S.C. § 824d(e) (1976). In ordering a rate hearing, the FERC must give reasonable notice to the filing utility and state its reasons for the suspension. The burden is on the filing utility to show that the proposed rates are reasonable, just and not unduly discriminatory. Id.


30 The rate-making process involves the resolution of four factors. First, the company's gross utility revenues must be determined. 1 A. Priest, Principles of Public Utility Regulation 45 (1969). Second, an estimate of the operating expenses incurred in accumulating gross revenues must be made. Id. Operating costs are then subtracted from the gross revenue to arrive at a figure for the utility's capital costs. Id.; see State Governments' Report, supra note 6, at 25. Third, the property providing the service for which rates are charged, such as transformers and power generation facilities, must be valued since it represents the rate base. 1 A. Priest, supra, at 46. Two methods are used to determine a utility's rate base: the original cost method used by the FERC and a majority of state commissions, see 1973 FPC Regulatory Survey, supra note 6, at 50, which uses the figure from the utility's accounts, 1 A. Priest, supra, at 46, and the fair value method which uses factors such as replacement costs, id. Finally, the rate of return must be determined so that the return to which investors are entitled may be established. Id.

The Supreme Court has held that rates must be established which will be "commensurate with returns on investments in other enterprises having corresponding risks." FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). After these four factors have been resolved, a rate schedule is devised that will give the company an opportunity to earn its revenue requirements. 1 A. Priest, supra, at 46. As a result of the adoption of a particular rate schedule, different classes of customers are charged different rates. Such differential pricing is lawful. P. Garfield & W. Lovejoy, Public Utility Economics 136 (1964) (citing G. Stigler, The Theory of Price 223 (1947)). Electric utilities typically have five major customer classes. They are: wholesale, residential, industrial, commercial, and institutional. State Governments' Report, supra note 6, at 49. Within the various classes, rates will differ depending on the level of kilowatt consumption. Id.

It is generally agreed that a utility's rate structure should approximate the cost of providing the service. Id. A utility's costs are usually grouped into three categories. First, there are
In the three to four years that often elapse from the time a rate is filed until it is approved, power companies have frequently filed for subsequent rate increases which have gone into effect subject to refund. It is this "pancaking" of rates, compounded by the long delays in the rate approval process, which leads to the creation of a price squeeze.

The State Regulatory Agency

While regulatory commissions have been established by all fifty states and the District of Columbia to oversee the operation of public utilities, their powers vary. A common purpose among the

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customer costs which include "accounting, billing, metering . . . service connections and certain advertising and distribution" costs. Id. Next, there are operation of energy costs which include "fuel, labor, materials, and maintenance." Id. The third category is demand costs which cover the cost of "generation, transmission, and distribution plant (reflected by depreciation), allowed rate of return on rate base, property taxes, and interest charges on long-term debt." Id. After a utility's costs have been determined, they are apportioned among the various classes of customers. Id. For a discussion of rate structures and design, see ESSAYS ON PUBLIC UTILITY PRICING AND REGULATION (H. Trebling ed. 1971); Huntington, The Rapid Emergence of Marginal Cost Pricing in the Regulation of Electric Utility Rate Structures, 55 B.U.L. REV. 689 (1975); Rate Design For Electric Corporations, 15 Pub. Util. Rep. 4th 434 (N.Y. Pub. Serv. Comm'n 1976); Note, Lexonomics and the Electrical Utility Industry: In Search of the Optimal Rate Structure, 61 IOWA L. REV. 134 (1975); 1978 ANN. SURV. AM. L. 559.

21 In City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977), the wholesale rate in question was filed with the Commission in June 1972, and final resolution occurred five years later. Id. at 1324.


23 Id.; AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ELECTRIC UTILITY RATE REFORM 1, 16 (1977).

24 STATE GOVERNMENTS' REPORT, supra note 6, at 17. State regulatory commissions were created in an attempt to remedy the failure of state legislatures and courts to control and oversee the large utility companies. Id. at 16-17. State regulatory structures are typified by the Delaware scheme.

The Delaware legislation provides:

No public utility shall make, impose or exact any unjust or unreasonable or unduly preferential or unjustly discriminatory individual or joint rate for any product or service supplied or rendered by it within the State, or adopt, maintain or enforce any regulation, practice or measurement which is unjust, unreasonable, unduly preferential or unjustly discriminatory or otherwise in violation of law, or make, or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any particular description of traffic, in any respect whatsoever.


To enforce this mandate, Delaware created a public service commission (PSC) consisting of five members. Id. § 103(a). The PSC has "exclusive original supervision and regulation of all public utilities and also over their rates. . . ." Id. § 201. The regulation of municipally-owned utilities, however, is not within the jurisdiction of the PSC. Id. § 202. The commission has the power to require public utilities "to file with the Commission complete schedules of
state commissions, however, is “to secure the benefits of a natural
monopoly but to prevent most of the inherent abuses.” Thus, like
the Federal Power Act, most states forbid the maintenance of rates
which are unduly or unreasonably discriminatory. To ensure that
the retail rates within their respective jurisdictions are not unrea-
sonable or unduly discriminatory, most state commissions can re-
quire prior authorization of rate changes, suspend the effectiveness
of proposed rates, investigate the lawfulness of rates, and prescribe
temporary rates pending the outcome of investigations.

The vast majority of state commissions regulate not only
investor-owned electric utilities but gas and telephone utilities as
well. In addition, almost half of the commissions perform other
duties which, compounded by the complexity and time consumed
determining the reasonableness of rates, contribute to the delays
encountered in receiving approval of retail rate schedules. To

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For a discussion of the various state statutes, see 1 A. Priest, supra note 30, at 286.


1973 FPC Regulatory Survey, supra note 6, at 7-8.

Id. at 3-8. Forty-six states vest their commissions with the power to regulate electric, gas and telephone utilities. Id. Although all the state commissions are empowered to regulate retail rates charged by investor-owned power companies, most have no authority to regulate rates charged by municipally-owned systems, and even among those that do, the extent of such regulation varies. See note 6 and accompanying text supra.

1973 FPC Regulatory Survey, supra note 6, at 124. Commission duties include regulation of insurance companies, collection of taxes on motor vehicles, and enforcement of “Blue Sky” laws. Id.

Delays encountered in receiving approval of rates by a state commission might be alleviated if proposals similar to one recently presented to the New York Senate were put into
effect. See N.Y.S. 1245, 201st Sess. (1978). This bill would prohibit the Public Service Com-
mission from granting an increase to any electric or gas utility which has received an increase
in the preceding 24 months, thereby reducing the number of rate filings. Temporary rate relief
could be granted, however, if extraordinary conditions existed. Id. This proposal, however,
could easily create or perpetuate price squeezes. If a utility is prohibited from seeking a retail
rate increase but is permitted to “pancake” wholesale rate filings, the likelihood is increased
that wholesale rates at some point will exceed retail rates.
counter these delays, some state commissions routinely halve rate
increases requested by utilities, thereby creating or exacerbating a
disparity between retail and wholesale rates. Additionally, since
most state commissions, in contrast to the FERC, are not author-
ized to permit proposed retail rates to be collected subject to re-
fund, pancaking of retail rates is unlikely. Thus, while the
investor-owned utility “pancakes” its wholesale rates, its retail
rates may increase more slowly.

