Recent Development

Antitrust—Price Squeeze—A vertically integrated utility's imposition of wholesale rates that exceeded its retail rates held to be an exclusionary act in violation of antitrust laws. *City of Mishawaka v. American Electric Power Co.*, Nos. S74-72, S75-210, S77-209 (N.D. Ind. Jan. 30, 1979).

The United States District Court for the Northern District of Indiana, in *City of Mishawaka v. American Electric Power Co.*,[1] decided that a large, investor-owned, vertically integrated[2] electric utility had violated antitrust laws. Indiana & Michigan Electric Co. (I & M), a subsidiary of American Electric Power Co., engaged in a series of exclusionary acts[3] which were forcing small Indiana and Michigan municipal utilities out of the retail electric power business. The decision particularly condemned I & M's exclusionary practice of charging its municipal customers higher wholesale rates than the retail rates offered to its industrial and fringe customers.[4] Such rate tactics are commonly called price squeezes[5] because the investor-owned utility's excessive wholesale rates make it economically im-

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[1]Nos. S74-72, S75-210, S77-209, (N.D. Ind. Jan. 30, 1979), *remanded*, City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). For a more complete discussion of the Seventh Circuit decision, see notes 20-21 *infra* and accompanying text.

[2]A vertically integrated electric utility is one that performs on two or more of the following levels: generation, which is the production of electricity; transmission, which is the transport of power over long distances; and distribution, which is the process of dividing power among customers on the wholesale or retail level.

[3]The district court decided that a public utility's imposition of unjust and unreasonable wholesale rates which exceeded its retail rates and the utility's threats to withdraw from the wholesale market and to impose limits on its service obligations, constituted exclusionary conduct, which demonstrated a violation of § 2 of the Sherman Act. Nos. S74-72, S75-210, S77-209, slip op. at 18.

[4]*Id.*

[5]Although the term "price squeeze" has been used in many different contexts, in this Recent Development it will refer to the situation in which a vertically integrated company distributing a service on both the wholesale and retail levels, with a monopoly on the wholesale level, charges an excessive wholesale price so that the company's wholesale customers cannot compete with the prices offered by the company on the retail level. "Price squeeze" has also been used to characterize the situation in which municipal and cooperative utilities must absorb the costs of a new wholesale rate because they cannot pass these costs onto the consumer immediately. *Hearings on Regulatory Reform—Vol. VI Before the Subcomm. on Oversight & Investigations of the House Comm. on Interstate & Foreign Commerce*, 94th Cong., 2d Sess. 642-45 (1976) (statement of Wallace Duncan).

possible for the municipal utilities and rural cooperatives, which buy wholesale from the large utility, to offer retail rates that are competitive with those offered by the large utility to industrial and fringe customers.

During the last decade, a growing number of municipal utilities and rural electric cooperatives have initiated massive administrative and legal assaults against many large, privately owned, vertically integrated utilities which have allegedly attempted to monopolize the retail sale and distribution of electric power by exerting price squeezes on smaller systems that depend on the large system for wholesale power.[6] Initially, the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission,[7] refused to consider the price squeeze allegations in reviewing wholesale rate requests made by large utilities on the grounds that the agency only had jurisdiction over wholesale rates and, therefore, could not examine a dual rate price structure which involved both retail and wholesale rates.[8] Moreover, by filing numerous procedural challenges, the large investor-owned utilities temporarily thwarted a number of antitrust suits filed by the small municipal and cooperative systems.[9] Yet, recent judicial decisions, including *American Electric Power Co.*, indicate a genuine effort to combat alleged price squeeze abuses by synthesizing antitrust and regulatory functions and policies to preserve competition on the retail distribution level of the electric power industry.[10]

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[6]City of Mishawaka v. Indiana & Mich. Elec. Power Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); City of Mishawaka v. American Elec. Power Co., Nos. S74-72, S75-210, S77-209 (N.D. Ind. Jan. 30, 1979); City of Groton v. Connecticut Light & Power Co., 456 F. Supp. 360 (D. Conn. 1978); City of Shakopee v. Northern States Power Co., No. 4-75-591 (D. Minn. Oct. 19, 1976).

[7]Created by Congress in 1920 to regulate the construction of hydroelectric projects, the FPC in 1935 was empowered to approve the transmission and sale of electric power in interstate commerce by setting just and reasonable rates. Federal Power Act of 1935, § 206(a), 16 U.S.C. § 824e(a) (1976). The Supreme Court held in 1964 that the FPC's ratemaking authority extends to the interstate sale of wholesale power. FPC v. Southern Cal. Edison Co., 376 U.S. 205, 210 (1964). In 1977, Congress transferred the ratemaking authority to the Federal Energy Regulatory Commission (FERC). Department of Energy Organization Act of 1977, Pub. L. No. 95-91, § 402, 91 Stat. 565 (1977) (to be codified in 42 U.S.C. § 7101).

