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Immunity from Regulatory Price Squeeze Claims: From Keogh, Parker, and Noerr to Town of Concord and Beyond

Keith A. Rowley
University of Nevada, Las Vegas -- William S. Boyd School of Law

Notes

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I. Introduction

On September 21, 1990, the First Circuit handed down its decision in *Town of Concord, Massachusetts v. Boston Edison Co.*[1] This case, the most recent in a growing line of court of appeals decisions examining the antitrust implications of public utility rate structures,[2] represents the first time a United States court of appeals has unequivocally stated that an antitrust action based upon a "price squeeze"[3] could not be maintained against a utility whose wholesale and retail rates were both fully regulated.[4] *Town of Concord* notwithstanding, the courts are far from agreeing whether investor-owned electric or natural gas utilities are immune from federal antitrust liability arising from rates approved by the appropriate state or federal regulators, nor have they been able to agree on the reasoning used to support a given answer. The Supreme Court has yet to grant certiorari and decide the issue.[5]

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1. 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1337 (1991).

2. *See* City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981); City of Mishawaka, Ind. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096 (1981); City of Mishawaka, Ind. v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied*, 436 U.S. 922 (1978).

The D.C. Circuit recently addressed a "price squeeze" claim against Southern California Edison. However, its review of orders entered by the Federal Energy Regulatory Commission (FERC) was limited to evidentiary matters. *See* City of Anaheim, Cal. v. FERC, 941 F.2d 1234 (D.C. Cir. 1991).

3. Generally, a "price squeeze" is alleged when a vertically-integrated firm with a monopoly at the wholesale level and competition at the retail level manipulates its wholesale prices in order to "squeeze" competing retailers (which are the monopolist's wholesale customers) out of the retail market. *See* John E. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L. REV. 563, 565 (1984); *infra* notes 46-59 and accompanying text.

4. *See Town of Concord*, 915 F.2d at 18-19.

5. The petitioners in *Town of Concord* filed a petition for certiorari which the Supreme Court

This Note explores both the price squeeze as an economic and legal phenomenon and three legal doctrines supporting antitrust immunity for fully regulated utility rates—the *Keogh* "filed rate" doctrine,[6] the *Parker* "state action" doctrine,[7] and the *Noerr-Pennington* "political action" doctrine[8]—in light of the First Circuit's decision in *Town of Concord*, as well as other recent decisions examining the applicability of federal antitrust law to regulated utility rates.

Part II provides an overview of those aspects of public utility economics and regulation that are relevant to this inquiry. Part III discusses the price squeeze, both in theory and in practice, in regulated and unregulated industries. Part IV outlines the origins and evolution of the filed rate, state action, and political action doctrines as well as their applicability to regulatory price squeeze claims brought against electric and natural gas utilities. Finally, Part V offers some concluding remarks on the past, present, and future of this niche of antitrust law.

II. Fundamentals of Utility Economics and Regulation

Providing electricity to consumers requires three basic processes: generation, transmission, and distribution.[9] Generation is the process of converting oil, natural gas, and other forms of energy into electricity.

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denied on March 18, 1991, leaving the issue unclarified. 111 S. Ct. 1337 (1991). The petitioners sought a rehearing, which was also denied. 111 S. Ct. 2047 (1991).

6. The "filed rate" doctrine says, in essence, that any rate filed with and approved by the appropriate regulatory agency has the imprimatur of the government and cannot be the subject of legal action against the private entity that filed it. This doctrine is attributed to the Supreme Court's decision in Keogh v. Chicago & Northwest Ry., 260 U.S. 156 (1922). *See infra* notes 75-88 and accompanying text.

7. The "state action" doctrine has its roots in the Tenth and Fourteenth Amendments of the Constitution. It is based on the belief that federal antitrust law may not intrude upon state sovereignty when the State is actively involved in the disputed conduct. While the doctrine is commonly attributed to the Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943), it actually appears to have been born in the earlier decision of Olsen v. Smith, 195 U.S. 332 (1904). *See infra* notes 100-10 and accompanying text.

8. The "political action" doctrine protects the First Amendment rights to assemble and petition government. In Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Supreme Court held that any anticompetitive consequences of a legitimate effort to petition the government were immune from federal antitrust prosecution. *See infra* notes 127-47 and accompanying text.

9. MICHAEL A. CREW & PAUL R. KLEINDORFER, THE ECONOMICS OF PUBLIC UTILITY REGULATION 169 (1986); *see also* FEDERAL ENERGY REGULATORY COMMISSION, POWER POOLING IN THE UNITED STATES 25 (1981) [hereinafter FERC, POWER POOLING] (describing the process of energy supply in the United States). With about 3500 corporate, cooperative, municipal, state, and federal entities engaged in the generation, transmission, or distribution of electric power, the combination of their efforts makes the electric power industry the largest industry in the United States. *See* PAUL L. JOSKOW & RICHARD SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRICAL UTILITY DEREGULATION 11 (1983); CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 523, 538-39 (1984).

Because electricity is typically produced on a much larger scale than is demanded by individual customers, generation is usually performed at centralized facilities, often located a considerable distance from the consumer.[10] Transmission involves sending the electricity generated at a power plant through high-voltage wires to a substation, where it is transformed into low-voltage electricity ready for distribution through low-voltage lines to individual customers.[11] The ownership structure of these three elements of the electricity supply process can vary from complete vertical integration to separate ownership at each level; likewise, ownership may rest in the hands of a private corporation, a cooperative, or a government enterprise.[12]

A. *Investor-Owned Utilities and Other Suppliers*

The private firms that supply most American homes and businesses with electricity are called investor-owned utilities (IOUs). Most IOUs are fully integrated, operating at all three levels of the industry.[13] Investor-owned utilities supply approximately three-fourths of the nation's electricity. The remainder is supplied by (generally nonintegrated) government- and consumer-owned systems.[14] Approximately 2000

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10. CREW & KLEINDORFER, *supra* note 9, at 169-70. For a more detailed discussion of the technical aspects and economic considerations of the electric generation process, see JOSKOW & SCHMALENSEE, *supra* note 9, at 45-58.

11. *See* CREW & KLEINDORFER, *supra* note 9, at 170; JOSKOW & SCHMALENSEE, *supra* note 9, at 59.

12. Thus, William Iulo has noted that:

> [Electric power] is supplied by a complex agglomeration of individual electric supply systems of widely differing economic and legal characteristics. These electric supply systems vary in nature from a small rural cooperative distributing power to a hundred or fewer customers to a large corporate utility serving the power needs of two or three million customers in an extensive metropolitan area. . . . An individual electric supply system may itself generate all the energy demanded by its customers, or it may obtain, by purchase or interchange, all or a portion of its needs from other utilities, government agencies, industrial enterprises, or it may utilize any combination of these sources. . . . The market served by an electric supply system may include only densely populated and industrialized sections within a relatively limited geographic area; or it may be comprised of sparsely populated rural territory spread over a wide geographic area; or the individual system may serve a region with both rural and metropolitan sections.

WILLIAM IULO, ELECTRIC UTILITIES—COSTS AND PERFORMANCE 1-2 (1961); *see also* PHILLIPS, *supra* note 9, at 538-39 (describing "four distinct ownership segments" in the industry: (1) privately owned systems; (2) stste, municipal, and local systems, such as public utility districts and special authorities; (3) cooperatively owned systems; and (4) federal agencies).

13. *See* James E. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 67-69 (1972). About 10% of domestic IOUs have no generating capacity of their own; instead, they buy power from other public and private utilities to supply their customers. JOSKOW & SCHMALENSEE, *supra* note 9, at 11.

14. *See* Paul L. Joskow, *Regulatory Failure, Regulatory Reform, and Structural Change in the Electrical Power Industry*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 125, 129 (Martin N. Baily & Clifford Winston eds., 1989) ("[B]etween 75 and 80 percent of the electricity

municipalities and cooperatives have their own distribution companies, but only a handful generate their own electricity—most purchase the electricity they distribute from IOUs or from government-owned facilities, such as those which are a part of the Tennessee Valley Authority.[15]

Many IOUs participate in power pools, which allow them to buy the excess output of other producers in order to distribute it to their own customers when their self-generated supply is insufficient. Similarly, participation in the pools benefits the IOUs by giving them access to other retail markets, providing them with a means of selling electricity to other utilities outside of their own territories.[16] The basic idea is that two or more utilities, through either a "formal"[17] or "informal"[18] pooling agreement, interconnect their transmission lines, allowing each member of the pool to "buy" or "sell" excess power simply by throwing a switch which connects their "grid"[19] with that of another member.[20] As a result, an integrated utility often distributes electricity generated by a different, interconnected company.