Federal Power Commission v. Conway—An Illustration of the Price Squeeze

Until the Supreme Court’s decision in Federal Power Commis-
sion v. Conway, it was not clear that the FERC was empowered
to consider whether a utility’s wholesale rates were discriminatory
and noncompetitive when compared with a utility’s nonjurisdic-
tional retail rates. In Conway, defendant Arkansas Power & Light
Co. filed a wholesale rate increase with the Commission. Several
of the company’s municipal wholesale customers in competition
with the defendant at the retail level sought to intervene in the
rate proceeding, arguing that the increase should be denied
because, inter alia, it “was ‘an attempt to squeeze [the municipal
utilities] . . . out of competition and to make them more suscep-
tible to the persistent attempts of the company to take over the
public[ly] owned systems in the State.’” Noting that its jurisdic-
tion covered only wholesale rates, the Commission allowed inter-
vention but refused to consider the price squeeze allegation because
its statutory jurisdictional grant would be exceeded. The Com-
mission reasoned that any anti-competitive effect of the price
squeeze would be the result of the retail rate set by the state com-
mission, since a determination that a wholesale rate is just and
reasonable precludes any anticompetitive consequences. Rejecting
the Commission’s argument, the Supreme Court held that the

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4 If a utility files a retail rate that is in parity with its wholesale rate but the retail rate
is automatically reduced, a price squeeze may be created through no fault of the filing utility.
4 Id. at 274.
4 Id. (quoting appellants’ brief at 6). The plaintiffs asserted that the proposed rates were
“plainly discriminatory” and would make it impossible for them to offer electric power at a
competitive price. Id. at 274-75.
4 Id. at 275.
4 Id. at 277-78.
agency must consider allegations of a price squeeze in setting wholesale rates. The Court stated that although the wholesale and retail rates may be reasonable when considered separately, their relationship may produce a discriminatory effect. Since the discrimination can be traced to a rate within the Commission’s jurisdiction, it was determined that the wholesale rates must be set within the “lower range of the zone of reasonableness” to comply with the Act.

The Position of the FERC

Consistent with the Conway decision, a recently promulgated FERC procedure allows “[a]ny wholesale customer, state commissioner or other interested person” to “file petitions to intervene alleging price discrimination and anticompetitive effects of the wholesale rates.” Regardless of who intervenes, the investigation

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49 Id. at 278. In rejecting the FERC’s argument, the Court quoted a previous statement of the Commission:

It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate per se, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

Id. (quoting Otter Tail Power Co., 2 F.P.C. 134, 149 (1940)).

50 426 U.S. at 279.

51 Id. The Court quoted from Gulf States Util. Co. v. FPC, 411 U.S. 747 (1973), wherein it was noted that among other powers granted to the Commission by the Federal Power Act was “the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206 . . . .” 426 U.S. at 279 (quoting 411 U.S. at 758-59). The Conway Court further construed § 206(a), see note 23 supra, to mean that “[t]he rules, practices, or contracts ‘affecting’ the jurisdictional rate are not themselves limited to the jurisdictional context.” 426 U.S. at 281.

52 18 C.F.R. § 2.17(a)(1978). An intervenor’s prima facie price squeeze case includes: 1) specification of the retail rate with which the intervenor is unable to compete; 2) proof of competition at retail between the intervenor and the filing utility; 3) proof that the proposed wholesale rates are higher than the present retail rates; 4) the intervenor’s comparable retail rate; 5) the reduction in the wholesale rate necessary to remedy the price squeeze. Id.

procedures provide for the participation of the state agency responsible for regulating the retail rates in issue. In addition, the wholesaler has the burden of disproving the existence of a price squeeze.

In Missouri Power & Light Co., the FERC recently sought to clarify the weight to be accorded allegations of a rate disparity and the consequent effects in deciding whether proposed wholesale rates are unlawful. In dicta, the Commission stated that although Conway directed it to consider price squeeze allegations in setting rates, the mere existence of a price squeeze does not render the proposed wholesale rates unlawful. It was asserted that the public interest, among other considerations, might render the rates not unduly discriminatory and hence lawful under the Act. While conceding that it must take into account "the fundamental national policy expressed in the antitrust laws," the Commission noted that the enforcement of procompetitive policies "cannot become [our] paramount goal." Thus, an evaluation of the "public interest"


18 C.F.R. § 2.17(f) (1978). By allowing participation by state commissions, the price squeeze procedure sets the stage for cooperation and coordination between the federal and state agencies.

Id. § 2.17(e).


19 Other factors which the FERC felt should be taken into account are "adequacy of service, reliability, [and] financial integrity." Id., reprinted in 16 Fed. Power Serv. at 5-274.


FERC Docket No. ER 76-539 (Oct. 27, 1978), reprinted in 16 Fed. Power Serv. at 5-
sometimes may outweigh any anticompetitive consequences resulting from approval of the proposed wholesale rates.\textsuperscript{63}

**Delmarva and Mishawaka: Differing Approaches**

Although *Conway* mandates that the FERC must consider price squeeze allegations, the Commission's position enunciated in *Missouri Power & Light* has not resolved the price squeeze dilemma. The Commission's apparent willingness to tolerate price squeezes as long as wholesale rates are not "unduly" discriminatory could have a devastating effect upon municipally-owned electric utilities. Absent an antitrust remedy, some municipal systems are likely to face competitive disadvantages sufficiently severe that they may be taken over by investor-owned utilities.\textsuperscript{64}

Recently, in *City of Newark v. Delmarva Power & Light Co.*\textsuperscript{65} and *City of Mishawaka v. Indiana & Michigan Electric Co.*,\textsuperscript{66} municipal utilities caught in price squeezes sought redress under the antitrust laws against investor-owned electric utilities, alleging that the maintenance of a price squeeze violated section 2 of the Sherman Act.\textsuperscript{67} The defendants interposed the administrative law prin-

\textsuperscript{63} FERC Docket No. ER 76-539 (Opinion No. 31, Oct. 27, 1978), reprinted in 16 Fed. Power Serv. at 5-274.

\textsuperscript{64} City of Shakopee v. Northern States Power Co., No. 4-75-591 (D. Minn. Oct. 18, 1976). The Shakopee plaintiffs alleged that "new industry will not locate in Shakopee if it must pay a higher power rate" and "existing industrial customers are pressuring Shakopee not to expand its service area and to get out of the power business altogether." *Id.*, slip op. at 2.

\textsuperscript{65} 467 F. Supp. 763 (D. Del. 1979).


\textsuperscript{67} Mishawaka, 560 F.2d at 1317; Delmarva, 467 F. Supp. at 765. The plaintiffs sued under the Clayton Act which authorizes private parties to initiate actions seeking treble damages, 15 U.S.C. § 15 (1976), and injunctive relief, *id.* § 26, for violations of the Sherman Act. Section 2 of the Sherman Act provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

*Id.* § 2.

The *Delmarva* plaintiffs also alleged that the defendant's activities constituted unreasonable restraints on trade in violation of § 1 of the Sherman Act, *id.* § 1, by preventing the plaintiffs from selling power to any of Delmarva's retail customers, by precluding the construction of transmission facilities, and by refusing to transmit power. 467 F. Supp. at 766. In addition to alleging violations of §§ 1 and 2 of the Sherman Act, the *Delmarva* plaintiffs
ciples of exclusive and primary jurisdiction and the judicially-created state action exemption doctrine. Basically, the doctrine of exclusive jurisdiction provides immunity from the antitrust laws for industries governed by a complete and pervasive federal regulatory scheme, provided certain criteria are fulfilled. In contrast, the primary jurisdiction doctrine, while not shielding conduct from antitrust proscriptions, mandates a stay in a judicial proceeding until the appropriate administrative agency has passed upon the issues within its jurisdiction. Two requirements have to be met before the doctrine applies: the agency’s determination must serve the interest of uniformity, and the agency’s expertise must be valuable to the court in reaching a decision. The third assertion, the state action exemption doctrine, protects conduct otherwise violative of the antitrust laws if undertaken pursuant to state directive.

The Mishawaka and Delmarva courts reached different results as to the applicability of exclusive jurisdiction and the state action exemption, apparently because of the distinguishable conceptual approaches used to analyze the issues. The Mishawaka court, finding that the defendant could be held liable for damages and injunctive relief, viewed the price squeeze problem as one which could not be remedied under the federal or state regulatory systems. Accoun-


Mishawaka, 560 F.2d at 1318-24; Delmarva, 467 F. Supp. at 768-71. Delmarva first moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), claiming that it was immune from liability for antitrust violations. 467 F. Supp. at 765-67. The Mishawaka defendants moved to dismiss on two alternative grounds: lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted. 560 F.2d at 1317. In the event these motions were denied, a stay was requested until the FERC concluded its hearings on the matter. Id.; 467 F. Supp. at 766.