[8]Southern Cal. Edison Co., 50 F.P.C. 836 (1973).

[9]*See* cases cited note 6 *supra*.

[10]*See generally* Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 75-76 (1972). *But see* Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962). Judicial efforts to coordinate regulatory and antitrust policies and functions were necessary because the Federal Power Act, as interpreted by the Supreme Court, left wheeling to the voluntary arrangements of different utilities and thereby foreclosed competition among wholesale distributors in supplying municipal

I. History of Efforts to Treat Price Squeeze Abuses

The Supreme Court initiated this synthetic effort in *FPC v. Conway Corp.*,[11] wherein the Court decided that the FPC had the power to consider and eliminate price squeeze abuses in evaluating wholesale rate requests.[12] The case involved nine Arkansas municipal and cooperative utilities which wanted the FPC to consider price squeeze allegations in approving the wholesale rates of a vertically integrated utility. The Court flatly rejected the FPC's argument that the agency lacked jurisdiction over dual rate abuse. Relying on section 205(b)[13] of the Federal Power Act which prohibits any unreasonable discrimination in rates with respect to any sale subject to Commission jurisdiction, the Court decided that, if a wholesale rate is in any way responsible for an anticompetitive difference between the wholesale and retail rates charged by a public utility, then the agency has the power to design a remedy[14] under section 206(a).[15] The Court indicated that the agency has the power

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and cooperative customers. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973) (ironically, a vertically integrated utility unsuccessfully contended that Congress intended wheeling matters, including anticompetitive refusals to wheel power to retail competitors, to be exempt from antitrust review); *accord*, Richmond Power & Light Co. v. FERC, 574 F.2d 610, 620 (7th Cir. 1978). Briefly defined, wheeling is the transmission of electric power by one utility to another utility over a third firm's lines. If wheeling were compulsory, investor-owned utilities theoretically could compete with themselves to supply municipal and cooperative customers and thereby reduce the opportunity for price squeeze abuses. Although Congressional subcommittees have examined numerous pieces of legislation that would allow FERC to compel wheeling in the public interest, Congress has never voted on these proposals. *See Hearings on Electric Utility Rate Reform and Regulatory Improvement Pursuant to H.R. 12461, H.R. 2633, H.R. 2650, H.R. 6696, H.R. 10869, H.R. 11449, H.R. 11475, H.R. 12848, H.R. 12872 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., pt. 1, 37, 127 (1976) [hereinafter cited as *Hearings Pursuant to H.R. 12461*]; Hearings on Electric Utility Rate Reform Pursuant to S. 1666, S. 2208, S. 2502, S. 2747, S. 3011, S. 3310, S. 3311 Before the Senate Comm. on Commerce, 94th Cong., 2d Sess. 129-30 (1976).

[11]426 U.S. 271 (1976).

[12]*Id.* at 277.

[13]Federal Power Act of 1935, § 205(b), 16 U.S.C. § 824d(b) (1976). Section 205(b) provides:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[14]426 U.S. at 277.

[15]Federal Power Act of 1935, § 206(a), 16 U.S.C. § 824e(a) (1976). Section 206(a) provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded,

under section 206(a) to reduce the wholesale rates to the lowest just and reasonable level in order to remove the price squeeze effects caused by the utility's wholesale rates.[16] As a result of *Conway*, FERC (formerly the FPC) has the clear responsibility to consider price squeeze allegations and to prevent such tactics if the price squeeze is found to be anticompetitive.

Although *Conway* represented a significant step in preventing anticompetitive dual rate practices, the administrative process did not eliminate all of the possible sources of price squeeze abuses or remedy all of the effects of past rate tactics. In fact, the agency's method of rate review provides an environment conducive to discriminatory rate practices by vertically integrated utilities.[17] According to FERC procedures, a utility can request and collect any number of wholesale rate increases before review of the first request is completed.[18] Municipals and rural cooperatives openly contend that regulatory delay in reviewing wholesale rates as well as the filing of rate requests in rapid succession (pancaking) leaves the small utilities vulnerable to price squeeze tactics exerted by the investor-owned systems. Although a refund may be granted ultimately for any unjust and discriminatory rate collected by the large privately-owned systems, the municipals and cooperatives argue that they may not be in existence by the time rate review is complete.[19]

Aware of the agency's limited remedial powers under *Conway*, the Seventh Circuit Court of Appeals in *City of Mishawaka v. Indiana & Michigan Electric Co.*[20] ostensibly approved the use of the antitrust laws to alleviate dual rate abuses by holding that the agency did not have exclusive jurisdiction, which would exempt price squeeze tactics from antitrust review by the courts,[21] or primary

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observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

[16]426 U.S. at 279.