B. *Regulation of Investor-Owned Utilities*

Investor-owned utilities are subject to pervasive economic regulation by municipal, state, and federal authorities. Franchising power usually rests with the state,[21] or is shared between the state and local govern-

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supplied is provided by about 100 independent, private investor-owned utilities (IOUs). The rest is generated or distributed by 3,000 publicly or cooperatively owned entities that vary widely in size, structure, and form of ownership." (footnotes omitted)).

15. *See* Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1337 (1991). For general discussions of the structure of the utility industry, see JOSKOW & SCHMALENSEE, *supra* note 9, at 11-12, 16-20, and Meeks, *supra* note 13, at 67-69.

16. *See generally* JOSKOW & SCHMALENSEE, *supra* note 9, at 66-77 (discussing the types of "pooled" or coordinated agreements and analyzing the economies available to larger pooling systems that are able to msintain a satisfactory level of cooperative activity).

17. *See* FERC, POWER POOLING, *supra* note 9, at 9 n.2 (defining a "formal" power pool as "two or more electric systems which coordinate the planning and/or operation of their bulk power facilities for the purpose of achieving greater economy and reliability in accordance with a contractual agreement that establishes each member's responsibilities").

18. *See id.* at 6 n.1 (defining an "informal" power pool as a group of utilities that "has agreed informally to establish common principles and practices for interconnected operation, to jointly review area power supply problems and establish criteria for power supply adequacy, . . . and to seek coordinated action for best economy and reliability, but which relies on voluntary adherence by members to pool principles and criteria").

19. "Grid" is jargon for the interconnected power supply and distribution system to which a given utility is attached.

20. *See* PHILLIPS, *supra* note 9, at 543-45; Meeks, *supra* note 13, at 101-04.

21. *See, e.g.*, CAL. PUB. UTIL. CODE § 1001 (West 1975 & Supp. 1991) ("No . . . gas corporation [or] electrical corporation . . . shall begin the construction of . . . a line, plant, or system, or of any extension thereof, without having first obtained from the [California Public Utilities Commission] a certificate that the present or future public convenience and necessity require or will

ments.[22] Typically, IOUs operate as franchised monopolies serving retail customers in legally defined service territories.[23] In a few areas, where permitted by state law, utilities have overlapping franchises and may theoretically compete with one another for retail customers.[24]

Sales of electricity are generally characterized as either "wholesale" or "retail" transactions. Wholesale (or "bulk") sales involve one utility selling its generated electricity to another utility, which the latter will distribute to its customers.[25] Sales of electricity directly from a utility to the end-user are retail transactions.[26] In most cases, both the price at which one utility sells to another—the wholesale rate—and the price a utility charges its retail customers—the retail rate—must be approved by the appropriate regulators.

All fifty states have commissions that regulate the rates which IOUs may charge their retail customers.[27] The overriding principle of rate regulation is that IOUs should be allowed to charge prices which cover the prudently incurred costs of providing service, including a "fair" rate of return on capital.[28] This return should be sufficient to compensate the owners of the utility for the risk-adjusted cost of their investment and to allow the utility to attract new investors in order to expand capacity and

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require such construction."); N.Y. PUB. SERV. LAW § 68 (McKinney 1989) ("No gas corporation or electric corporation shall begin construction of a gas plant or electric plant without first having obtained the permission and approval of the [New York Public Service Commission]. No such corporation shall exercise any right or privilege under any franchise hereafter granted . . . without first having obtained the permission and approval of the commission."); TEX. REV. CIV. STAT. ANN. art. 1446c, § 50(1) (Vernon 1989 & Supp. 1991) ("No public utility may in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the [Public Utilities Commission] a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.").

22. *See, e.g.*, ILL. ANN. STAT. ch. 111⅔, ¶ 8-406(a) (Smith-Hurd 1988) ("No public utility not owning any city or village franchise . . . shall transact any business in this State until it shall have obtained a certificate from the [Illinois Commerce] Commission that public convenience and necessity require the transaction of such business.").

23. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1446c, § 50(2) (Vernon 1980 & Supp. 1991) ("[N]o retail public utility may furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another retail public utility . . . without first having obtained a certificate of public convenience and necessity that includes the [contested] area.").

24. JOSKOW & SCHMALENSEE, *supra* note 9, at 13.

25. Joskow, *supra* note 14, at 130.

26. *Id.* at 128 & n.3.

27. JOSKOW & SCHMALENSEE, *supra* note 9, at 13; *see* Joskow, *supra* note 14, at 133-34. These commissions, unless provided for in a state's constitution, are created by statute. *See, e.g.*, FLA. STAT. ANN. § 366.04 (West 1968 & Supp. 1991); ILL. ANN. STAT. ch. 111⅔, ¶ 2-101 (Smith-Hurd 1988); N.Y. PUB. SERV. LAW §§ 5(1)(b), 65 (McKinney 1989); TEX. REV. CIV. STAT. ANN. art. 1446c, § 5 (Vernon 1989 & Supp. 1991).

28. *See* JOSKOW & SCHMALENSEE, *supra* note 9, at 13.

service.[29] By contrast, municipally-owned systems generally are not subject to state regulation.[30]

The Federal Energy Regulatory Commission (FERC), under authority provided by the Federal Power Act of 1935,[31] regulates all wholesale sales made in interstate commerce by IOUs within the United States.[32] The FERC also has responsibility for approving power pooling arrangements, including the prices and terms governing intrapool transactions and the rules under which pools operate and admit members, and for promoting power system reliability and efficiency.[33]

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29. *Id.*; *see* PHILLIPS, *supra* note 9, at 151-52; TEX. REV. CIV. STAT. ANN. art. 1446c, § 39(a) (Vernon Supp. 1991); *see also infra* note 62 (discussing "reasonable" rates in terms of costs and profit).

The determination of what costs are prudently incurred, what rate of return is fair to existing and future owners, and what mechanisms are required to ensure that efficiency is rewarded and inefficiency discouraged is a complicated process which seems to produce few "correct" answers and an almost unceasing call for reform. For a more detailed discussion of the theory and practice of public utility rate regulation, see CREW & KLEINDORFER, *supra* note 9, at 111-18, 124-32 (arguing that the economic costs of regulation probably outweigh the economic benefits). *See generally* PHILLIPS, *supra* note 9, at 281-377 (describing different ways to establish a rate base and rate structure).

30. *See, e.g.*, FLA. STAT. ANN. § 366.11 (West Supp. 1991) (declaring that, with specified exceptions, state regulatory laws are inapplicable to municipally-owned utilities); ILL. ANN. STAT. ch. 111⅔ ¶ 3-105(1) (Smith-Hurd 1988) (excluding municipally-owned utilities from the definition of "public utility"); TEX. REV. CIV. STAT. ANN. art. 1446c, § 20 (Vernon Supp. 1991) (denying the Public Utilities Commission the power to regulate municipally-owned utilities regarding services provided within municipal boundaries). *But see* N.Y. PUB. SERV. LAW § 65 (McKinney 1989) (subjecting municipally-owned utilities to the same requirements as privately-owned utilities with regards to safe and adequate service, just and reasonable charges, and discriminatory or preferential rates or services).

31. 16 U.S.C.A. §§ 791a-828c (West 1988 & Supp. 1991).

32. *See* 16 U.S.C. § 824(b)(1) (1988) (granting the Commission power to regulate "the sale of electric energy at wholesale in interstate commerce"); *see also* Cincinnati Gas & Elec. Co. v. FPC, 376 F.2d 506, 507-08 (6th Cir.) (affirming the district court's holding that the Federal Power Commission, the predecessor of the FERC, had jurisdiction to require utilities to file, and maintain on file, rate schedules covering their interstate wholesale sales), *cert. denied*, 389 U.S. 842 (1967).

Wholesale sales made by IOUs which are strictly intrastate in nature are subject to regulation by the appropriate state authorities. *See* 16 U.S.C. § 824(b)(1) (1988) (stating that "any other sale of electric energy" other than "the sale of electric energy at wholesale in interstate commerce" is beyond the purview of the Commission). However, the division between intrastate sales and interstate sales is less clear than it may appear. Ultimately, the classification depends upon whether the electricity is sold via a pool or other mechanism which might intermingle power generated in two or more states, rather than the physical locations of the seller and buyer. Public Serv. Co. of Ind. v. Federal Power Comm'n, 375 F.2d 100, 103 (7th Cir.) (holding that a power company doing all its business intrastate was engaged in interstate commerce because its power intermingled with a pool doing interstate business), *cert. denied*, 387 U.S. 931 (1967).

