NOTES

ANTITRUST LAW—PUBLIC UTILITIES—POWER COMPANY'S "REFUSAL TO DEAL" WITH FORMER MUNICIPAL CUSTOMERS FOUND TO VIOLATE SHERMAN ACT—*United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973).

Otter Tail Power Company is a small investor-owned utility which operates in parts of Minnesota, North and South Dakota and provides electricity at the retail level to 465 towns in its service area.[1] Four municipalities served by Otter Tail attempted to set up community-owned electric systems;[2] their intent was to buy power at wholesale rates from either Otter Tail or from other suppliers and transmit it over Otter Tail's lines.[3] The establishment of municipal electric systems would enable them to utilize lower cost power alternatives, *i.e.*, wholesale power or power transferred ("wheeled") from other sources.[4]

In an effort to preserve its retail markets, Otter Tail refused to sell power at wholesale rates,[5] refused to wheel power over its facilities,[6] and

1 United States v. Otter Tail Power Co., 331 F. Supp. 54, 57 (D. Minn. 1971), *aff'd in part, remanded in part*, 410 U.S. 366 (1973). The electric utility industry operates at three levels to supply power to consumers: generation of electric power, transmission of energy at high voltage, and distribution to the final customer. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 67 (1972). Otter Tail operated on all three levels, but most of the power sold to its retail customers was purchased from other companies and transmitted and distributed over its power lines. Otter Tail had set up its retail distribution system by virtue of non-exclusive statutory franchises granted to it by the municipalities in its service area. 331 F. Supp. at 57. *See* MINN. STAT. ANN. §§ 300.03-.04 (1969); N.D. CENT. CODE §§ 49-03-01 to -02 (Supp. 1973); S.D. COMPILED LAWS ANN. §§ 9-35-1 to -3 (1967).

2 The towns of Elbow Lake, Minnesota, Hankinson, North Dakota and Colman and Aurora, South Dakota did not renew Otter Tail's franchises when they expired, preferring instead to set up their own distribution systems. Otter Tail Power Co. v. United States, 410 U.S. 366, 371 (1973).

3 *Id.* In the towns of Elbow Lake and Hankinson, Otter Tail was the only utility operating transmission facilities. *Id.* Elbow Lake had offered to purchase Otter Tail's distribution lines in that town when Otter Tail's franchise expired, but Otter Tail refused, preferring to remove them. Elbow Lake then built its own generating plant and sought standby power from Otter Tail. Village of Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675, 676 (1971). The Federal Power Commission (FPC) subsequently ordered a temporary interconnection to furnish standby power. Village of Elbow Lake v. Otter Tail Power Co., 40 F.P.C. 1262, 1272 (1968), *aff'd sub nom.* Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). After further hearings on the issues previously raised, the FPC ordered a permanent interconnection between the utility and the town. 410 U.S. at 371. Colman and Aurora, South Dakota, also established municipal systems, but Otter Tail refused to sell at wholesale rates or to wheel power to them. However, these towns had access to other transmission lines. *Id.*

4 *Cf.* 410 U.S. at 371.

5 *Id.* Otter Tail had established a company policy of not providing wholesale power.

initiated litigation against its customers to prevent them from establishing their own systems.[7] Further, it attempted to prevent the Bureau of Reclamation from supplying power to the towns by invoking government transmission contracts which provided that Otter Tail could refuse to wheel power to those customers it had formerly served at retail.[8] Consequently, the United States Government brought an action against Otter Tail to enjoin violations of section 2 of the Sherman Antitrust Act,[9] charging the company with monopolization of the sale and distribution of power.[10]

The district court found that Otter Tail had violated section 2 by attempting to maintain a monopoly position through its refusal to wheel or to deal.[11] Otter Tail attempted to justify these refusals on the basis that if forced to wheel or sell at wholesale, its business would erode and lead to the demise of the company, since most of its customers would convert to municipally owned systems which would use either wholesale or wheeled power.[12] The court noted that Otter

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40 F.P.C. at 1264. Electric utilities generally have not been "required to sell at wholesale rates unless they have 'held themselves out' to do so." Hale & Hale, *Competition or Control V: Production and Distribution of Electric Energy*, 110 U. PA. L. REV. 57, 64 (1961). However, the FPC, in ordering a temporary interconnection between Otter Tail and Elbow Lake, found such a company policy to be inconsistent with the Federal Power Act, 16 U.S.C. § 824a(b) (1970). 40 F.P.C. at 1270.

6 331 F. Supp. at 60-61. Otter Tail was already wheeling power to 18 municipal customers which it had not previously served at retail when the suit was started. *Id.* at 58.

7 *Id.* at 61-62.

> Otter Tail either instituted or sponsored and financially supported court litigation which had the effect of frustrating the sale of revenue bonds to finance the municipal systems. A "no-litigation certificate," reflecting the absence of litigation which might impair the salability of revenue bonds, is essential to a successful sale of municipal bonds. The pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system.

Id. at 62.

8 *Id.* at 59. Otter Tail had entered into contracts to provide wheeling services for the Bureau of Reclamation of the Department of the Interior and for several regional power cooperatives. The Bureau handles the marketing of power generated by federally sponsored hydroelectric facilities in Montana, North Dakota and South Dakota.

9 This action may be brought under section 4 of the Sherman Antitrust Act, 15 U.S.C. § 4 (1970).

10 331 F. Supp. at 56. Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1970), reads in pertinent part:

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

11 331 F. Supp. at 61.