[17]City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314, 1324-25 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *see* City of Mishawaka v. American Elec. Power Co., Nos. S74-72, S75-210, S77-209, slip op. at 39 (N.D. Ind. Jan. 30, 1979).

[18]City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314, 1325 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

[19]*Id.*

[20]560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

[21]560 F.2d at 1321. In many cases, Congressional statutes provide that certain matters are exempted from antitrust review and are within the sole jurisdiction of an agency. *See* Note, *Regulated Industries and the Antitrust Laws: Substantive and Pro-*

jurisdiction, which would preempt antitrust litigation until the agency had reviewed the wholesale rate requests for their justness and reasonableness.[22] The Seventh Circuit's refusal to grant the FPC ex-

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cedural Coordination, 58 COLUM. L. REV. 673, 679-81 (1958). If statutory authority is silent, the task of deciding whether an issue is within the exclusive jurisdiction of an agency is more difficult. The federal courts have provided some exemptions by finding that a regulatory act has impliedly repealed the antitrust act to the extent that the regulatory and antitrust acts are in conflict. The courts have indicated that they will imply such exemptions only if a plain repugnancy exists between the antitrust and regulatory statutes and that a mere conflict in standards between the two acts is not sufficient. 560 F.2d at 1321 n.8. In determining whether a "plain repugnancy" exists, the federal courts generally ask if antitrust immunity is necessary for the regulatory act to be effective. Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 683 (1975) (SEC case); Silver v. New York Stock Exch., Inc., 373 U.S. 341, 357 (1963) (SEC case). *See also* 560 F.2d at 1321. In light of the Supreme Court's holding in *Conway*, the appellate court determined that the FPC's jurisdiction to approve wholesale rates and to consider price squeezes in setting those rates could not immunize a vertically integrated utility's anticompetitive conduct from antitrust laws prohibiting dual rate abuses. The *Mishawaka* court held that antitrust immunity was not necessary to the regulatory process because the price squeeze was external to that process. *Id.* In other words, the application of antitrust principles to the price squeeze would not interfere greatly with the FPC's ratemaking authority. *Id.* The court stated that the anticompetitive rate structure involved retail rates which are the jurisdiction of state regulatory agencies and not the FPC. *Id.* The court also explained that the FPC's power to set wholesale rates would not be disturbed if the municipals only sought relief for past damages and injunctive relief against future abuses. To substantiate this point, the Seventh Circuit Court of Appeals quoted an FPC order recognizing that the agency could only examine pending rate requests for price squeezes and could not look at past schedules for price squeeze abuses, grant damages for abuses, or issue orders enjoining future abuses. *Id.* It thus determined that the FPC did not have exclusive jurisdiction over this issue.

[22]Primary jurisdiction allows the courts to refer certain issues to the federal agency before the court reviews the matter. Primary jurisdiction may be appropriate in order to promote uniformity of result. *Id.* at 1322. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958 & Supp. 1965). In assessing whether uniformity of the regulatory scheme required the district court to give the FPC primary jurisdiction over antitrust conduct, the *Mishawaka* court stated: "The antitrust and regulatory regimes accommodate and supplement each other in order to prove full protection from anti-competitive practices." 560 F.2d at 1323. Therefore, *Mishawaka* decided that the federal courts should apply antitrust laws only "to the extent that antitrust claims are not within the reach of the regulatory agency's supervision." *Id.* at 1324. The court held that antitrust review in this case would not violate this standard because the relief sought by the plaintiffs would not significantly conflict with or improperly preempt the FPC's supervision of a vertically integrated utility's wholesale rates even where the agency could consider anticompetitive price squeezes in setting wholesale rates. *Id.* at 1323-24. According to the court, the Federal Power Act does not necessarily prevent the application of the antitrust laws where the FPC has the power to consider antitrust factors. The court also explained that the agency had only limited remedial powers. The Commission cannot eliminate a price squeeze by raising retail rates because such rates can only be adjusted by the states. *Id.* at 1323. Moreover, the *Conway* remedy of reducing wholesale rates to remove the price squeeze is necessarily

clusive or primary jurisdiction over price squeeze claims allowed the district court on remand, in *American Electric Power Co.*, to offer the first definitive statement on the application of antitrust laws to price squeeze abuses in the electric power industry.