See notes 94-100 and accompanying text infra.

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 439-40 (1907); see notes 125-130 and accompanying text infra.

Great N. Ry. v. Merchants' Elevator Co., 259 U.S. 285, 291 (1922); see notes 130-131 and accompanying text infra.

See notes 137-159 and accompanying text infra.


Since the defendants supplied 89% of the retail electricity in their areas and 95-100% of the power purchased at wholesale by the plaintiffs, the court found that the defendants possessed monopoly power over the sale of electric power at wholesale and retail in their
ingly, the court found that the FERC did not possess exclusive jurisdiction. Similarly, the state action exemption was inapplica-

graphic service areas. 465 F. Supp. at 1325-26. Having also found that the defendants and plaintiffs competed at retail for the business of residential and industrial customers, the court concluded that the defendants had utilized their monopoly power to engage "in anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding...an existing monopoly in retail sales..." Id. at 1326-28. The court stated that the defendants had been charging wholesale rates that, in effect, were unregulated due to their pancaking of rate filings with the FERC. These rates were found to be unreasonable by the court and hence in violation of the Federal Power Act because of the defendants' failure to achieve parity between their wholesale and retail rates. Id. at 1328. The court also noted that the anticompetitive effects of the defendants' rate structures were compounded by other practices engaged in by the defendants, such as expressions of their intent to discontinue sales at wholesale and attempts to impose contract provisions which would place the plaintiffs at an unacceptable competitive disadvantage. Id. at 1328-29.

The district court also concluded that when a defendant is found to possess monopoly power, only a general intent to monopolize need be shown and proof that the defendant engaged in predatory conduct is not required. Id. at 1329-32 (citations omitted). The Mishawaka defendants' general intent to monopolize had been shown by their failure to maintain a parity between their wholesale and retail rates. Id. at 1332-34. Assuming a specific intent to monopolize was necessary, it was found that this could be inferred from the defendants' maintenance of a price squeeze and attempts to discontinue their wholesale business to the plaintiffs. Id. at 1334-37.

The Mishawaka court rejected the defendants' contention that their conduct was immune from the operation of the antitrust laws under the Noerr-Pennington doctrine. Id. at 1337. In brief, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), established that efforts by private individuals to influence legislative and regulatory activity are not in violation of the antitrust laws despite anticompetitive motives. The Mishawaka court stated:

[N]othing in the Noerr opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct. 465 F. Supp. at 1337 (quoting Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976)). For a discussion of Mishawaka on remand, see 12 INn. L. Rev. 637 (1979).

The Mishawaka court also relied on Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Analogizing to Cantor, the Mishawaka court held that it would not be unfair to subject the defendants to liability for conduct required by the sovereign since the defendants could have avoided the disparity in rates. 560 F.2d at 1320-21. In reaching this conclusion, the court quoted with approval the interpretation accorded Cantor by the court in City of Shakopee v. Northern States Power Co., No. 4-75-591 (D. Minn. Oct. 18, 1976). The Shakopee court expressed the reasoning of Cantor as follows:

[If an anticompetitive practice is the product, at least in part, of the company being regulated, and could be avoided if the company chose to do so, then
ble because the antitrust laws would not conflict with a regulation by a state which did not have jurisdiction to remedy the price squeeze.  

In contrast to the Mishawaka court, which looked at the interrelationship of the federal and state structures, the Delmarva court appeared to view the regulatory systems independently. The court minimized the importance of Mishawaka's recognition that an antitrust remedy for price squeezes would fill the gap created by the inability of either the FERC or state regulatory bodies acting alone to eliminate the anticompetitive effect inherent in a disparity between retail and wholesale rates. Rather, it found that the relevant inquiry should be "whether the exercise of antitrust jurisdiction or the granting of a particular form of antitrust relief" would conflict with regulation by the FERC and state commissions.

Thus, when the court addressed the exclusive jurisdiction doctrine, it found that since Congress had empowered the FERC to set wholesale rates consistent with the public interest, the FERC's determination precluded the existence of anticompetitive situations. As additional support, the Delmarva court relied on the Supreme Court's holding that no one can claim to be entitled to an electric power rate other than the one on file with the Commission and "not even a court can authorize commerce in the commodity on other terms." The court concluded that granting damages would be inconsistent with the rates sanctioned by the FERC, although in-

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the anticompetitive condition is in reality the work of that company and is not "necessary" to the functioning of the regulatory scheme and will not be immunized from antitrust liability.

Id., slip op. at 6, quoted in 560 F.2d at 1320.

Finally, Mishawaka followed the reasoning of the Shakopee court in holding that no conflict existed between the application of the antitrust laws and regulation of rates by the FERC, because it is the relationship between the wholesale and retail rates which is challenged and not the wholesale rate per se. 560 F.2d at 1321. Thus, the anticompetitive effect was found to be "external" to the federal regulatory process. Id.

560 F.2d at 1320 n.7.

467 F. Supp. at 769. Despite the Delmarva court's assertion to the contrary, the Mishawaka court did consider whether antitrust liability would conflict with the federal regulation of electric power rates. See 560 F.2d at 1321; note 74 supra.

467 F. Supp. at 769.

Id. at 769-70.


467 F. Supp. at 771 (citing Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1923)). In Keogh, a manufacturer sought treble damages for the imposition of freight rates alleged to be arbitrary and unreasonable. Although the rate in question had been approved by the ICC after hearings in which the plaintiff had participated, Keogh asserted that he would have paid a different rate had it not been for the defendants' anticompetitive conduct. 260 U.S.
junctive relief may be available.\textsuperscript{81} Turning to the state action doctrine, the \textit{Delmarva} court emphasized that the antitrust laws must give way when they conflict with "activity authorized by a state in active pursuit of an established state policy."\textsuperscript{78} Since the state in this case had such a policy regulating electric utilities, and retail rates took effect pursuant to the policy, antitrust damage relief was barred.\textsuperscript{83}

The \textit{Mishawaka} and \textit{Delmarva} courts agreed that the FERC did not have primary jurisdiction over the price squeeze issue.\textsuperscript{84} Although the \textit{Delmarva} court conceded that the FERC's expertise would be helpful in determining whether to grant injunctive relief,\textsuperscript{85} at 162-65. The \textit{Keogh} Court enumerated three reasons for dismissing the action. First, it noted that "[a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade..." \textit{Id.} at 162. Second, it stated that an award of damages would be similar to a rebate and give the injured party an advantage over other shippers. \textit{Id.} at 163-64. Third, the Court stated that the plaintiff's damages were speculative. \textit{Id.} at 164.

The \textit{Delmarva} plaintiffs, however, contended that \textit{Keogh} was distinguishable on three bases: the Interstate Commerce Act evinced a more pervasive regulatory scheme than the Federal Power Act, \textit{Keogh} involved a direct attack on rates and not a rate differential, and the ICC, unlike the FERC, had power to grant reparations. 467 F. Supp. at 770. The \textit{Delmarva} court responded that in both cases an antitrust damage award might conflict with the rates approved by each commission. Moreover, the court noted, the FERC's lack of authority to grant reparations to utility customers did not warrant a different result. \textit{Id.} at 768-71. The \textit{Delmarva} plaintiffs were not seeking an injunction to prohibit the defendants from charging the rates presently filed with the Commission. Rather, they sought to enjoin the future initiation of an anticompetitive rate structure. \textit{Id.} at 768. Since this would not interfere with either the state or federal regulation of the defendants' rates, the \textit{Delmarva} court held that such relief could be granted. \textit{Id.; see Cantor v. Detroit Edison Co., 428 U.S. 579, 615 n.6 (1976) (Blackmun, J., concurring); Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693, 728-32 (1974); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 236 (1976); cf. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (while a damage award would conflict with the Interstate Commerce Act, injunctive relief would not).}

\textsuperscript{82} 467 F. Supp. at 769. The \textit{Delmarva} court relied on the Supreme Court's observation in \textit{Conway} that the FERC's rate-setting power was "expressly limited to jurisdictional sales to foreclose the possibility that the Commission would seek to correct an alleged discriminatory relationship between wholesale and retail rates by raising or otherwise regulating the nonjurisdictional, retail price." 426 U.S. at 277. The court stated that Congress did not intend to impose liability for charging a rate approved by a state commission and "the fact that plaintiffs' claim is based on two rates, only one of which is within the jurisdiction of the...[state commission] seems irrelevant." 467 F. Supp. at 769.