33. *See* 16 U.S.C. § 824a-1 (1988) (enabling the Commission to (1) exempt a utility from a state law barring pooling in cases where the Commission finds that pooling would be economically useful, and (2) recommend pooling to utilities in cases where doing so would optimize "the efficiency of use of facilities and resourees" or "increase[] reliability"); *see also Cincinnati Gas & Elec.*, 376 F.2d at 508 (stating that where electricity generated interstate and intrastate are commingled and flowing through a utility's system, the Commission need not prove the source of electrical current supplied from a pool in order to regulate it—each sale is "drawn from the integrated system and hence interstate in

III. The Price Squeeze as an Antitrust Violation

Although most investor-owned electric utilities are, in effect, legally protected monopolies, they have frequently been accused of misusing their power to protect or expand their positions, in violation of the prohibitions of section 2 of the Sherman Act[34] against monopolization or attempted monopolization.[35] Since the Supreme Court's decision in *Otter Tail Power Co. v. United States*,[36] it has been clear that an electric utility, with a validly obtained monopoly franchise "upstream" in the supply process, may be found guilty of violating section 2 by monopolizing, or attempting to monopolize, "downstream."[37] One misuse of monopoly power is the creation of a price squeeze, which is a differential between a utility's wholesale and retail rates that impedes the ability of the utility's wholesale customers to compete with it at the retail level.[38]

A. *Relevant Antitrust Principles*

Section 2 of the Sherman Act makes it illegal for any person to "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."[39] In *United States v. Grinnell Corp.*,[40] the Supreme Court defined the elements of monopolization as: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[41] "Monopoly power," in turn, means "the power to control market prices or exclude competition" in a relevant market.[42]

Attempted monopolization occurs when a firm not currently possessing monopoly power in a particular market undertakes conduct (1) totally

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nature" (quoting Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 241 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952))); *Public Serv. Co. of Ind.*, 375 F.2d at 103 (upholding FPC's finding that the petitioner's participation in a power pool which included out-of-state utilities caused interstate electricity to commingle with the utility's own generated power and enter into all of its sales, thereby giving FPC jurisdiction over the utility's wholesale rates).

34. 15 U.S.C. § 2 (1988).

35. Lopatka, *supra* note 3, at 564.

36. 410 U.S. 366 (1973).

37. *See id.* at 377 ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws.").

38. *See* Lopatka, *supra* note 3, at 564-65.

39. 15 U.S.C. § 2 (1988).

40. 384 U.S. 563 (1966).

41. *Id.* at 570-71.

42. *Id.* at 571 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

unrelated to competition on the merits; (2) that clearly implies the presence or prospect of some degree of durable market power; and (3) that has potentially significant exclusionary effects.[43] In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[44] the Supreme Court gave some guidance in discerning acceptable from unacceptable conduct vis-à-vis section 2: if the dominant firm's behavior reduces competition and cannot be justified on efficiency grounds, it is unlikely to pass section 2 muster.[45]

B. *The Theory of the Price Squeeze*

As generally conceptualized, a price squeeze requires a firm with substantial monopoly power in an upstream market (*e.g.*, electricity generation) to integrate into one or more downstream markets (*e.g.*, electricity retailing) that use the upstream product as an input. The firm with monopoly power in the upstream market thus becomes both a supplier to and a direct competitor with firms in the downstream markets into which it has integrated.[46] The "squeeze" occurs when the monopoly input supplier raises the price it charges its downstream competitors so that they cannot profitably sell the downstream product in competition with the integrated firm. The integrated firm, of course, implicitly charges itself less for the input than it charges its competitors.[47] Thus, by engaging in the "squeeze," an integrated firm can force its downstream competitors out of business and "extend" its monopoly power into the new market.[48]

However, even if an integrated firm can drive independent competitors out of business and extend its monopoly to the second industry level, that alone does not make a price squeeze anticompetitive. The mere fact that

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43. *See* 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 313 (1978). Areeda and Turner's definition refines the "classic" formulation of attempted monopolization—intent plus conduct plus dangerous probability of success—to which many courts still turn. *See* Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 430 (7th Cir. 1980) ("The elements of attempt to monopolize are: '(1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.'" (quoting Gough v. Rossmoor Corp., 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979))).

44. 472 U.S. 585 (1985).

45. *See id.* at 610-11 ("[T]he evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.").

46. Paul L. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition, in* ANTITRUST AND REGULATION: ESSAYS IN MEMORY OF JOHN J. MCGOWAN 173, 186 (Franklin M. Fisher ed., 1985).

47. *Id.*

48. Although the downstream firms may themselves have a legally obtained monopoly over retail sales in a geographic area into which the upstream monopolist cannot directly intrude, there are still methods by which the upstream monopolist can effectively compete for potential clients. *See infra* text accompanying notes 69-70.

a firm eliminates its competitors is not necessarily anticompetitive, because every legitimate business activity that succeeds in helping a firm will likely disadvantage that firm's competitors.[49] Rather, a practice is "anticompetitive" only if it harms competition—that is, if it detracts from the ability of present or future market participants to compete with the defendant.[50]

In *United States v. Aluminum Co. of America*,[51] Judge Learned Hand wrote that a price squeeze violates section 2 of the Sherman Act when (1) the firm conducting the "squeeze" has monopoly power at one industry level, (2) its price at that level is "higher than a 'fair price,'" and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit."[52] Judge Hand proposed a "transfer price test" to determine whether the integrated firm had engaged in a price squeeze.[53] Simply put, a price squeeze occurs when an integrated firm could not sell its downstream output profitably at prevailing prices if it had to "pay" the same price for the input that it charges to its downstream competitors.[54]

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49. *See* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1113 (7th Cir.) ("After all, competition consists of winning business from rivals."), *cert. denied*, 464 U.S. 891 (1983).

50. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977) ("The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' . . . Plaintiffs must prove *antitrust* injury, which . . . should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original))); *Brown Shoe*, 370 U.S. at 320 ("Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors* . . . ." (emphasis in original)); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) ("'Anticompetitive' . . . has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that barm the competitive process."), *cert. denied*, 488 U.S. 1007 (1989).

51. 148 F.2d 416 (2d Cir. 1945) (*Alcoa*).

52. *See id.* at 437-38; *see also* Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990) (reiterating Judge Hand's requirements, but stating that the effect of a price squeeze in a fully regulated industry is not likely to result in a violation of § 2), *cert. denied*, 111 S. Ct. 1337 (1991).

53. *See Alcoa*, 148 F.2d at 437.

54. *See id.* (holding that Alcoa practiced a price squeeze by selling aluminum ingot at so high a price that similar manufacturers foreed to buy their raw material from Alcoa could not make a profit if they sold the finished product at the same price as Alcoa); Joskow, *supra* note 46, at 186-87 ("A price squeeze is said to take place when the monopoly input supplier charges a price for the input to its downstream competitors that is so high they cannot profitably sell the downstream product in competition with the integrated firm."). Alternatively, Professor Lopatka deflnes a "price squeeze" as occurring when

$$\frac{P_w}{MC_w} > \frac{P_r}{MC_r}$$

where P_w is the price charged by the integrated firm to its wholesale customers (*i.e.*, its retail competitors), MC_w is the marginal cost of providing wholesale distribution, P_r is the price charged by the integrated firm to its retail customers, and MC_r is the marginal cost of providing retail distribution.

At least two arguments can be made in favor of discouraging this extension of monopoly power. First, insofar as it is more difficult for a firm to enter an industry at two levels than at one, the monopolist, by expanding its monopoly power, has made entry by new firms more difficult.[55] Second, the existence of competitors at the second level, regardless of their immediate impact on price, provides an added incentive for the integrated firm to develop better, more efficient means of serving its customers. Specifically, the monopolist's failure to become more efficient may enable the competing firms, by their own efforts to enhance efficiency or product quality, to capture a growing share of the integrated firm's second-level customers.[56]

There are at least two situations, however, in which the circumstances which create a "squeeze" might simultaneously create economic benefit. First, the primary-level monopolist might carry out its second-level activities more efficiently than its independent competitors—that is, there may be economies of scope, as well as economies of scale, at work.[57] Second, prices that squeeze out a "second-level" firm will benefit consumers whenever that firm is itself a monopolist.[58] Moreover, "the

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In this case, the integrated firm's wholesale profits exceed its retail profits at the margin. *See* Lopatka, *supra* note 3, at 588.

55. *See Town of Concord*, 915 F.2d at 23. In addition, if "the monopolist previously set prices cautiously to avoid attracting a competitive challenge, the added security of a two-level monopoly could even lead [the] monopolist to raise his prices." *Id.* at 24; *see also* 3 AREEDA & TURNER, *supra* note 43, at 204-08, 243-54 (discussing the economic effect of a monopolist's full or partial vertical integration through merger, acquisition, and long-term requirements and output contracts). *See generally* William G. Shepherd, *Potential Competition Versus Actual Competition*, 42 ADMIN. L. REV. 5, 6 (1990) (discussing potential competition in general and advocating that entry barriers be considered only peripherally, since they divert attention from the decisive conditions of monopoly).

56. *See Town of Concord*, 915 F.2d at 24; *see also* 3 AREEDA & TURNER, *supra* note 43, at 204 ("[The monopolist] faces the threat that inefficiency and lack of progressiveness will increase his vulnerability to new entry.").