II. An Overview of *American Electric Power Co.*

American Electric Power Co. involved an antitrust suit filed by ten Indiana and Michigan municipalities against I & M, a vertically integrated, investor-owned utility, and two other defendants.[23] I & M sells power on the wholesale level to the plaintiff municipalities as well as on the retail level to its own customers. The cities alleged that I & M intentionally monopolized the retail sale and distribution of electricity by engaging in a number of exclusionary acts,[24] including a price squeeze, which were in violation of section 2 of the Sherman Act.[25]

In analyzing the case, the district court stated that a section 2 violation required proof that I & M not only had monopoly power in a relevant market, but also had the general intent to abuse that power.[26] The district court decided that I & M had two forms of monopoly power.[27] First, the defendant possessed a monopoly over

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limited in that the FPC cannot set the rates below the level needed to recover costs. *Id.*

In addition, the federal courts can give the agency primary jurisdiction if the agency would advance the court's fact-finding capacity or aid the court's determination of the extent of antitrust immunity. *Id.* at 1321-22. The *Mishawaka* court decided that the use of primary jurisdiction was not required in the interest of obtaining the advantages of administrative expertise, stating that the agency's "expert views on what constitutes a just and reasonable rate" would in no way aid the court in determining whether a utility violated that antitrust provisions. *Id.* at 1324. Furthermore, the court rejected the argument that agency expertise was necessary to determine whether the antitrust laws are applicable to the case. *Id.*

[23]The Indiana and Michigan municipalities also sued American Electric Power Co., an investor-owned public utility holding company of which I & M is a subsidiary, and American Electric Power Service Corp., a corporation which offers management, professional, and technical services to American Electric Power Co. and its subsidiaries.

[24]*See* note 3 *supra.*

[25]Sherman Act, § 2, 15 U.S.C. § 2 (1976). Section 2 provides in 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 . . . ."

[26]Nos. S74-72, S75-210, S77-209, slip op. at 3.

[27]To find monopoly power, the court in *American Electric Power Co.* employed statistical share tests which gauge monopoly power based on the portion of the market the alleged monopolistic controls. Other courts which have treated price squeeze abuses have used the price squeeze as evidence of monopoly power. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 437 (2d Cir. 1945); Jones, *Marketing Strategy and Government Regulation in Dual Distribution Practices*, 34 Geo. Wash. L. Rev. 456, 470 (1965).

the wholesale supply of power "on which the plaintiffs depend to serve their customers and to compete with I & M for retail sales."[28] The court observed that the plaintiffs relied on I & M for ninety-five percent or more of their wholesale power and concluded that I & M's complete control of the municipals' source of supply was by itself sufficient to find monopoly power under section 2.[29] Second, the court found that I & M had a monopoly on the retail level by defining and identifying the product and geographic components of the relevant market on that level.[30] The court stated that retail electric power obviously constituted the relevant product market.[31] Turning to the question of relevant geographic market, the court indicated that the geographic market ought to "'conform to areas of effective competition and to the realities of competitive practice.'"[32] The court concluded that the relevant geographic market in which I & M competed with the plaintiffs coincided with I & M's service area.[33]

In an effort to gauge I & M's power in the relevant market on the retail level, the district court relied on two different statistical tests.[34] The court first applied the test used in *Otter Tail Power Co. v. United States*[35] which analyzes market power by counting the number of municipalities and townships within the service area served by a large utility.[36] The court found that eighty-nine percent

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[28]Nos. S74-72, S75-210, S77-209, slip op. at 4.

[29]*Id.*, slip op. at 6.

[30]*Id.*, slip op. at 4-5; *see* United States v. Grinnell Corp., 384 U.S. 563, 570-71, 575-76 (1966).

[31]Nos. S74-72, S75-210, S77-209, slip op. at 4.

[32]*Id.* (quoting L.G. Balfour Co v. FTC, 442 F.2d 1, 11 (7th Cir. 1971)).

[33]Nos. S74-72, S75-210, S77-209, slip op. The court made it clear that the plaintiffs and I & M competed in the relevant geographic market. The court stated that I & M definitely competed with each municipal plaintiff for the right to serve all of the customers presently served by the plaintiffs' municipal utilities. *Id.* , slip op. at 6; *accord*, Otter Tail Power Co. v. United States, 410 U.S. 366, 369-70 (1973). The district court in *American Electric Power Co.* explained that, if the citizens of any of the cities voted to eliminate their municipal operations, then I & M would likely gain all of the municipalities' customers. The court also indicated that "actual and potential competition exists for certain customers presently located" in plaintiffs' corporate limits. Nos. S74-72, S74-210, S77-209, slip op. at 8. The court also found that I & M and the municipal plaintiffs were competing along the peripheries of their service areas. *Id. See also* Meeks, *supra* note 10, at 94-95 (suggesting that competition between adjacent utilities along their peripheries is not desirable). The district court's determination that competition actually existed between I & M and the municipals effectively rejected I & M's contentions that they were not competing with the plaintiffs in a relevant geographic market.