\textsuperscript{83} 467 F. Supp. at 769.

\textsuperscript{84} \textit{Mishawaka}, 560 F.2d at 1321-24; \textit{Delmarva}, 467 F. Supp. at 771-72; see notes 125-127 and accompanying text infra.

\textsuperscript{85} 467 F. Supp. at 771. The court did not state that the FERC's expertise would be useful in determining if the antitrust laws had been violated. Rather, the court opined that the FERC's expertise would be useful in judging the validity of Delmarva's defenses. \textit{Id.} at 772. Delmarva contended that the disparity between wholesale and retail rates was attributable to the different costs of providing electricity to wholesale and retail customers, the delays
it noted the improbability of the FERC considering any evidence of an alleged prior price squeeze and determined that other issues in the case would not require the Commission's expertise. The Delmarva court, however, left open the possibility of referring issues to the FERC at a later time if necessary. In denying a stay, the Mishawaka court reasoned that the uniformity requirement for the exercise of primary jurisdiction did not apply because any new rates the defendants might be required to file would still have to be approved by the Commission. The court similarly concluded that the expertise requirement was not met since the FERC possessed no expertise in the antitrust field.

The different conclusions reached by Delmarva and Mishawaka raise the issue whether the regulation of electric utilities by federal and state agencies precludes an award of damages when a municipal utility demonstrates that a price squeeze has caused injury. In an attempt to resolve this issue, the applicability of the doctrines of primary and exclusive jurisdiction and the state action exemption will be examined.

inherent in the rate-setting process, and the varying standards used by the federal and state commissions in setting rates. Id. at 771.

86 Id. at 772. Because of its inability to award reparations or invalidate past rate filings, the FERC has declined to investigate the past existence of a price squeeze. Northern States Power Co., FPC Docket No. ER 76-818 (May 23, 1977).

87 467 F. Supp. at 772. The other issues not requiring the FERC's expertise arose from the plaintiffs' allegations that defendants had acted to restrain trade in violation of § 1 of the Sherman Act. Id.; see note 67 supra.

88 467 F. Supp. at 772. Although it recognized the potential utility of the FERC's expertise, the Delmarva court allowed discovery to proceed. Id. If discovery were completed prior to the termination of the rate proceedings, however, the court reasoned that a stay would then be appropriate. Id.

89 560 F.2d at 1323. The Mishawaka court stated that a grant of injunctive relief would not interfere with the rates which had already been approved, but would only command the defendants to end their price squeeze. In this sense, the court noted, the antitrust and regulatory statutes would complement each other to provide protection from anticompetitive practices, since the FERC is without power to award reparations and might not be able itself to remedy the price squeeze. Id.

The court observed that ordering the defendants to file a new rate would not "'starkly conflict with the explicit statutory mandate of the Federal Power Commission.'" Id. at 1323-24 (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 395 (1973) (Stewart, J., concurring and dissenting)).

90 560 F.2d at 1324. The court stated that the considerations relevant to a determination of a just and reasonable rate under the Federal Power Act were different from those that would be used to determine whether a particular rate comported with the antitrust laws. Id.
UTILITY PRICE SQUEEZES

THE APPLICATION OF THE DOCTRINES OF PRIMARY AND EXCLUSIVE JURISDICTION AND THE STATE ACTION EXEMPTION TO THE "PRICE SQUEEZE" ANTITRUST CASE

Exclusive Jurisdiction

The doctrine of exclusive jurisdiction was developed by the federal courts in response to situations where conduct apparently in violation of federal law fell within the ambit of a regulatory scheme. Exclusive jurisdiction immunizes regulated conduct from antitrust liability if the court finds that Congress, in forging the regulatory scheme, "intended to override the fundamental national policies embodied in the antitrust laws." When an express exemption is not provided, as in the Federal Power Act, courts may imply one. Since such "repeals by implication are not favored," the courts typically require that a pervasive regulatory scheme be clearly repugnant to the imposition of liability under the antitrust laws.

Since the Supreme Court's decision in Otter Tail Power Co. v.

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One commentator has argued that

[a] regulatory agency . . . should not make the final determination concerning antitrust violations. In antitrust policy the relevant factors are so numerous, the policy choices so complex, and the impact so broad that the ultimate decision should always rest with a decisionmaker who is without overt institutional bias and who is in a position to balance the multiplicity of competing interests. The courts appear better suited for this task. . . . Thus even when an agency is instructed by statute to consider anticompetitive factors, such a mandate should be viewed only as providing an additional opportunity for enforcing antitrust policy and not as depriving the courts of effective jurisdiction.


United States, it is clear that the Federal Power Act does not provide any per se insulation from the antitrust laws. The defendant in Otter Tail, charged with violating the Sherman Act by refusing to "wheel" power to municipal power companies, maintained that its conduct was exempt from the antitrust laws, because the Federal Power Act gives the FERC the authority to order interconnections for the purpose of wheeling power. The Court, however, found the emphasis of the Act to be on voluntary interconnection. The Court observed that "Congress had rejected a pervasive regulatory scheme" in this instance and stated that "[w]hen relationships are governed in the first instance by business judgment and not regulatory coercion," courts could not infer that the legislative intent was to bypass the federal antitrust laws.

While Otter Tail dealt with the FERC's authority to order interconnections, it is submitted that the decision is relevant in determining whether a pervasive regulatory scheme exists where price squeezes are concerned. While filing a rate schedule with the FERC is mandatory, unlike interconnection which is voluntary, there appears to be no pervasive regulation of electric power rates. The

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86 Id. at 372.
87 Id. at 368. Electric power is "wheeled" when the transmission facilities of one system are used to transmit the power generated by another system. AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ELECTRIC UTILITY RATE REFORM 2 (1977). The defendant's practices were allegedly designed to prevent the establishment of municipal power companies by communities which previously were retail franchisees of the defendant. 410 U.S. at 368.
88 410 U.S. at 371-72.
89 Id. at 373. The FERC has the power to order interconnection only if a company refuses to do so voluntarily. Id. In determining whether to order interconnection, the FERC must consider the best interests of the public; antitrust considerations are not determinative. Id.
90 It might be argued that the enactment of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C.A. §§ 824a-825s (1979) will affect future antitrust cases dealing with refusals to interconnect in light of the Supreme Court's emphasis in Otter Tail that interconnection is voluntary in the first instance. The amendment provides that the Commission may order interconnection on its own motion. See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C.A. § 824d (1979)). The Act's legislative history reveals, however, that the jurisdiction of the courts to hear antitrust cases concerning interconnection and refusals to wheel was not intended to be abridged. See H.R. Rep. 95-1750, 95th Cong., 2d Sess. 68, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7697.
91 410 U.S. at 374.
93 The Federal Power Act requires only that utilities file their rates with the FERC; each rate does not have to be approved. 16 U.S.C. § 824d(c) (1976). It has been held that the FERC, under the provisions of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d (1976), has pervasive control over the regulation of rates and hence rates set by the Commission may not be challenged on antitrust grounds. McLeran v. El Paso Natural Gas Co., 357 F. Supp. 329, 331-32 (S.D. Tex. 1972), aff'd mem., 491 F.2d 1405 (5th Cir. 1974). The provisions embracing the
rate schedules are the product of the utilities' business judgment in the first instance, although some restrictions are contained in Commission guidelines. A hearing is held to determine whether the changes are just and reasonable only when there is a challenge by an intervenor or the Commission. Moreover, the FERC staff participates in the setting of rates only when the hearing reveals the rates may be outside the zone of reasonableness. As in Otter Tail, antitrust considerations must be taken into account in determining the reasonableness of rates. Anticompetitive factors are not dispositive, however, since the Commission's central concern is in discerning the "public interest."