57. *See Town of Concord*, 915 F.2d at 24 (explaining that prices that squeeze the less efficient competitors could lower prices by driving the competitor out of business and lowering costs, thereby saving economic resources overall); 3 AREEDA & TURNER, *supra* note 43, at 201 (explaining that whenever vertical integration produces new efficiencies, productive resources are saved and consumers are directly benefitted); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 243 (1978) (arguing that a price "squeeze" shifts business from less to more efficient operations).

Scale economies arise when the production process is such that costs per unit can only be minimized at high levels of output. Scale economies occurring at a sufficiently high level of output so that only one firm can supply the market and operate at minimum average total cost are the basis of "natural" monopoly theory. *See* WILLIAM W. SHARKEY, THE THEORY OF NATURAL MONOPOLY 15-16, 20 (1982). Scope economies, on the other hand, arise when the production or distribution of two or more products is so intertwined as to make joint production or distribution more cost-effective than production or distribution by separate entities. In such a case, an integrated firm (supplying both products) enjoys a competitive advantage over single-product firms. *See id.* at 23-24.

58. Judge Breyer provides the following illustration:

> If, for example, ingot costs $40, the fabricating process costs $35, and the profit-maximizing price for sheet is $100, an ingot monopolist will charge $65 for the ingot, hoping that competition at the fabricating level will keep the total price at $100. If a

extension of monopoly power from one to two levels [of the production process] does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices."[59]

C. *The Price Squeeze in a Fully Regulated Industry*

Any analysis of the desirability of an antitrust solution to the price squeeze problem requires that we clearly distinguish between "predatory" price squeezes, which are the product of the utility's intent and conduct, and "innocent" price squeezes which are the consequence of, among other things, administrative inconsistency.[60] The former may be a proper subject of antitrust scrutiny, while the latter are not.[61]

Full price regulation dramatically reduces the risk that predatory price squeezes may occur. Specifically, regulation significantly diminishes the risk that retail prices will rise because new firms will hesitate to enter the market and compete after a price squeeze has driven pre-existing competitors from the market. First, in a fully regulated industry regulators control prices directly, as well as the range within which an expansion-minded utility could operate, significantly reducing the opportunities for conducting a price squeeze.[62] Second, factors related to regulation, such as the

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> different, independent monopolist dominates the fabricating level, however, [he] will mark up the price by more than $35, because he wants to earn monopoly profits as well. The results will be a market price of more than $100, resulting in smaller monopoly profits overall (for the final price is too high), but greater profits for the second monopolist than if he sold the sheet for only $100 . . . . Under these circumstances, entry by the ingot monopolist into the sheet-fabrication level—even by means of a price squeeze—will help the consumer by limiting the final price of sheet to $100.

Town of Concord, 915 F.2d at 24; *see also* Fishman v. Estate of Wirtz, 807 F.2d 520, 563 (7th Cir. 1986) (Easterbrook, J., dissenting) (arguing that "successive monopolies injure consumers").

59. *Town of Concord*, 915 F.2d at 23 (emphasis in original); *see also* BORK, *supra* note 57, at 229 ("[V]ertically related monopolies can take only one monopoly profit."); RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production."). *But see supra* notes 55-56 and accompanying text.

60. *See* Lopatka, *supra* note 3, at 603, 614-17 (defining "predatory" and "innocent" price squeezes and explaining the conduct involved with each type).

61. *Id.* at 603; *see* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1137 (7th Cir.) ("Ordinarily, antitrust liability should not be imposed when a firm acts in compliance with its regulatory obligations."), *cert. denied*, 464 U.S. 891 (1983). *But see* City of Anaheim, Cal. v. FERC, 941 F.2d 1234, 1239 (D.C. Cir. 1991) (stating that "the intent of the utility has no bearing on the price squeeze inquiry").

62. *See Town of Concord*, 915 F.2d at 25 (noting that in regulated industries, regulation reduces the risk of a price squeeze because "regulators control prices directly" and because statutes require prices to be at "'reasonable' levels"); *see also MCI Communications*, 708 F.2d at 1107 ("Ultimately, [monopoly power] analysis must focus directly on the ability of the regulated company to control prices or exclude competition—an assessment which, in turn, requires close scrutiny of the regulatory scheme in question."); Travelers Ins. Co. v. Blue Cross, 361 F. Supp. 774, 780 (W.D. Pa. 1972) (holding that a company lacked monopoly power since it lacked control over the ratemaking mechanism), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973).

economic ability of the market to support an additional firm or the legal requirement that potential entrants first secure permission from the appropriate regulatory agency, are more likely to determine entry into a regulated industry than is a new entrant's fear of a two-level monopolist's market power.[63] Finally, in a regulated industry such as electricity, where the competing retailers are generally franchised monopolies themselves, there is little chance that a price squeeze will drive them out of the market. They would likely respond to higher wholesale rates by requesting higher retail rates.[64]

Furthermore, other factors suggest that attempts to control price squeezes through aggressive enforcement of antitrust statutes may be counterproductive, if not harmful. Specifically, to the extent that regulators succeed in setting retail rates that reflect costs, an integrated utility's prices are likely to squeeze only those independent distributors who operate less efficiently (*i.e.*, at higher cost) than the utility.[65] Consequently, a rule preventing prices that might create a squeeze may be more likely to discourage efficient operations and deprive customers of prices that reflect lower costs than to preserve competition and protect consumers.[66]

Statutes typically require regulators to maintain utility rates at "just and reasonable" levels. *See, e.g.*, 16 U.S.C. § 824d(a) (1988); CAL. PUB. UTIL. CODE § 451 (West 1975 & Supp. 1991); ILL. ANN. STAT. ch. 111⅔, ¶ 9-101 (Smith-Hurd 1988); N.Y. PUB. SERV. LAW § 66(5) (McKinney 1989); TEX. REV. CIV. STAT. ANN. art. 1446c, § 38 (Vernon Supp. 1991).

"A 'reasonable' rate is one that permits the firm to recover its costs and earn a reasonable profit." FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

63. *See Town of Concord*, 915 F.2d at 26; *see also* Meeks, *supra* note 13, at 95-96 (discussing the effects of territorial restrictions, such as "convenience and need" certification and franchise requirements, on potential entrants). *See generally* 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: INSTITUTIONAL ISSUES 113-72 (1988) (disputing the legitimacy of regulated, natural monopolies when other competitors wish to enter).

64. *See* Joskow, *supra* note 46, at 178, 209-13 (analyzing the lack of retail competition for "large industrial customers," noting the existence of "[m]onopoly supply at the retail level," and arguing that the assumption "that retail competition can and does play an important role in allocating resources" is "largely wrong" in this area); *cf.* Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973) ("Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail."); *Town of Concord*, 915 F.2d at 26 ("Higher wholesale electricity prices (or lower retail prices elsewhere) will not lead the entire towns of Wellesley and Concord to pull up stakes and move to Dover . . . . Even if an integrated utility such as Edison managed to set prices that severely squeezed a distributor, it could not take over the municipality's distribution area without the regulator's permission.").

65. This argument should work equally well for wholesale rates except in the situation where the integrated firm experiences both economies of scale and economies of scope. In such a situation, the latter may enable an integrated firm to drive an efficient downstream competitor out of the market, if that downstream competitor is not also experiencing scope economies. *See supra* note 57.

66. *See Town of Concord*, 915 F.2d at 26; *see also MCI Communications*, 708 F.2d at 1114 ("Such a rule would tend to freeze the prices of dominant firms at their monopoly levels and would prevent many pro-competitive price cuts beneficial to consumers and other purchasers.").

D. *Analyzing Utility Price Squeeze Cases*

Prior to the First Circuit's decision in *Town of Concord*, a number of courts indicated that a price squeeze by a regulated utility may be a violation of federal antitrust law.[67] In those cases, the plaintiff typically alleged that an integrated utility with monopoly power in the wholesale market had extended its power into the retail market by perpetrating a price squeeze, in violation of section 2 of the Sherman Act.[68]

An excellent illustration of the issues at stake is provided by Judge McCune's opinion in *Borough of Ellwood City, Pennsylvania v. Pennsylvania Power Co. (Ellwood I)*:[69]

> Not only does Penn Power sell power to plaintiffs at wholesale rates, but it [also engages] in the retail distribution of power to customers in the area surrounding plaintiffs' service area. . . . For practical purposes, competition between Penn Power and plaintiffs can be seen most strongly in the service of industrial and commercial customers having the option to locate in either the service area of Penn Power or that of plaintiffs. These customers do have a choice of suppliers when making their initial decision to locate their operations. If the retail rates of plaintiffs and Penn Power differ, the loeation choice of the potential customer can be affected by the differential. Plaintiffs and Penn Power also compete, at least theoretically and on a long term basis, for service areas. If plaintiffs were to become unable to serve their customers profitably, Penn Power would logically be in the best position to assume plaintiffs' present service. . . .