[34]For criticism of these tests, *see* notes 63-66 *infra* and accompanying text.

[35]410 U.S. 366 (1973).

[36]The *Otter Tail* test has received criticism for treating towns as units of competition because large utilities may not have a monopoly over actual retail sales because

of the units received electric power at retail from I & M within its service area, while the remaining eleven percent were served by plaintiffs and other wholesale customers of I & M.[37] The court concluded that this percentage of the market was sufficient to show monopoly power. The court also applied a retail sales test[38] to measure I & M's market dominance. By finding that I & M controlled eighty-five percent of all retail sales made by public utilities and municipalities within its service area and eighty percent of all such sales if rural electric cooperatives within the relevant market were included, the court confirmed that I & M had monopoly power.[39]

The court next considered the question whether I & M had demonstrated a general intent to abuse its monopoly power. The court defined "general intent" as "'an intent to bring about the forbidden act'"[40] which impairs another firm's ability to compete. Under this approach, the courts generally assume that, if the alleged monopolist's conduct has the consequence of excluding competition or maintaining a monopoly, then the requisite intent is shown.[41]

Accordingly, the district court examined I & M's actions for evidence of exclusionary conduct.[42] The court observed that I & M had engaged in a number of exclusionary acts,[43] including exertion of

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different communities vary in size. Stanton, *The Demise of Traditional Antitrust Law Concepts*, 44 MISS. L.J. 852, 856-57 (1973). For instance, it was found in *Otter Tail* that, although a large vertically integrated utility served 91% of the communities in its relevant market, the utility only supplied 28.9% of the total retail power in that market. 410 U.S. at 383 n.1 (Stewart, J., dissenting).

[37]Nos. S74-72, S75-210, S77-209, slip op. at 5.

[38]Use of this second test indicates that the district court was aware of the criticism of the *Otter Tail* monopoly power test. *See* note 36 *supra*.

[39]Nos. S74-72, S75-210, S77-209, slip op. at 5.

[40]*Id.*, slip op. at 13 (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945).

[41]*See* United States v. Aluminum Co. of America, 148 F.2d at 432 (stating that "no monopolist monopolizes unconscious of what he is doing").

[42]The defendants in *American Electric Power Co.* argued that predatory conduct was essential for establishing an illegal monopoly under § 2. Nos. S74-72, S75-210, S77-209, slip op. at 15. Briefly considered, predatory conduct is an abnormal business practice which is directed at a specific target. L. SULLIVAN, THE HANDBOOK OF THE LAW OF ANTITRUST § 43, at 111-112 (1977). The district court rejected the need to find predatory conduct. Instead, the court applied the less stringent standard of exclusionary conduct, which is defined as "conduct that does not further competition on the merits or that tends to impair the opportunities on the merits or that tends to impair the opportunities of [the alleged monopolist's] rivals to compete." Nos. S74-72, S75-210, S77-209, slip op. at 15. The court justified its use of an exclusionary conduct standard by relying on cases advancing the principle that conduct which would be a normal business practice in absence of a monopoly situation constitutes action that a monopolist should avoid because such action would impair competition. *Id.*, slip op. at 15-16.

[43]*See* note 3 *supra*.

a price squeeze. The court stated that I & M had the duty under the Federal Power Act, as construed by the Supreme Court in *Conway*, to compare its wholesale rates against its retail rates, analyze the anticompetitive impact, and avoid or justify any disparity.[44] The court stated that I & M plainly disregarded this duty:

> As the evidence clearly indicates the defendants [including I & M] made no attempt to compare their wholesale and retail rates, much less to consider the possible anticompetitive impact of that relationship and try to avoid the anticompetitive consequences or, at a minimum, justify any anticompetitive consequences that the defendants claim cannot be avoided.[45]

The court concluded that I & M's imposition of wholesale rates in excess of its retail rates was clearly an exclusionary act because it significantly hindered the municipals' efforts to compete with I & M on the retail level and to provide their citizens with a "full range of benefits,"[46] including cheap retail service, lower electric rates, reduced tax rates, and contributions to the city's operating funds to finance needed city programs and projects.[47]

Moreover, the court indicated that I & M's exclusionary practice of imposing wholesale rates that exceeded its retail rates was not "economically inevitable" and, therefore, could not be excused on the basis of authority that exclusionary acts which cannot be avoided are not violations of the antitrust laws.[48] In fact, the court generalized that the monopolist has a duty under the antitrust laws to refrain from exclusionary conduct that is not inevitable.[49] The court stated that this legal duty under the antitrust laws is complemented by the defendant's obligation under *Conway* to consider and avoid disparities between rates actually in effect.[50] Citing evidence that I & M made no attempt to avoid a discriminatory dual rate structure when the firm filed wholesale rate requests, the court decided that I & M *willfully* disregarded its duties under *Conway* and the antitrust laws.[51]

In addition to finding that I & M possessed the general intent to abuse its power by virtue of its exclusionary conduct, the court

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[44]Nos. S74-72, S75-210, S77-209, slip op. at 10.