Another consideration in determining whether exclusive jurisdiction applies to a price squeeze is the "filed rate" doctrine, because antitrust liability could result in a court ordered rate change. The filed rate doctrine, formulated by the Supreme Court


See 16 U.S.C. § 824d(c) (1976). The FERC has formulated rules governing accounting methods which must be used in computing rate filings and the form of and information contained in rate filings. See, e.g., 18 C.F.R. §§ 2.16, 2.8 (1979). The FERC also has the power to reject a rate filing which is patently defective. City of Groton v. FERC, 584 F.2d 1067, 1070 (D.C. Cir. 1978).

The filed rate doctrine, formulated by the Supreme Court
in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, states that a power company may not charge a rate other than the one filed with the FERC and that a customer has no right to pay other than the approved rate. The plaintiff in *Montana-Dakota* alleged that the defendant's rates were unreasonable and hence in violation of the Federal Power Act. In dismissing the action, the Court noted that the rates set by the Commission may be reasonable, but other rates also may be since "reasonableness is an abstract quality represented by an area rather than a pinpoint." The concern seemed to be that the courts would transgress upon the FERC's discretion and order rates which they deemed to be more reasonable than those set by the Commission. In a price squeeze situation, however, it is not the wholesale rates per se which are being challenged but the relationship between the wholesale and retail rates. Moreover, the Act's central concern is whether rates are reasonable, just and not unduly discriminatory, whereas the thrust of an antitrust action is to prevent and afford recompense for discrimination and anticompetitive effects. Even if the FERC set wholesale rates within the lowest boundary of reasonableness, an anticompetitive effect might persist where retail rates are extremely low, since the Commission's discretion ends where confiscatory rates begin.

109 Id. at 251. Justice Jackson, writing for the majority, stated that if the cause of action arises under the Federal Power Act, exclusive jurisdiction vests in the Commission. The Court stressed, however, that a federal action may be brought to enforce the Act, "using the allegations of fraud to escape the limitations of the Power Commission remedies." Id. at 250.
110 Id. at 248. Both parties in *Montana-Dakota* were electric utilities engaged in interstate commerce. In addition to claiming that the defendant's rates were unreasonable, the plaintiff claimed that the defendant had fraudulently abused the interlocking directorate which had existed between the parties. Id. at 247. The Court held, however, that the plaintiff could not "litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment." Id. at 251.
112 341 U.S. at 251. In *Montana-Dakota*, the Court left the plaintiff remediless by holding the determination of reasonable rates to be exclusively within the jurisdiction of the FERC. Id. at 251-53.
113 FPC v. Conway Corp., 426 U.S. at 279.
115 See note 90 supra.
116 *Mishawaka*, 560 F.2d at 1323. The *Mishawaka* court noted that "severely depressing wholesale rates" does not necessarily eliminate the price squeeze, since the FERC cannot set rates below a reasonable level even if it would remedy the price squeeze. Id. The court concluded, therefore, that antitrust remedies, which would not conflict with the "explicit statutory mandate of the Federal Power Commission," constitute the only available protection. Id.
Thus, while the filed rate doctrine controls per se challenges to rates approved by the Commission,\textsuperscript{117} it should not be a bootstrap used to establish exclusive jurisdiction in the FERC when a price squeeze exists.\textsuperscript{118}

In addition to not providing a pervasive regulatory scheme, the Federal Power Act does not seem repugnant to the operation of the antitrust laws. While the considerations relevant to rate-making under the Federal Power Act may differ from those used to determine a violation of the Sherman Act,\textsuperscript{119} the prophylactic purposes of the schemes are the same: to curb discriminatory or anticompetitive business practices. The statutory frameworks, therefore, may complement each other.\textsuperscript{120} Yet, because the FERC cannot provide a remedy for injury due to the existence of a price squeeze and may be unable to prevent future occurrences, it is suggested that the sole effective means of redress available to municipally-owned utilities is under the antitrust laws.\textsuperscript{121}

\textbf{Primary Jurisdiction}

The administrative law doctrine of primary jurisdiction, which stays a judicial proceeding, is intended to coordinate the work of the


\textsuperscript{118} Contra, Delmarva, 467 F. Supp. at 765-66.

\textsuperscript{119} Unlike the cases involving the Interstate Commerce Comm’n, see note 94 supra, the courts have been reluctant to find exclusive jurisdiction in the FERC. For example, in Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), cert. denied, 340 U.S. 906 (1950), the court held that a suit challenging the propriety of pricing agreements alleged to be violative of the antitrust laws was properly before a federal court. 184 F.2d at 561. The court reviewed the Federal Power Act and found that the Act’s prohibition against monopolistic combinations in the issuance of licenses “was a reaffirmation of the Sherman Act and was designed to restrict rather than to enlarge the Commission’s authority.” Id. at 561-62.

\textsuperscript{120} See note 90 and accompanying text supra.

\textsuperscript{121} See Mishawaka, 560 F.2d at 1323.

The FERC in Northern States Power Co., FPC Doc. No. ER 76-818 (May 23, 1977), conceded that it does not have exclusive jurisdiction over a price squeeze. The Commission stated that its examination would not conflict with a court’s determination since [t]hat action seeks damages for allegedly anticompetitive activity that occurred in the past. . . . [An award of damages or injunctive relief] are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct.

\textit{Id., quoted in Mishawaka, 560 F.2d at 1321}.
courts and administrative agencies and ensure an informed judicial determination through use of an agency’s expertise. The doctrine will be invoked when a defendant’s conduct falls within the ambit of a regulatory scheme or when an agency’s expertise would be helpful to the court in its determination. While both the exclusive and primary jurisdiction doctrines have been invoked when the antitrust laws appear to conflict with a regulatory scheme, the exercise of primary jurisdiction will not result in a determination of all pending issues.

It is suggested that the need for coordination or uniformity between the courts and administrative agencies does not exist when a price squeeze is at issue. An injunction requiring an investor-owned electric utility to file new rates to eliminate or prevent a price squeeze would not conflict with the regulatory scheme established by the Federal Power Act, since a lower rate schedule still would need Commission approval. Even if the injunction pertained only to rates charged the complaining party, the FERC, in approving the rates, could ensure that the new schedule was not unduly discriminatory or preferential to other wholesale customers. An award of damages for past anticompetitive conduct also does not have to be coordinated with the FERC, since the Commission does not possess the authority to invalidate rates retroactively or to award repara-

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122 Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 114 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 290 (1973); cf. Far East Conference v. United States, 342 U.S. 570, 574 (1952) (“cases raising issues of fact not within conventional experience of judges or cases requiring the exercise of administrative discretion”).

The doctrine of primary jurisdiction originated in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41 (1907), to preserve uniformity in regulation. Later, the purpose was expanded to include the utilization of the specialized knowledge of the regulatory agency. See, e.g., Far East Conference v. United States, 342 U.S. 570, 574 (1952).

The Supreme Court has stated that “[n]o fixed formula exists for applying the doctrine of primary jurisdiction.” United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956). Rather, the relevant inquiry is “whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” Id.