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67. *See, e.g.*, City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981); City of Mishawaka, Ind. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096 (1981); City of Mishawaka, Ind. v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied*, 436 U.S. 922 (1978); Borough of Ellwood City, Pa. v. Pennsylvania Power Co., 570 F. Supp. 553 (W.D. Pa. 1983) (*Ellwood II*); Borough of Lansdale v. Philadelphia Elec. Co., 517 F. Supp. 218 (E.D. Pa. 1981); City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979); Borough of Ellwood City, Pa. v. Pennsylvania Power Co., 462 F. Supp. 1343 (W.D. Pa. 1979) (*Ellwood I*).

In the first reported decision to come out of the federal courts since *Town of Concord*, the defendant utility was found to have conducted a price squeeze, essentially by manipulating the timing of its rate requests to FERC and the California PUC; yet the court found no antitrust liability, holding that the utility had no affirmative duty to mitigate the effect of the squeeze that might have occurred as a result of the timing and amount of the two rate applications. *See* City of Anaheim, Cal. v. Southern Cal. Edison Co., 1990-2 Trade Cas. (CCH) ¶ 69246, at 64904 (C.D. Cal. Oct. 22, 1990).

68. *See, e.g.*, *City of Kirkwood*, 671 F.2d at 1175-76; *Mishawaka II*, 616 F.2d at 978; *Borough of Lansdale*, 517 F. Supp. at 219; City of Groton v. Connecticut Light & Power Co., 497 F. Supp. 1040, 1052 n.14 (D. Conn. 1980), *aff'd in part and rev'd in part*, 662 F.2d 921 (2d Cir. 1981); *City of Newark*, 467 F. Supp. at 765-66; *Ellwood I*, 462 F. Supp. at 1344-46.

69. 462 F. Supp. 1343 (W.D. Pa. 1979).

> Plaintiffs must deal with Penn Power for their supply of bulk power at wholesale rates. . . . It is the position of the plaintiffs that Penn Power thus has the ability to dictate the profitability of plaintiff's [sic] operations, theoretically to the point of destroying, completely, plaintiffs' ability to operate profitably, subject only to state and federal regulation and market constraints.[70]

A price squeeze claim is usually accompanied by allegations that other actions by the integrated utility were designed to eliminate retail competition.[71] The exact role of the price squeeze claim in the midst of the other allegations is a subject of some dispute. In Professor Lopatka's opinion, the price squeeze allegations in these cases are "the heart of the antitrust complaint."[72] In fact, he goes on to speculate that "if the price squeeze is deemed an insufficient basis of liability, few utility monopolization claims would be brought, the other conduct allegations being specious, unprovable, or equally insufficient."[73]

On the other hand, Judge Breyer stressed in *Town of Concord* that in the three court of appeals cases he declined to follow—*City of Kirkwood*, *City of Groton*, and *Mishawaka II*—the price squeeze claims are often only one of several claims of "exclusionary" conduct, and that "the one court that affirmed a Sherman Act § 2 judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone."[74] As yet, it is not clear whether electric utilities, barring some immunity, will continue to be subjected to antitrust liability for conducting price squeezes allegedly in violation of section 2 of the Sherman Act.

IV. Possible Sources of Antitrust Immunity from Utility Price Squeeze Claims

Given the lack of consensus among the circuits concerning the validity of price squeeze claims against fully regulated utilities, and the lack of

70. *Id.* at 1346.

71. *See, e.g.*, *City of Kirkwood*, 671 F.2d at 1176 (stating that the plaintiff accused the utility of refusing to establish a transmission rate for the city); *City of Newark*, 467 F. Supp. at 766 (stating that the plaintiff charged the utility with refusing to "wheel" power—*i.e.*, transport power from another supplier across the utility's lines); *id.* (stating that the plaintiff charged the utility with imposing restrictions, as a condition of sale, that prohibited the plaintiff from serving new customers); City of Mishawaka, Ind. v. American Elec. Power Co., 465 F. Supp. 1320, 1328 (N.D. Ind. 1979) (stating that the plaintiff accused the utility of threatening to terminate wholesale sales), *aff'd in part, vacated in part and remanded*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *id.* (stating that the plaintiff accused the utility of threatening to restrict the amount of power available for sale); *Ellwood I*, 462 F. Supp. at 1346 (stating that the plaintiff accused the utility of refusing to allow plaintiff to participate in a power pool).

72. Lopatka, *supra* note 3, at 605.

73. *Id.* at 605-06.

74. Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 28 (1st Cir. 1990) (emphasis in original) (referring to *Mishawaka II*, 616 F.2d at 986).

guidance from the Supreme Court, perhaps the safest bet for a regulated utility is to find a nice, warm blanket of immunity, to protect it not only from the slings and arrows of price squeeze allegations, but from all other potential antitrust complaints arising from the rate-setting process as well. The decisions of various courts suggest that there may be three sources of potential immunity for fully regulated utilities: the "filed rate" doctrine, the "state action" doctrine, and the "political action" doctrine.

A. *The Filed Rate Doctrine and Regulatory Price Squeeze Claims*

1. The Origins and Evolution of the Filed Rate Doctrine.—The filed rate doctrine had its origins in the case of *Keogh v. Chicago & Northwestern Railway.*[75] In *Keogh,* a shipper complained that certain railroads had unlawfully conspired to set rates higher than they would have been in the presence of competition.[76] The Supreme Court held that the shipper could not prevail on a claim that rates on file with the Interstate Commerce Commission (ICC) were unlawful under federal antitrust laws.[77] The Court explained: "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper."[78] The filed rate doctrine has subsequently beeu extended across the entire spectrum of regulated industries.[79]

The filed rate doctrine assumes that all rates that have been filed and approved are "reasonable and nondiscriminatory."[80] Regulated entities are prohibited from charging rates for their services other than those

75. 260 U.S. 156 (1922).

76. *Id.* at 160.

77. *See id.* at 161-62.

78. *Id.* at 163.

79. *See, e.g.,* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) (motor carriage); Arkansas La. Gas Co. v. Hall, 453 U.S. 571 (1981) (*Arkla*) (natural gas production); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (electric utilities); INF, Ltd. v. Spectro Alloys Corp., 881 F.2d 546 (8th Cir. 1989) (common carriage generally); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445 (6th Cir.) (dockside loading, unloading, and handling), *cert. denied,* 488 U.S. 880 (1988); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1145 (7th Cir.) (telecommunications), *cert. denied,* 464 U.S. 891 (1983).

For an excellent discussion of the development of the filed rate doctrine in the context of interstate carriage, see Paul S. Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species,* 32 AM. U. L. REV. 335 (1983). For an updated discussion incorporating recent court decisions, see Michael A. Rouse, Note, *A Re-Evaluation of the "Filed Rate" Doctrine in Light of Revised Regulatory Policy and Carriers' Practices:* INF, Ltd. v. Spectro Alloys Corp., 23 CREIGHTON L. REV. 669 (1990).

80. *Square D Co.,* 476 U.S. at 415 (quoting *Keogh,* 260 U.S. at 161); *see Arkla,* 453 U.S. at 577-78 (observing that the doctrine is based on the preservation of the regulatory agency's primary jurisdiction over the reasonableness of rates); *see also Montana-Dakota Util.,* 341 U.S. at 251 (stating that a customer "can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the [Federal Power] Commission").

properly filed with the appropriate regulatory authority.[81] Likewise, the doctrine precludes the rate-setting body from altering filed and approved rates retroactively.[82]

Prior to the Sixth Circuit's 1988 decision in *Pinney Dock & Transportation Co. v. Penn Central Corp.*,[83] most courts that addressed the applicability of the filed rate doctrine to price squeeze allegations distinguished *Keogh* and its progeny[84] on one or more of the following grounds: (1) the price squeeze allegation is not a direct attack on filed rates, but rather on the relationship between wholesale and retail rates;[85] (2) the filed rates have been questioned or held unlawful by the relevant agency, thus excepting those rates from the "filed and approved" requirement of the doctrine;[86] (3) the filed rate doctrine applies only to actions brought by customers, not by competitors;[87] or, (4) the filed rates were "rubber stamped" by the relevant regulatory body, without requiring

81. *Arkla*, 453 U.S. at 577.

82. *See id.* at 578 (noting that "[n]ot only do the courts lack authority to impose a different rate than the one approved by the [Federal Power] Commission, but the Commission itself has no power to alter a rate retroactively"); FPC v. Sunray DX Oil Co., 391 U.S. 9, 24 (1968) (holding that the Federal Power Commission lacked authority to change a price limit that it had previously established in a "final, permanent certificate").