[45]*Id.*

[46]*Id.*, slip op. at 11.

[47]Nos. S74-72, S75-210, S77-209, separate findings of fact and conclusions of law at 2. The district court, in effect, recognized that the municipal plaintiffs provided economic benefits that justify their existence on the retail level of the electric power industry.

[48]*Id.*, slip op. at 18-19, 27.

[49]*Id.*, slip op. at 18-19.

[50]*Id.*, slip op. at 19.

[51]*Id.*, slip op. at 21.

stated that I & M's anticompetitive practices, including its price squeeze, would support a finding of specific intent to monopolize. The court indicated that specific intent is satisfied if an alleged monopolist acts with the knowledge that the probable consequence of his practices will injure competition.[52] Deciding that specific intent may be inferred from the nature of I & M's acts, the court stated that the dual rate price structure offers some proof of specific intent because such a structure is likely to have the "probable consequence" of impairing the municipals' ability to compete on the retail level.[53]

As a result of I & M's exclusionary acts, including its price squeeze, which evidenced not only a general intent but also a specific intent to abuse its monopoly power, the court granted the municipal plaintiffs over twelve million dollars in treble damages under the Clayton Act.[54] The damages were figured by computing the difference between I & M's wholesale and retail rates between 1976 and 1978. In addition, the court granted injunctive relief under the Clayton Act.[55] The court ordered I & M to calculate the "billing determinants" for each plaintiff when a new wholesale rate is requested and to compare the billing to each plaintiff to its retail rates actually in effect.[56] The court enjoined I & M from charging the municipalities any new wholesale rate if the wholesale billings exceed I & M's actual retail rates, unless FERC later decides that the wholesale rates are just and reasonable and not unduly discriminatory.[57] However, the court indicated that this injunctive relief would not prevent I & M from filing a new wholesale rate so long as it delayed collection of the rate until FERC determined its justness and reasonableness. The court stated that I & M also had the options of tailoring its wholesale and retail rates to avoid any

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[52]*Id.*, slip op. at 22 (citing United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978)).

[53]Nos. S74-72, S75-210, S77-209, slip op. at 22-23.

[54]Clayton Act, § 4, 15 U.S.C. § 15 (1976). In awarding damages, the district court rejected defendant's argument that the municipal plaintiffs were not injured because they theoretically could "pass on" the higher wholesale costs to the cities' retail customers. Nos. S74-72, S75-210, S77-209, slip op. at 33-36. The court stated that the "pass-on" defense operates only if a firm and its owners are a group district from its customers. *Id.*, slip op. at 36. The court reasoned that the defense was not applicable because the municipal utility's owners and customers were the city's citizens and, therefore, were not separate groups. *Id.* The court concluded that "passing on" the overcharge would have the effect of reducing "the benefits provided by the utility" and increasing the possibility that community citizens might vote to discontinue their municipal utility and "sell it to the defendants." *Id.*

[55]Clayton Act, § 16, 15 U.S.C. § 26 (1976).

[56]Nos. S74-72, S75-210, S77-209, slip op. at 41.

[57]*Id.*

anticompetitive disparity or of timing its wholesale rate requests "to avoid charging any of the plaintiff municipalities more at wholesale" than at retail until its requests for increased retail rates are approved.[58]

In sum, *American Electric Power Co.* clearly demonstrates that the policies and functions of regulatory review and the antitrust laws can be coordinated to preserve competition on the retail level in the electrical power business by eliminating price squeeze consequences. The complementary relationship between a public utility's obligation under the regulatory scheme to avoid the anticompetitive consequences of a dual rate price structure and its corresponding duty under the antitrust laws to avoid exclusionary acts, including a price squeeze, demonstrates the "procompetitive purposes" of both the Federal Power Act and the Sherman Antitrust Act.[59] This synthesis in objectives between the antitrust laws and the regulatory scheme offers the municipals and cooperatives better protection from price squeezes. By providing the municipals with injunctive relief preventing I & M from charging wholesale rates that are greater than its retail rates until FERC effectively reviews the rates for their justness and anticompetitive consequences, the court has eliminated the price squeeze effects resulting from regulatory lag and pancaking.[60] Such injunctive relief will "shift the burden of excessive and exclusionary rates from the [municipalities] onto the [public utilities], where it belongs."[61]

III. The Future Use of Antitrust

Although *American Electric Power Co.* represents a well-reasoned statement regarding the application of antitrust principles to price squeeze abuses, a number of commentators in recent years have expressed a legitimate fear that the courts might apply the antitrust laws in an insensitive manner without considering the unique characteristics of the electric power industry as well as the regulatory policies of FERC.[62] A careful analysis of *American Electric Power Co.* indicates that the district court adequately considered the current realities of the electric industry and, therefore,

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[58]*Id.*

[59]*Id.*, slip op. at 40. *But see* Hale & Hale, *supra* note 10, at 58-59.