124 See generally Mishawaka, 560 F.2d at 1321-24.


127 See id. §§ 824d(b), (d). Since most utilities file rate schedules for classes of customers, a filing in compliance with an injunction would probably benefit all wholesale customers.
tions for past unlawful rates. Moreover, adjudication of a price squeeze controversy demands an analysis of the reasonableness of retail rates, a matter over which the FERC has no jurisdiction, and therefore, the court's determination would not conflict with the Commission's.

It is additionally suggested that the doctrine of primary jurisdiction should not be invoked because the Commission's expertise will not materially aid the court in its final resolution of the issues. Although the Commission enjoys considerable expertise in ascertaining the reasonableness of rates under the Federal Power Act, the question whether a rate is reasonable under the antitrust laws falls without the FERC's "expertise."

The assertion of primary jurisdiction also should not be an exercise in futility. The extraordinary delays inherent in the processing of rates by the FERC would burden an aggrieved municipal system with increased costs and expenses. Moreover, when the Commission finally acts, a price squeeze may have existed for so long that a municipality may no longer be engaged in the business of selling electric power. It is submitted, therefore, that the doc-

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129 See notes 67-68 and accompanying text supra. See also Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). In holding that a shipper seeking redress must seek reparations primarily with the ICC, the Abilene Court was concerned with the uniformity of rates. Id. at 441. One analysis of Abilene suggests, however, that uniformity of reparations is an altogether different proposition from uniformity of rates. "The fact that one shipper received greater or lesser reparations than another was not tantamount to a preference of the sort that the [Interstate Commerce] Act was intended to prevent, for it created no real competitive advantage." Convisser, Primary Jurisdiction: The Rule and Its Rationalizations, 65 YALE L.J. 315, 322 (1956). It is submitted that this analysis is pertinent in determining whether the need for uniformity compels the exercise of primary jurisdiction by a court considering price squeeze allegations. In awarding damages, such a court would not be granting an injured party an unfair advantage. Additionally, if an injunction ordering a new rate to be filed were phrased so as not to prescribe a particular rate, no unfair advantage would result.


132 See note 90 and accompanying text supra.

133 Mishawaka, 560 F.2d at 1323; see Schwartz, Primary Administrative Jurisdiction and the Exhaustion of Litigants, 41 Geo. L.J. 495 (1953); cf. Sunflower Elec. Coop. v. Kansas Power & Light Co., 603 F.2d 791, 799 (10th Cir. 1979) (refusal to wheel not referable to FERC when, inter alia, it would be futile).

134 Mishawaka, 560 F.2d at 1324. See generally Schwartz, supra note 133.

135 Mishawaka, 560 F.2d at 1325.
trine of primary jurisdiction should not be applied in most price squeeze cases. Should the need for the FERC's expertise arise during the action, the court still could order a stay.\(^{139}\)

**The State Action Exemption**

Since retail rates are regulated by state commissions, it is necessary to determine whether the state action exemption doctrine precludes antitrust liability for the maintenance of a price squeeze.\(^{137}\) The Supreme Court first enunciated the doctrine in *Parker v. Brown*,\(^{138}\) wherein it held that the federal antitrust laws do not apply to activity undertaken pursuant to a state economic regulatory scheme.\(^{139}\) Although some circuit courts had broadly interpreted the state action exemption to include private parties acting under the auspices of a state regulatory scheme,\(^{140}\) several recent Supreme Court cases have circumscribed the application of the doctrine.

In the first case decided, *Goldfarb v. Virginia State Bar*,\(^{141}\) the Court stated that the "threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was
not meant to proscribe is whether the activity is required by the State acting as sovereign.\textsuperscript{142} Since this test was designated as a "threshold inquiry," the \textit{Goldfarb} decision suggests that factors other than whether the activity is required by the state must be taken into account before granting antitrust immunity.\textsuperscript{143} This view of \textit{Goldfarb} was confirmed in \textit{Cantor v. Detroit Edison Co.},\textsuperscript{144} wherein the Supreme Court found the state action exemption inapplicable, even though a state regulatory scheme approved the defendant's conduct.\textsuperscript{145}

In \textit{Cantor}, Detroit Edison, an investor-owned electric power company, furnished free light bulbs to its residential customers under a tariff filed with and approved by the Michigan Public Service Commission.\textsuperscript{146} Cantor, a retail druggist, sued Detroit Edison, alleging that the program restrained competition in the light bulb market and hence violated the antitrust laws.\textsuperscript{147} The defendant claimed it would be unfair to hold it liable under the antitrust laws for merely obeying an order of the state.\textsuperscript{148} Rejecting this argument, the Court held that neither the program's approval by the state regulatory body nor the inability of Detroit Edison to terminate the program without prior state approval constituted a sufficient basis for exemption from the antitrust laws. In reaching its conclusion, the Court noted that although Michigan had a strong interest in regulating electric utilities, its concern did not extend to the light bulb industry.\textsuperscript{149} Moreover, since no hearing had been held to determine the impact of the bulb exchange program on competition, enforcement of the antitrust laws would not really conflict with an anticompetitive program specifically sanctioned by the state.\textsuperscript{150} The

\textsuperscript{142} Id. at 790.


\textsuperscript{144} 428 U.S. 579 (1976).

\textsuperscript{145} Id. at 588. The Court's opinion, written by Justice Stevens, is divided into four sections. Sections II and IV, which deal with the proper scope of the state action exemption, were acceded to only by a plurality of the Court.

\textsuperscript{146} Id. at 583. Although Detroit Edison did not charge its customers separately for the light bulbs, their cost was included in the retail rates. \textit{Id.} at 582-83. Through its program, Detroit Edison supplied almost 50\% of the light bulbs most commonly used in residences. \textit{Id.}


\textsuperscript{148} 428 U.S. at 592.

\textsuperscript{149} Id. at 584. Because Detroit Edison's conduct was not required by the regulatory scheme, \textit{Goldfarb}'s threshold inquiry was not satisfied. \textit{See} note 147 and accompanying text \textit{supra}.

\textsuperscript{150} 428 U.S. at 584-85.
Court also reasoned that, despite Michigan's approval, Detroit Edison played a sufficiently dominant role in instigating and maintaining the program to require the utility to conform to the standards of the antitrust laws. Moreover, the Court stressed that the state action exemption enunciated in Parker was applied to conduct engaged in by a state official, not a private party acting under a state directive. That the anticompetitive conduct must be employed by the state, and not merely a private person acting with state "acquiescence" or approval, was reaffirmed in Bates v. State Bar of Arizona.

\[1\] Id. at 593-95. Prior to Cantor, none of the circuit courts had subjected a utility to antitrust liability where the utility had acted under a state-sanctioned tariff. See, e.g., Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), cert. denied, 409 U.S. 1001 (1972); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972).

\[2\] 428 U.S. at 591. Justice Stevens stressed the distinction between state action and private action under the color of state law first enunciated in Parker v. Brown, 317 U.S. 341 (1943):

Unquestionably the term "state action" may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term... is not, however, what Mr. Chief Justice Stone described in his Parker opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials.