83. 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

84. *See* James P. Denvir, *The Sixth Circuit's Decision in* Pinney Dock*: The End of Utility Price Squeeze Damage Claims?*, ANTITRUST, Summer 1988, at 28, 29 (explaining the significant cases involving the filed rate doctrine decided before *Pinney Dock*). *But see* City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 769-70 (D. Del. 1979).

> I consider it unlikely that Congress intended a federal court to impose liability on a public utility for charging a retail rate which a state has authorized it to charge . . . .
>
> I reach the same conclusion with respect to . . . Delmarva's wholesale rates . . . . The Federal Power Act contemplates that the expert eye of the FPC will oversee the wholesale rates of public utilities in order to protect the public interest. . . . In order to effectuate that objective, Congress provided for filing and review of rates and decreed that it would be unlawful for anyone to charge more or less than the filed rate.

Id.

85. *See, e.g.*, City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir. 1982) ("Kirkwood does not quarrel with the reasonableness determinations of the FERC and PSC as to any individual wholesale or retail rate. Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable."), *cert. denied*, 459 U.S. 1170 (1983).

86. *See, e.g.*, City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) ("Disapproved tariffs provide no immunity when . . . the regulatory agency expressly refuses to commit itself pending investigation.").

87. *See, e.g.*, *City of Kirkwood*, 671 F.2d at 1179 ("[T]he doctrine was created to protect customers, not competitors."); Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114, 1121 (3d Cir. 1979) ("[T]he filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors . . . ; competitors are not the intended beneficiaries of that rule of public utility regulation."). *But see City of Groton*, 662 F.2d at 929 ("[A]n anticompetitive practice embodied in a tariff may violate the antitrust laws if it . . . impacts upon competitors as opposed to customers . . . .").

active participation by the agency in the decision-making process or active oversight of the competitive consequences by the agency.[88]

2. *Pinney Dock and the Extension of the Filed Rate Doctrine.*—Unlike both *Keogh* and *Square D*, which involved lawsuits brought by customers, *Pinney Dock* involved an antitrust challenge to filed rates by competitors of the putative monopolists. The defendants in *Pinney Dock* were railroads which provided freight transportation to and from certain dock facilities on Lake Erie. Each of the defendants also owned, operated, or was affiliated with one or more of the docks. The plaintiffs were the owners of a competing dock facility (Pinney) and a company which operated self-unloading and conventional vessels used to ship bulk commodities over Lake Erie and the other Great Lakes (Litton).[89]

The thrust of the complaint was that the defendant railroads had conspired to restrain trade in, eliminate competition in, and monopolize the business of providing dock services for iron ore and other bulk commodities being loaded or unloaded at docks on the Great Lakes. The plaintiffs alleged that the defendants sought to accomplish these ends by engaging in secret meetings, by refusing to grant nonrailroad-owned docks a competitive rail rate, by refusing Litton access to docks which could accommodate self-unloading vessels, by charging Pinney higher-than-competitive rail rates and switching charges, and by forcing any railroad wishing to service the docks to forego their right to determine their rates and services independently.[90]

The defendants contended that the *Keogh* doctrine foreclosed the plaintiffs' damage claims based on unreasonable freight and handling charges, because the defendants' rates had been filed with and approved by the ICC.[91] The plaintiffs responded that the *Keogh* rule applies only to damage actions brought by customers, not by competitors.[92] The Sixth Circuit, while acknowledging the limited construction favored by the Second[93] and Third[94] Circuits, found no compelling reason to limit the

88. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 594 (1976) (holding that even when a utility could neither maintain nor abandon an allegedly anticompetitive tariff without express regulatory approval, a utility may still be liable for antitrust consequences if "the option to have, or not to have, such a program [was] primarily [the utility's], not the Commission's"); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1145 (7th Cir.) ("The existing terms were not instituted or required by the FCC, and AT&T could presumably modify them upon due notice. The tariffs could not thus provide an excuse for AT&T's knowingly anticompetitive conduct." (citation omitted)), *cert. denied*, 464 U.S. 891 (1983).

89. Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1449 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

90. *See id.* at 1452.

91. *See id.* at 1455.

92. *Id. See generally supra* note 87 and accompanying text.

93. *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347 (2d Cir. 1985)

applicability of the *Keogh* doctrine to suits brought by customers.[95] Thus, *Pinney Dock*'s holding, if widely followed, would deprive price squeeze plaintiffs of an important means of avoiding the application of the *Keogh* defense: the argument that the rule operates to foreclose damages only in actions brought by customers, not in those brought by competitors.[96]

3. Beyond Pinney Dock*:* Town of Concord *and the Future of the Filed Rate Defense in Price Squeeze Actions.*—In *Town of Concord, Massachusetts v. Boston Edison Co.*,[97] the First Circuit appeared to base its holding on a variant of the filed rate doctrine. Specifically, the court held that effective price regulation at both the wholesale and retail levels makes it unlikely that any rate request will create a serious risk of significant anticompetitive harm.[98] The court made no explicit reference to either the filed rate doctrine or *Pinney Dock*, but its decision seems strongly influenced by the fact that the defendant utility's rates were fully regulated by the FERC at the wholesale level and the Massachusetts Department of Public Utilities at the retail level.[99] While not an explicit endorsement of *Pinney Dock*, the First Circuit's decision in *Town of Concord* is consistent with *Pinney Dock*'s two main themes: (1) approved rates are presumptively not anticompetitive; and (2) the filed rate defense may be used against antitrust claims brought by competitors as readily as against the antitrust claims of customers.

B. The State Action Doctrine and Regulatory Price Squeeze Claims

1. Origins and Evolution of the State Action Doctrine.—*Parker v. Brown*[100] was the first Supreme Court case to clearly enunciate the state action immunity from federal antitrust law.[101] In *Parker*, the Court

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(limiting the use of the *Keogh* rule to customers in preventing a private shipper from bringing an antitrust action against defendant motor carriers), *aff'd*, 476 U.S. 409 (1986); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) ("Under the *Keogh* or 'filed rate' doctrine, . . . a public utility subject to regulation is not subject to antitrust liability to its customers for rates or services provided under tariffs approved by the appropriate regulatory agency.").

94. *See* Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979) (explaining that *Keogh* applies to customers, not competitors).

95. *See Pinney Dock*, 838 F.2d at 1456-57 (stating that previous claims brougbt by shippers, the defendants' customers, should not be read to preclude applicability of the *Keogh* doctrine to competitors).

96. *See* Denvir, *supra* note 84, at 31.

97. 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1337 (1991).

98. *Id.* at 19.

99. *See id.* at 20.

100. 317 U.S. 341 (1943).

101. *See* Olsen v. Smith, 195 U.S. 332, 345 (1904) ("[I]f the State has the power to regulate . . . those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law."); *cf.* Lowenstein v. Evans, 69 F. 908, 911 (C.C.D.S.C. 1895)

found that California's agricultural marketing program was immune from antitrust scrutiny and held that the Sherman Act is "a prohibition of individual and not state action."[102]

At the heart of the *Parker* doctrine is the principle of state sovereignty. In our federal system, the several states retain all power not transferred to the federal government by the Constitution.[103] The *Parker* Court observed:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[104]

The *Parker* notion of state action immunity gave rise to the general assumption that "all local government entities, including state agencies and local political subdivisions of a state, were exempt from federal antitrust laws."[105] Subsequent Supreme Court decisions, however, have narrowed its application.

In a 1980 decision, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[106] the Court, through Justice Powell, articulated the two-pronged test by which putative state action defenses should be judged. First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy."[107] Second, "the policy must be 'actively supervised' by the State itself."[108] Five years later, *Southern Motor*

("The state is a sovereign having no derivative powers . . . . [A]s the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court."). Both cases are cited in the *Parker* opinion to support the proposition that the state, as sovereign, may impose restraints which the Sherman Act would otherwise prohibit. *See Parker*, 317 U.S. at 352.

102. *Parker*, 317 U.S. at 352.

103. U.S. CONST. amend. X.

104. *Parker*, 317 U.S. at 351.

105. Keith E. Moxon, Comment, *Municipal and Private Petitioner Immunity from Antitrust Liability: A Declaration of Independence to Preserve the* Parker *and* Noerr-Pennington *Doctrines*, 65 NEB. L. REV. 330, 335-36 (1986).

106. 445 U.S. 97 (1980).

107. *Id.* at 105 (quoting New Motor Vebicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)); *see also* Community Communications Co. v. City of Boulder, 455 U.S. 40, 55 (1982) ("[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." (emphasis in original)); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive activity is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.").