[60]*See* Nos. S74-72, S75-210, S77-209, slip op. at 39.

[61]*Id.*, slip op. at 42.

[62]*Hearings Pursuant to H.R. 12461*, *supra* note 10, pt. 2, at 1953 (memorandum of Hunton & Williams); Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559 (1977); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720 (1974).

offers strong precedent for future price squeeze cases, provided these realities do not change.

One of the criticisms of applying traditional antitrust standards to a regulated setting is that many courts gauge monopoly power by only examining statistical data of the alleged monopolist's share of the market without determining whether the accused firm actually has the characteristics of monopoly power.[63] The chief indicators of monopoly power are the abilities to control prices or to exclude competition.[64] Rather than determining whether the alleged monopolist actually controls prices or excludes competition, courts, relying on the statistical share test, usually infer that a firm with a large majority of the market possesses the characteristics of monopoly power. Some experts contend that sole reliance on the statistical share test is not a useful test in regulated industries because the regulatory scheme prevents the private firm from controlling prices or excluding competition,[65] thereby foreclosing the inference of monopoly power from a firm's statistical dominance of a market. These commentators argue that the courts must examine whether the regulated scheme prevents an alleged monopolist from controlling prices or excluding competition.[66]

On the surface, *American Electric Power Co.* might be subject to criticism because the decision relied on the statistical share test to determine whether a utility had monpoly power on the wholesale and retail levels. Arguably, FERC's power to establish wholesale rates which eliminate the anticompetitive and discriminatory impact of a utility's rate request might preclude a firm from controlling prices or excluding competition, provided regulatory review was *meaningful* and *timely.*[67]

However, regulatory review of wholesale rates has not been timely and has rarely been meaningful.[68] The court in *American Electric Power Co.* stated: "The history of plaintiff's experience before the Federal Commission demonstrates that the relief it can offer invariably comes too little and too late."[69] Indeed, the municipalities in *American Electric Power Co.* suffered significant harm because I & M was allowed to collect new wholesale rates

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[63]Watson & Brunner, *supra* note 62, at 565-68.

[64]United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (quoting United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956)).

[65]Watson & Brunner, *supra* note 62, at 566.

[66]*Id.* at 566-68.

[67]*Id.* at 568.

[68]*But see* Missouri Power & Light Co., No. ER76-539 (F.E.R.C. Oct. 27, 1978) (definitive statement by the agency on procedure for consideration of price squeeze abuses).

[69]Nos. S74-72, S75-210, S77-209, slip op. at 12.

before the agency had completed its rate review. The district court observed that refund relief from unjust and unreasonable rates does little to alleviate the anticompetitive effect of a utility's wholesale rates during the period that they are collected while rate review remains pending.[70] Although the agency has the limited ability to suspend collection of the wholesale rates for five months,[71] such relief is of small aid because rate review often takes two to three years thereby allowing the large utility to charge its excessive rates for a considerable time.[72] Quite clearly, the investor-owned utility can control prices as well as discourage competition by filing requests for and collecting wholesale rates that exceed its retail rates because rate review is *not timely or meaningful.* Use of the statistical share test to infer monopoly power under these circumstances is adequate by itself.

Criticism also surrounds the application of traditional intent standards to monopoly situations in a regulated industry.[73] Traditionally, requisite monopolistic intent is inferred from conduct which allows the accused firm to acquire or maintain monopoly power. Some commentators have feared that the courts will infer willful intent from the ordinary business conduct of a regulated monopoly without determining if such conduct is acceptable and economically desirable in the regulated context.[74] For example, conduct that inhibits competition should not be automatic proof of willful intent if competition is not desirable or if such conduct is required by the firm's public obligations and need to guarantee reliable service.[75] Accordingly, commentators have urged the courts to avoid mechanical application of traditional standards of willful intent in a regulated setting.[76]

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[70]*Id.*, slip op. at 13.