428 U.S. at 590-91 (footnotes omitted); see note 141 supra.

The Court rejected the contention that the procompetitive thrust of the antitrust laws is inconsistent with the public interest standard of regulatory statutes:

There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

428 U.S. at 593.

In dissent, Justice Stewart responded that the Court's holding "will surely result in the disruption of the operation of every state-regulated public utility company in the nation and in the creation of "the prospect of massive treble damage liabilities" payable ultimately by the companies' customers." Id. at 615 (Stewart, J. dissenting) (citation omitted).

\[3\] 433 U.S. 350, 361 (1977). The Bates defendants, who had violated an Arizona Supreme Court rule which prohibited advertising by attorneys, claimed that the rule was violative of the antitrust laws. The Court noted that, while there was no real regulation of the light bulb industry in Michigan, antitrust liability in Bates would interfere "with a State's traditional regulation of a profession." Id. at 362. The Court also stressed that while Cantor involved a private party, Bates involved a government entity. Id. at 361. Lastly, the Court distinguished the two cases on the basis that there was active regulation by the state in Bates whereas in Cantor the state merely "acquiesced" in the maintenance of the light bulb program. Id. at 362-63.
It is submitted that the Supreme Court's recent decisions show the inapplicability of the state action exemption to the price squeeze case. As in Cantor, the antitrust claim in a price squeeze case is directed against a private party—an electric utility.154 A more difficult question is whether the practice attacked in a price squeeze case is state-compelled. As in Cantor, it is suggested that it is not. Initially, it may appear that a utility's rates are compelled by the state since investor-owned power companies are required to file their retail rates with state commissions and are prohibited from charging rates other than those filed. It should be stressed, however, that the retail rates per se are not being challenged, but the rates' relation to the wholesale rates and the resulting "synergistic" effect.155 Since the state commissions have no jurisdiction over the wholesale rates, they cannot be said to have compelled the maintenance of a price squeeze. Additionally, the Cantor Court emphasized that it must clearly be the state's decision to employ anticompetitive practices. If the private party significantly participates in the decisionmaking, it is considered to be merely approved by the state.156 Since utilities exercise business judgment in proposing retail rates and deciding to pancake wholesale rate filings, the anticompetitive practices at most can be described as approved by the state commissions rather than compelled.157

Another relevant consideration is whether imposition of antitrust liability would conflict with the state regulatory interest in the

\footnotesize{Bates may be distinguished from Goldfarb, see notes 141-143 and accompanying text supra, on the ground that the Goldfarb minimum fee schedule was formulated by a county bar association, a private organization, while in Bates the prohibition against attorney advertising was imposed by an agency of the state. 433 U.S. at 359-60. Moreover, the minimum fee schedule in Goldfarb was merely suggested, whereas the prohibition against attorney advertising in Bates was absolute.

Another recent case, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), also involved the state action exemption. City of Lafayette was an antitrust action brought by a municipally-owned electric utility against an investor utility in which the defendants counterclaimed that the plaintiff was violating the antitrust laws by tying its electric power service to its water and gas service. The plaintiff contended that it was immune from antitrust liability under the state action exemption since it was a subdivision of the state. The Court rejected the plaintiff's contention declaring that "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of the government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." Id. at 413.


156 428 U.S. at 593-95.

157 See Mishawaka, 560 F.2d at 1320; City of Shakopee v. Northern States Power Co., No. 4-75-591, slip op. at 7 (D. Minn. Oct. 18, 1976).}
challenged conduct. As previously discussed, the states have a considerable interest in the regulation of electric power rates. The interest is multifaceted. Aside from attempting to ensure reasonable and not unduly discriminatory retail rates, state regulatory schemes were instituted to prevent the abuses that often occur when a state sanctions a monopoly and to foster the relatively insignificant competition that exists. It appears, therefore, that enforcement of the antitrust laws complements rather than conflicts with state regulatory interests since both schemes are designed to prevent the abuses of monopoly and foster competition.

**ESTABLISHING THE ANTITRUST VIOLATION**

Having shown that neither the state action exemption nor the doctrine of exclusive jurisdiction should immunize the rate activities of electric utilities from the antitrust laws, the focus shifts to whether the maintenance of a price squeeze violates section 2 of the Sherman Act. Section 2 prohibits actual monopolization, at-

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134 See note 6 and accompanying text supra.
135 See Cantor, 428 U.S. at 595-96. The Cantor Court stated:
[A]ll economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.
Id. (footnotes omitted) (emphasis added). In addition to the retail competition previously discussed, see note 7 and accompanying text supra, public utilities also engage in what is known as “yardstick” competition. “This term is meant to identify the competitive pressure felt by a utility as a consequence of lower rates or superior service of a neighboring utility even when the two systems are legally or practically prevented from competing for customers.” Fairman & Scott, supra note 7, at 1162 & n.18 (1977).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them.
The Delmarva defendants argued that the claim should be dismissed because electricity
tempts to monopolize, and combining or conspiring to monopolize.\textsuperscript{161} Thus, the mere existence of a monopoly is not proscribed. Rather, acts or attempted acts of monopolization are prohibited.\textsuperscript{162} To prove monopolization, it must be established that a defendant has monopoly power\textsuperscript{163} and the intent to exclude competition through the exercise of that power.\textsuperscript{164}


Although sales of services and intangibles are not included within the meaning of "commodities" under the Robinson-Patman Act, see Baum v. Investors Diversified Serv., Inc., 409 F.2d 872 (7th Cir. 1969); F. Rowe, Price Discrimination Under the Robinson-Patman Act 59 (1962), it is submitted that electricity is neither a service nor an intangible since it can be produced, stored, measured, bought and sold. Finally, the Supreme Court, although perhaps inadvertently, has referred to electricity as a commodity. See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

\textsuperscript{161} 15 U.S.C. § 2 (1976); see note 67, supra.

\textsuperscript{162} Standard Oil Co. v. FTC, 340 U.S. 231 (1951); see E. Kintner, An Antitrust Primer 101 (1973); 1 J. Von Kalinowski, supra note 13, ¶ 7.01[1], at 7-4, 7-5 (1979); cf. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (unlawful conduct distinguished from achievement of monopoly power by "superior product, business acumen, or historic accident"); Buck v. Kuykendall, 285 F. 197, 203 (W.D. Wash. 1923), rev'd on other grounds, 267 U.S. 307 (1925) (monopoly power achieved by grant of a public franchise not in violation of "law or public policy").


For a discussion of monopolization, see E. Kintner, supra note 162, at 101; 1 J. Von Kalinowski, supra note 13, ¶ 7.01[1].
In determining whether monopoly power exists, two factors must be examined: the relevant market\textsuperscript{65} and the degree of control over the market.\textsuperscript{66} Investor-owned electric utilities usually possess monopoly power over the sale of electricity at wholesale and retail within the areas in which they conduct business.\textsuperscript{67} Thus, liability


With respect to determining the product market, the Supreme Court has stated:

The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purpose for which they are produced—price, use and qualities considered.

See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956). It is submitted that upon applying the test for determining relevant product market as enunciated by the Supreme Court in \textit{du Pont} and later cases, see, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); International Boxing Club Inc. v. United States, 358 U.S. 242 (1959), to the price squeeze antitrust action, the relevant product market is electric power.

The relevant geographic market in which a company does business may be national, see, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966), regional, see, e.g., United States v. Columbia Steel Co., 334 U.S. 495 (1948), a state, see, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), or a subdivision of the state, see, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). In price squeeze cases, it appears that the relevant geographical market generally will be a state or a subdivision of a state, although the exact geographical market will vary in each case. For example, in \textit{Mishawaka} the relevant geographic market was found to be the "clearly defined service area in Indiana and Michigan within which it sells electric power and energy at retail pursuant to franchises granted by the municipalities and townships." City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320, 1325 (N.D. Ind. 1979).

\textsuperscript{66} United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956). The degree of market power necessary to establish monopoly power will vary from case to case. United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948). Certain percentages, however, serve as guidelines. In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand stated that a market share of "[o]ver ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and thirty-three percent is not." 148 F.2d at 424.

\textsuperscript{67} Due to the expense of constructing generation and transmission facilities, there is rarely more than one utility which has such capacity in one area. See Meeks, supra note 5, at 64, 68-69 (1972). As of 1968, 76% of the generating capacity in the United States was controlled by investor-owned utilities. FPC, 1969 \textit{STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES} (1970). The district court in \textit{Mishawaka} found that the defendant possessed monopoly power in the wholesale and retail markets by supplying 95-100% and 89% of the power in the markets, respectively. City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320, 1325-26 (N.D. Ind. 1979).