108. *Midcal*, 445 U.S. at 105 (quoting City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., plurality opinion)); *see also City of Lafayette*, 435 U.S. at 412 (Brennan, J., plurality opinion) ("Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to 'official action directed

Carriers Rate Conference, Inc. v. United States,[109] unequivocally brought private parties under the ambit of the *Parker* defense and also subjected them to the *Midcal* test.[110]

2. *Applying the State Action Doctrine to Utility Rate Filings.*—Combining the lessons of *Midcal* and *Southern Motor Carriers*, the state action doctrine will provide a utility with immunity from federal antitrust scrutiny if (1) its challenged activities are conducted pursuant to a "clearly articulated and affirmatively expressed" state policy,[111] and (2) the state actively supervises the conduct.[112]

The first prong of this test will be satisfied for regulated private parties if state policies "permit, but do not compel" the challenged conduct,[113] or if a comprehensive regulatory scheme is found.[114] The first prong will also be satisfied, even in the absence of an express statutory provision, if the state legislature has "made clear its intent that intrastate rates will be determined by a regulatory agency, rather than by the market"[115] and if the state legislature has left the details to the discretion of the agency which authorized the challenged conduct.[116] As long as the resulting anticompetitive activity is a "foreseeable" consequence of the authority delegated by the state, the requirement that the conduct be the result of a "clearly articulated and affirmatively expressed" state policy will be met.[117]

The second prong of the state action immunity standard set out in *Midcal* requires that the challenged conduct be "actively supervised" by the state.[118] A state typically satisfies this prong by giving an administrative

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by a state' is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves." (citations omitted)).

109. 471 U.S. 48 (1985).

110. In *Southern Motor Carriers* the Court reasoned that:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. . . .
>
> The circumstances in which *Parker* immunity is available to private parties . . . are defined most specifically by our decision in [*Midcal*].

Id. at 56-57 (footnote and citation omitted).

111. *Id.* at 57; *see supra* note 107.

112. *Southern Motor Carriers*, 471 U.S. at 57 (citing *Midcal*, 445 U.S. at 105).

113. *Id.* at 60.

114. *See, e.g.*, Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847, 849 (10th Cir. 1985) (finding that a combination of state constitutional and statutory provisions was adequate to establish "state action" and validate the conduct in question).

115. *Southern Motor Carriers*, 471 U.S. at 63-64.

116. *Id.* at 64.

117. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42-44 (1985).

118. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105

agency supervisory authority over potentially anticompetitive private conduct.[119] Agency review qualifies as "active supervision" if the agency exercises ultimate control over the challenged anticompetitive conduct.[120] This ultimate control criterion necessarily entails the power to overturn a private decision that conflicts with state policy.[121] However, state agencies that tacitly approve, or merely fail to object to, the decisions or recommendations of private parties may also satisfy the ultimate control criterion.[122] The Supreme Court has not yet determined whether judicial review of private conduct can constitute "active supervision" under *Midcal*.[123]

(1980) (quoting City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., plurality opinion)); *Southern Motor Carriers*, 471 U.S. at 57 (quoting *City of Lafayette*); *Town of Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required . . . . Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.").

119. *See, e.g.*, Patrick v. Burget, 486 U.S. 94, 102 (1988) ("Oregon's Health Division has general supervisory powers . . . including the licensing of hospitals, and the enforcement of health laws . . . . [I]t may initiate judicial proceedings . . . [and it] may deny, suspend, or revoke a hospital's license for failure to [establish peer-review procedures]." (citations omitted)); *Southern Motor Carriers*, 471 U.S. at 62 (noting that the Government conceded to the appellate court's finding that the Public Service Commissions of North Carolina, Georgia, Mississippi, and Tennessee "actively supervise the collective ratemaking activities of the [private] rate bureaus").

120. *Patrick*, 486 U.S. at 101; *see* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.7 (1987) (holding that certain forms of agency scrutiny of a privately established restraint were not active supervision because they did not "exert[] any significant control over" the terms of the restraint); *Southern Motor Carriers*, 471 U.S. at 51 (finding that the relevant state commissions "have and exercise ultimate authority and control over" intrastate motor carrier rates).

121. *See Patrick*, 486 U.S. at 101 ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

122. *See Southern Motor Carriers*, 471 U.S. at 50-51, 64-65 (finding immunity even when a proposed rate became effective if a state agency took no action within a specified period of time). *But cf.* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1145 (7th Cir.) (holding that a defendant is not insulated from antitrust scrutiny when tariffs issued by the defendant take effect unless vetoed by the relevant agency because the terms of the tariffs are not "instituted or required" by the FCC), *cert. denied*, 464 U.S. 891 (1983).

123. Thus Justice Marshall wrote:

> This Court has not previously considered whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine. All of our prior cases concerning state supervision over private parties have involved administrative agencies or State Supreme Courts with agency-like responsibilities . . . . This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, because judicial review of privilege-termination deeisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement.

Patrick, 486 U.S. at 103-04 (citations omitted). *See generally* Michael Dlouhy, Note, *Judicial Review as* Midcal *Active Supervision: Immunizing Private Parties from Antitrust Liability*, 57 FORDHAM L. REV. 403, 416-23 (1988) (echoing the statement that the Supreme Court has not determined the question of whether judicial review constitutes "active supervision" and arguing that the Court should answer in the affirmative).

Differential retail rates that have been considered explicitly, subjected to public comment, and subsequently approved by a state regulatory commission would be immune under the *Midcal* standard.[124] The more interesting question is whether the state regulatory commission must consider the relationship between federally approved wholesale rates and the proposed retail rates prior to approving the retail rates in order to immunize the utility from antitrust liability for a resultant price squeeze.

An antitrust suit is unlikely to be limited to the naked allegation that a rate relationship is unlawful. Ordinarily, a plaintiff will assert that the rate differential was part of a pattern of exclusionary conduct, only some of which is subject to state regulation.[125] And in such a case, the extent of protection provided by the state action doctrine will be a focal point of the court's analysis.[126]

C. *The Political Action Doctrine and Regulatory Price Squeeze Claims*

While the state action doctrine protects private and municipal actions authorized by the state, "the *Noerr-Pennington* 'political action' doctrine protects private efforts to influence government officials in creating or implementing legislation that has anticompetitive effects."[127] As such,

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124. *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

Id. at 357; *see also* Cantor v. Detroit Edison Co., 428 U.S. 579, 593-94 (1975) (stating that when the option to have or not have a program rests primarily with the utility, rather than the regulatory body, "[t]here is nothing unjust in a conclusion that [the utility's] participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law").

Despite the apparently contradictory posture of *Southern Motor Carriers*, the Court neither overruled nor distinguished *Jackson* or *Cantor* in that opinion.

125. *See supra* notes 71-74 and accompanying text.

126. *See, e.g.*, City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1180 (8th Cir. 1982) (holding that legislative policy neither authorizes nor encourages an alleged price squeeze and that, while wholesale and retail rates are "actively supervised" by the respective regulatory authorities, the interrelation between those rates is not), *cert. denied*, 459 U.S. 1170 (1983). *But cf.* Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (holding that a utility whose rates are fully regulated at both the wholesale and retail level may ask regulators to approve rates that could create a price squeeze, § 2 of the Sherman Act notwithstanding), *cert. denied*, 111 S. Ct. 1337 (1991). *See generally* Lopatka, *supra* note 3, at 622-23 (arguing that because some of the conduct of a utility which is involved in a price squeeze is required by law and some is discretionary, only a portion of the utility's conduct should be protected by the state action doctrine).

127. Moxon, *supra* note 105, at 351. *See generally* Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 82-88 (1977) (discussing the *Noerr* decision, the limits of the antitrust exemption

it springs less from the traditional power of the sovereign than from the rights of individuals to petition the sovereign.

1. Origins and Evolution of the Political Action Doctrine.—Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.[128] involved an antitrust claim by truckers against an association of railroads. The plaintiffs alleged that the railroads had undertaken a vigorous publicity campaign aimed at procuring legislation (and subsequent enforcement thereof) harmful to truckers.[129] The *Noerr* Court held that attempts to secure the passage and enforcement of anticompetitive laws cannot form the basis for antitrust liability,[130] regardless of any injury resulting to plaintiffs.[131] The Court gave two reasons for its decision. First, to the extent that state government has the power to restrain trade, a contrary holding would be in direct conflict with the *Parker* doctrine.[132] Second, allowing such conduct to establish Sherman Act liability might substantially impair the First Amendment rights of the people to assemble and to petition the government.[133]

In *United Mine Workers v. Pennington*,[134] decided four years later, the Court expanded the *Noerr* doctrine to include efforts to petition the executive branch[135] and broadened the scope of behavior which may be protected. The *Noerr* doctrine, said the Court, "shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose*."[136] Furthermore, the Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition*. Such conduct is not illegal, either

for private efforts to influence governmental action, and the application of *Noerr* to attempts to influence the courts and administrative adjudicative bodies); James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L.J. 65 (1985) (exploring the limits and application of the *Noerr* doctrine and proposing a more systematic approach for addressing conflicts between the policies favoring competition and those springing from the First Amendment).