[71]*See* Federal Power Act of 1935, § 205(e), 16 U.S.C. § 824d(e) (1976). A 1978 FERC decision indicated that the agency is attempting to reduce the anticompetitive effects of regulatory lag and pancaking by suspending the collection date of a rate request for five months, the maximum period that the agency can delay collection. Indiana & Mich. Elec. Co., Nos. ER78-379, ER78-380, ER78-381, ER78-382, ER78-383 (F.E.R.C. July 20, 1978).

[72]*See* City of Mishawaka v. Indiana & Mich. Elec. Power Co., 560 F.2d at 1325. Regulatory lag and pancaking may not be the only causes of future price abuses. Antitrust litigation may take several years to resolve because of crowded federal court dockets. Consequently, the small utilities may be vulnerable to price squeeze tactics while they await antitrust relief, unless the courts decide to grant preliminary or temporary injunctive relief.

[73]Watson & Brunner, *supra* note 62, at 575-79.

[74]*Id.* at 576.

[75]*Id.* at 577-79.

[76]*Id.* at 579-80. *See generally Hearings Pursuant to H.R. 12461, supra* note 10, pt. 2, at 1953-54 (memorandum of Hunton & Williams).

Careful review of *American Electric Power Co.* reveals that the district court did not carelessly apply the traditional standard of willful intent. The court firmly decided that the disparity between wholesale and retail rates was an exclusionary act that could not be justified on the grounds that the utility had some public obligation or need to impose an anticompetitive dual rate structure or that such competition was undesirable.[77] In fact, the court clearly found that competition on the retail distribution level was desirable. The court observed that the municipal utilities provided a number of benefits, including low electric rates, reduced tax rates, and vital contributions to city operating budgets.[78] The benefits provided by the small utility effectively justified the court's efforts to preserve competition on the retail level.

However, the court recognized that an exclusionary price squeeze should not be proof of an illegal monopoly if the price differential is an "economically inevitable" act.[79] Although the defendant did not justify its rate tactics, the court's recognition of the "economically inevitable" defense would allow a utility which honestly has different costs in providing services on the wholesale and retail levels to justify the discrimination between the rates and to escape monopoly charges because of the economic need to meet costs. In sum, *American Electric Power Co.* applied a willful intent standard that allows consideration of the realities of the electric power industry and offers the investor-owned utility some latitude to provide reliable and economical service.

Although the court in *American Electric Power Co.* applied the antitrust principles in a manner that did not offend the regulatory scheme, criticism of the use of antitrust laws in price squeeze cases should not be ignored. Future use of the antitrust laws should

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[77]Defendant I & M made no attempt to justify its rates on these grounds. I & M, however, did attempt to justify the discrimination on the grounds that it had also filed proposed changes in its retail rates at the same time that it filed for new wholesale rates. The utility argued that the price squeeze resulted because of the State Commission's delay in approving the retail rates which would eliminate the price squeeze caused by the wholesale rates that were being collected pending review by the federal commission. The court indicated that this argument was untenable because the retail rate requests are subject to change by the state commission and are, therefore, too intangible to be relied on by the public for removal of the price squeeze effects caused by the wholesale rates. Nos. S74-72, S75-210, S77-209, slip op. at 29.

[78]Nos. S74-72, S75-210, S77-209, findings of fact and conclusions of law at 2.

[79]A firm's argument that the exclusionary act is "economically inevitable" is commonly called the "thrust-upon" defense which allows an alleged monopolist to evade illegality by showing that its position was "thrust upon" it because of its superior business skill or because of natural market forces. *See* United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

accurately recognize the realities of the electric power industry and avoid mechanical principles that fail to accommodate regulatory factors.

IV. Conclusion

The price squeeze controversy demonstrates a significant effort by the courts to coordinate antitrust and regulatory functions and policies to preserve competition on the retail distribution level of the electric power industry. Although the Supreme Court in *Conway* firmly decided that the FPC (now FERC) has the responsibility to consider and prevent price squeeze tactics,[80] the agency's limited power to suspend the collection of rates still leaves cities and cooperatives vulnerable to the price squeeze effects of regulatory lag and pancaking. *American Electric Power Co.* represents an effort to overcome FERC's limitations by applying antitrust principles. In such application, however, the courts must consider the realities within the regulated electric industry and avoid the shortcomings of mechanical, per se rules that have little sensitivity for a regulatory scheme. If the federal courts carefully consider regulatory factors in approving wholesale rates, the substantive policies of the courts and FERC can be synthesized without injuring the regulatory scheme or vertically integrated utilities which act in a responsible manner.[81]

Charles E. Barbieri

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[80] *See* notes 11-15 *supra* and accompanying text.

[81] *See generally* Meeks, *supra* note 10, at 75-76; Note, *Regulated Industries and Antitrust Laws: Substantive and Procedural Coordination*, 58 Colum. L. Rev. 673, 701 (1958).