It has been suggested that market share data should not be the measure of monopoly power in regulated industries. See Watson & Brunner, \textit{Monopolization by Regulated "Monopolies": The Search for Substantive Standards}, 22 \textit{ANTITRUST BULL.} 559, 566-67 (1977). Rather, a determination of market share "should ultimately focus directly upon the ability
utility price squeezes

may be premised upon the theory that the investor-owned utility is using its monopoly power on the wholesale level or on both levels to exclude competition on the retail level.\textsuperscript{168}

Although intent is a necessary element in proving a violation of section 2 of the Sherman Act, specific intent to eliminate competition need not be shown when the defendant undertakes anticompetitive conduct.\textsuperscript{169} A general intent by one possessing monopoly power may be inferred from acts which are prone to have anticompetitive consequences although the acts would be lawful in the absence of monopoly power.\textsuperscript{170} Since the maintenance of a price squeeze tends to foreclose competition,\textsuperscript{171} intent may be inferred from a defendant's failure to attempt to retain parity between wholesale and retail rates.\textsuperscript{172}

The Clayton Act authorizes a private antitrust plaintiff to seek treble damages and injunctive relief for violations of the antitrust laws.\textsuperscript{173} In seeking damages, the exact amount of injury sustained by a plaintiff need not be shown. Rather, only a reasonable estimate must be ascertainable.\textsuperscript{174} It is submitted that the only reasonable

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\textsuperscript{168} See Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); Meeks, \textit{supra} note 5, at 118-19; cf. Associated Press v. United States, 326 U.S. 1 (1945) (firm may not use monopoly power at one level to extend its control to other levels by prohibiting competitors from using a facility over which it has control); International Business Machines Corp. v. United States, 298 U.S. 131 (1936) (use of patent to extend the holder's monopoly power to other services in violation of § 3 of Clayton Act). See also Silver v. New York Stock Exch., 373 U.S. 341 (1963).

\textsuperscript{169} United States v. Griffith, 334 U.S. 100, 105-06 (1948). Anticompetitive actions are "kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist." Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-12 (7th Cir.), \textit{aff'd mem.}, 570 F.2d 347 (7th Cir. 1977), \textit{cert. denied}, 439 U.S. 822 (1978).

\textsuperscript{170} United States v. Griffith, 334 U.S. 100, 105-06 (1948).


\textsuperscript{172} See generally Meeks, \textit{supra} note 5, at 118-19. It is submitted that intent should not be inferred from the mere existence of a price squeeze since a disparity between wholesale and retail rates may result from the dual regulatory process. Rather, intent should be inferred from an investor-owned utility's failure to make a good faith effort to achieve parity.


estimate of damages sustained due to the maintenance of a price squeeze is the difference between the investor-owned utility's wholesale and retail rates. Although the "reasonable" rate that a municipally-owned utility should be charged may be at a higher level than the retail rates, the difference between this "reasonable" wholesale rate and the wholesale rate actually paid is not the amount of damages sustained. The real injury sustained in a price squeeze situation is the loss of customers, revenue and competitive position.\textsuperscript{175} The most effective means of remedying this injury would be to award damages equal to the difference between wholesale and retail rates so that the municipal power company could lower its retail rates and recoup some of its lost business, thus providing redress for the past discriminatory overcharge.\textsuperscript{176}

RECENT LEGISLATIVE PROPOSALS

A recent legislative proposal advanced by Senators Kennedy and Hatch promises to have favorable effects on the resolution of the price squeeze problem.\textsuperscript{177} Entitled the Competition Improvements Act of 1979, the bill would increase the extent to which regulatory agencies must consider anticompetitive effects in reaching

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\textsuperscript{176} See City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320, 1341 (N.D. Ind. 1979). The effect of awarding damages in an amount representing the difference between wholesale and retail rates would be to treat the wholesale customers as if they had bought at retail.

Although a successfully prosecuted action would result in an award of treble damages, other considerations might make it desirable to assess actual damages. It is in the public interest that electric power rates be kept low, since electricity is a necessity. A judgment for treble damages, however, may prompt the offending power company to file for an increase in rates in order to recoup some of its lost profits. See also Cantor v. Detroit Edison Co., 428 U.S. 579, 615 (1976) (Stewart, J., dissenting). Furthermore, an award of treble damages may increase a utility's capital costs which are used to determine revenue requirements. State Governments' Report, supra note 6, at 25. An increase in capital costs may entitle the utility to a higher rate but this would be discretionary with the FERC due to the reason for the increased costs. Since the antitrust laws only provide for treble damages, legislation would be needed to allow a court to assess actual damages.

their determinations. Regulatory agencies would have to apply an antitrust standard unless three criteria were satisfied. The proposed action must be necessary to achieve the agency's statutory goal, must clearly outweigh any detrimental effect to competition, and must have the least anticompetitive impact of any alternative course. The bill also provides that if a party appeals, the regulatory agency bears the burden of proving that it has satisfied the criteria.

It is submitted that passage of the Competition Improvements Act together with the Conway decision, which requires the FERC to consider retail rates, and any actions taken pursuant to a study recently authorized by the Public Utilities Regulatory Policies Act effectively would prohibit the FERC from allowing a price squeeze to exist. The study seems to contemplate a reduction in the delays encountered in receiving rate filing determinations and a prohibition of pancaking rate filings. Although antitrust remedies should still be available to an injured party, these measures would help prevent the problem initially and thus eliminate the possibility of a wholesale customer being forced to discontinue its business prior to receiving relief.

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178 Id. § 3(a).
179 Id.
180 Id.
181 Pub. L. No. 95-617, 95 Stat. 3117 (1978). Finding the need for a program to improve the regulation of sales of electric power at the wholesale level, id. § 2, Congress included a provision instructing the chairman of the FERC to conduct an investigation into the procedures used in determining the lawfulness of proposed wholesale rate increases. Id. § 207. The purpose of the study is threefold. First, the chairman must consider ways to eliminate the long delays in determining the reasonableness of proposed rates. A second objective is to generate proposals to prevent the pancaking of rates. Finally, the chairman has been directed to develop procedures to ensure that price squeezes do not come into existence. Id.

Although manifesting a desire on the part of Congress to curb abuses of the regulatory process, the investigation provision is substantially weaker than that originally passed by the House of Representatives. See H.R. 8444, 95th Cong., 1st Sess. (1977). The House version required the FERC to reach a decision on proposed rates within ten months after filing, id. § 543(a), and prohibited the pancaking of rates. Id. § 543(b). Moreover, the proposal expanded the definition of a reasonable rate to include that the rate be otherwise lawful; a rate creating or maintaining an anticompetitive price squeeze would be unlawful. Id. § 543(a). The House bill also granted the FERC the power to reject a rate filing in order to prevent unfair trade practices. Id. Thus, the House measure could have protected wholesale customers from the establishment of a price squeeze. Radin, Outlook and Insights, Improving FPC Regulation, 1976 PUB. POWER 8-9 (May-June 1976).

182 See note 181 supra.
Conclusion

Competition in the electric power industry is a desirable goal, yet the nature of the industry often necessitates the existence of a monopoly in a particular geographic area. An electric utility with monopoly power, however, should not be allowed to use its position to exclude the minimal competition that does exist. Imposition of antitrust liability for the creation or perpetuation of a price squeeze should help further the national goal of maintaining competitive conditions in the marketplace.

In applying the requisite tests for establishing the applicability of exclusive jurisdiction and the state action exemption, it has been suggested that neither doctrine immunizes an investor-owned utility from antitrust liability for the creation or perpetuation of a price squeeze. Moreover, since the antitrust action to remedy a price squeeze is a challenge to neither the wholesale rate per se nor the retail rate per se but rather to the "synergistic" effect that results from the dual regulation of electric rates, the application of antitrust damage remedies would not interfere with either state or federal regulation.

It also has been suggested that the maintenance of wholesale rates in excess of retail rates is a violation of section 2 of the Sherman Act, for which a plaintiff may be awarded both monetary and injunctive relief.

Antitrust liability, however, is by itself insufficient. Legislation in this area not only is desirable but necessary to change the policies, and prevent the practices, which allow price squeezes to exist.

Michele Gapinski