128. 365 U.S. 127 (1961).

129. *Id.* at 129.

130. *Id.* at 135.

131. *See id.* at 143-44 ("It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against wbom the campaign is directed . . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.").

132. *See id.* at 137 & n.17 (noting that a contrary holding would allow use of the Sherman Act to regulate political activity and citing *Parker*'s holding that the validity of a state regulatory program under the Act does not depend on the kind of political support necessary for its implementation); *see supra* notes 103-09 and accompanying text.

133. *See Noerr*, 365 U.S. at 137-38.

134. 381 U.S. 657 (1965).

135. *See id.* at 669 (holding that the union's approaching the Secretary of Labor [an executive officer] falls under the *Noerr* doctrine's protection of attempts to influence "public officials").

136. *Id.* at 670 (emphasis added).

standing alone or as part of a broader scheme itself violative of the Sherman Act."[137]

In *California Motor Transport Co. v. Trucking Unlimited*,[138] the Court further extended the reach of the *Noerr* doctrine to attempts to petition administrative agencies and the judiciary.[139] *California Motor Transport* rounded out the list of government entities one could petition without fear of antitrust liability. But it also introduced the first limitation on the exercise of the political action defense: actions designed to deny plaintiffs access to the courts and administrative agencies are not protected by the *Noerr* doctrine.[140] The Court also emphasized that the nature of the governmental body being petitioned is relevant to the availability of *Noerr* protection. Conduct permitted in the political or legislative context may not be immunized when used in the adjudicatory process.[141]

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[142] the Court began to "fine tune" the *Noerr-Pennington* doctrine. While *California Motor Transport* established something of an outer boundary beyond which *Noerr* immunity could not extend, there remained a vast field of actions that do not exclude competitors from the adjudicatory process, yet may not be "legitimate" attempts to petition government.[143]

Under *Allied Tube*, antitrust immunity for acts of petitioning the government may be either absolute or qualified. Absolute immunity extends to acts of petitioning that result in restraints of trade imposed by governmental action.[144] Qualified immunity extends to acts of petitioning that result in restraints of trade imposed by private parties if those

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137. *Id.* (emphasis added).

138. 404 U.S. 508 (1972).

139. *See id.* at 510-11 ("[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.").

140. *See id.* at 511-12 ("[T]he allegations are not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." (citation omitted)).

141. *See id.* at 513 ("Misrepresentations, condoned in the political arena [under the umbrella of political expression], are not immunized when used in the adjudicatory process.").

142. 486 U.S. 492 (1988).

143. Regardless of the forum, private action that is a "sham" (not genuinely aimed at procuring favorable government action) is not protected. *Id.* at 500 n.4; *see California Motor Transp.*, 404 U.S. at 511 (explaining the "sham" theory as the use of "power, strategy and resources" by one party to harass and deter another party in the use of administrative and judicial proceedings "so as to deny them 'free and unlimited access' to those tribunals"); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961) ("There may be situations in which a publicity campaign, ostensibly directed toward governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.").

144. *Allied Tube*, 486 U.S. at 499 (citing *Noerr*, 365 U.S. at 136, and United Mine Workers v. Pennington, 381 U.S. 657, 671 (1965)).

restraints are "incidental" to "valid and genuine" efforts to influence governmental action.[145] Qualified immunity "varies with the context and nature of the activity."[146]

The difficult task under *Allied Tube* is drawing the line that divides restraints resulting from government action and those resulting from private action in order to determine the level of immunity, if any, available to the defendant.[147] But at least *Allied Tube* presents some sort of framework for addressing the remaining issues.

2. *Applying the Political Action Doctrine to Utility Rate Filings*.—Under the *Noerr-Pennington* doctrine, if a single agency has jurisdiction over all of a utility's rates, a request by a utility for a price squeeze, even for the specific purpose of injuring municipal competitors, should be protected.[148] The existing system of dual regulation, however, produces a critically different environment. In the wake of *Federal Power Commission v. Conway Corp.*,[149] FERC has an obligation to consider the anticompetitive effects of its rate orders,[150] but it is unclear whether either FERC or the relevant state commission will have the authority, ability, or interest to manipulate rates in order to prevent unwanted price squeezes.[151] To be protected by *Noerr-Pennington* immunity, therefore, requests for governmental action that will produce anticompetitive results must be directed to governmental entities with the responsibility for and interest in considering the competitive effects of their actions and the power to decide whether to produce those effects.[152]

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145. *Id.* at 499 (citing *Noerr*, 365 U.S. at 143). Thus, for instance, where an ostensibly private organization, such as the Federal Reserve, is empowered by statute to establish guidelines and regulations, attempts by third parties to encourage or discourage certain actions should receive qualified immunity.

146. *Id.*

147. *Id.* at 501-02. *See generally* William L. Monts, III, Note, Allied Tube & Conduit Corp. v. Indian Head, Inc.*: An Emerging Conceptual Framework for Claims of* Noerr *Immunity*, 41 S.C. L. REV. 633 (1990) (discussing the framework for analyzing *Noerr* immunity after *Allied Tube*).

148. Thus,

> The agency would have official responsibility to consider the effects of its order, an interest in evaluating the concerns of aggrieved competitors, and the power to decide to produce those effects or not. The utility should be allowed to present its views to the government and request action that will produce an anticompetitive end regardless of its motive. This is the structure of requests for governmental action which the Court intended to protect in *Noerr* and *Pennington*.

Lopatka, *supra* note 3, at 634.

149. 426 U.S. 271 (1976).

150. *See id.* at 278-79. FERC subsequently adopted procedures to comply with the *Conway* mandate. *See* 18 C.F.R. § 2.17 (1983) (outlining the elements of a prima facie case of anticompetitive price discrimination and adopting procedures for "raising price squeeze issues").

151. *See* Lopatka, *supra* note 3, at 634 & n.346.

152. *See id.* at 634-35.

The Courts of Appeals that have ruled on the applicability of the *Noerr-Pennington* defense to rate filings have reached widely disparate results. In *Litton Systems, Inc. v. AT&T*,[153] the Second Circuit held that a regulated utility filing a tariff as required by law was "engaged in a private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."[154] In *MCI Communications Corp. v. AT&T*,[155] the Seventh Circuit wrote that "[u]nder the so-called *Noerr-Pennington* doctrine, activities such as state tariff filings are immune from antitrust liability where their purpose is to influence government action."[156] In *United States v. Southern Motor Carriers Rate Conference, Inc.*,[157] the Fifth Circuit held that "joint efforts . . . to secure legislation or commission regulation permitting collective ratemaking procedures would clearly fall within the ambit of *Noerr* protection, inasmuch as it would seek to influence policy."[158]

City of Kirkwood v. Union Electric Co.,[159] the only Court of Appeals case explicitly addressing the applicability of *Noerr-Pennington* to a utility price squeeze, held: "The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory process to achieve anti-competitive results."[160] Unfortunately, *Town of Concord* does not address the issue of political action immunity.

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153. 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

154. *Id.* at 807. The court further stated:

> AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures. The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental action or an "expression" of political opinion.

Id. (footnote omitted).

155. 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

156. *Id.* at 1153. *But cf. id.* at 1159-60 ("The *Noerr-Pennington* doctrine . . . immunizes only those actions directed toward government agencies or officials. The fact that a common carrier's decision may eventually provoke agency action or review does not alone call the *Noerr-Pennington* doctrine into play."). Thus, mere regulatory "rubber stamping" of unilateral action taken by the utility will not be protected under this view.

157. 672 F.2d 469 (5th Cir. 1982), *aff'd*, 702 F.2d 532 (5th Cir. 1983) (en banc), *rev'd on other grounds*, 471 U.S. 48 (1985).

158. *Id.* at 477.

159. 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

160. *Id.* at 1181. The court continued:

> The facts in the instant case cannot be distinguished from those in *Cantor*, in which the Supreme Court held that "nothing 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."

Id. (quoting Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976)).

V. Concluding Remarks

The First Circuit's recent decision in *Town of Concord* is an exciting new addition to the case law on utility price squeezes and provides significant reinforcement for the *Pinney Dock* argument that rates which have been filed and approved by the appropriate regulatory entity are presumptively not anticompetitive. In addition, Judge Breyer's thorough examination of the price squeeze phenomenon in both unregulated and regulated industries may prove instructive as other circuits receive new cases in this line.

Based upon the foregoing analysis, it would appear that the Supreme Court, in its line of "state action" cases from *Parker* through *Midcal* and *Southern Motor Carriers* has established fairly clear standards that must be met in order to claim immunity from antitrust prosecution on that basis. In the absence of "active supervision" or a "clearly articulated and affirmatively expressed" state policy, the utility's next best option may be to argue a *Keogh* filed rate defense, saving the ever uncertain *Noerr-Pennington* argument as a last resort.

Keith A. Rowley