12 *Id.* at 64.

Tail's franchises were non-exclusive and that the company was not thereby protected from competition from municipal ultilies.[13]

The sponsoring of litigation also was held to be violative of section 2 of the Sherman Antitrust Act since its effect was to hinder and delay the establishment of municipal electric systems.[14] Otter Tail had contended that the use of litigation was within the reach of the rule set out in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[15] where antitrust immunity was granted to certain lobbying activities aimed at influencing governmental action.[16] However, the court held that *Noerr* applied only to efforts directed toward the legislative and executive branches and did not extend to judicial proceedings.[17]

The court further stated that Otter Tail's restrictive transmission contracts were in fact territorial allocation schemes and constituted "per se" violations of the Sherman Antitrust Act.[18] Otter Tail had argued that since the contracts in question were approved by government agencies (the Bureau of Reclamation was a party to one contract and the Rural Electrification Administration (REA) had approved Otter Tail's contracts with certain cooperatives), these agreements were immune to antitrust attack[19] in light of *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*[20]

In *Alabama Power* it was held that the REA administrator had acted within the scope of his statutory authority in granting loans to a power cooperative which were conditioned on the security of 35-year all-requirements contracts between the cooperative and its members.[21] Moreover, it was found that such proper discretionary action was immune from the antitrust laws and that the party with whom the administrator dealt was likewise immune.[22]

However, the district court found *Alabama Power* to be inapposite and stated that there was no legislative provision conferring a similar exemption from antitrust laws on the actions of either the Bureau or the REA.[23] Therefore it granted injunctive relief prohibiting any

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13 *Id.* at 57, 64. *See* Alabama Power Co. v. Ickes, 302 U.S. 464, 480 (1938); Rural Electrification Admin. v. Central La. Elec. Co., 354 F.2d 859, 864 (5th Cir. 1966).

14 331 F. Supp. at 62.

15 365 U.S. 127 (1961).

16 *Id.* at 139-40.

17 331 F. Supp. at 62.

18 *Id.* at 63. *See* notes 87 & 88 *infra* and accompanying text.

19 331 F. Supp. at 63.

20 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968).

21 *See* 394 F.2d at 675-76.

22 *See Id.* at 676-77.

23 331 F. Supp. at 63.

future refusals to wheel, refusals to deal, or the sponsoring of litigation, which conduct had been found to violate section 2.[24]

The contention raised on direct appeal[25] before the United States Supreme Court in *Otter Tail Power Co. v. United States*[26] was that refusals to deal within the utility industry were immunized from antitrust regulation by virtue of the authority to compel the interconnection of electric systems given to the Federal Power Commission (FPC) under the Federal Power Act.[27] Collateral issues considered by the Court concerned the validity of Otter Tail's refusals to wheel power, the economic justification of refusals to wheel and to deal, and the legality of using litigation to block potential competition.[28]

The United States Supreme Court first held that the Federal Power Act did not confer immunity from section 2 prosecutions upon Otter Tail's particular conduct and that these actions were in violation of section 2.[29] The Court then affirmed the district court's decree enjoining any future refusals to wheel or to deal, but vacated that part of the order relating to the sponsored litigation and remanded it for reconsideration by the lower court in light of more recently adopted principles.[30]

In deciding *Otter Tail*, the Supreme Court was called upon to

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24 *See id.* at 65. The court enjoined Otter Tail

> from any and all conduct, whether expressed in terms of contracts, policies, or practices, having the effect of continuing the violations of the Sherman Act herein found to exist.

However, the final decree issued by the district court was more explicit, enjoining Otter Tail from

> "[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in [its service area]" and from refusing to wheel electric power over its transmission lines from other electric power lines to such cities and towns.

410 U.S. at 375 (quoting from unreported district court decree).

25 The company took a direct appeal under section 2 of the Expediting Act, 15 U.S.C. § 29 (1970), and the Supreme Court noted probable jurisdiction, 406 U.S. 944 (1972).

26 410 U.S. 366 (1973).

27 *Id.* at 373. The district court had not expressly ruled on the question of antitrust immunity. Therefore the defendant contended that the trial court had erred because no mention had been made of section 202(b) of the Federal Power Act. Brief for Appellant at 25, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

28 410 U.S. at 378-81.

29 *Id.* at 374-75, 377.

30 *Id.* at 379-80, 382. On remand, the district court found that Otter Tail's repetitive use of litigation was violative of the Sherman Act. United States v. Otter Tail Power Co., 360 F. Supp. 451, 451-52 (D. Minn. 1973).

For a discussion of the recently adopted principles concerning the use of administrative or judicial processes to suppress competition by way of litigation, see notes 82 & 83 *infra* and accompanying text.

construe section 202(b) of the Federal Power Act[31] to determine whether it preempted antitrust regulation of refusals to deal.[32] Sherman Act immunity was not expressly granted in the Federal Power Act,[33] and in *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*,[34] the Court of Appeals for the Fourth Circuit found that

> the grant of monopolistic privileges, subject to regulation by governmental body, does not carry an exemption, unless one be expressly granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them.[35]

Repeal of antitrust laws by implication has been judicially disfavored unless the court finds a "plain repugnancy between antitrust and regulatory provisions."[36] Such repugnancy may be shown where a regulatory agency has been given the power to decide antitrust issues and to enforce restrictions upon illegal conduct.[37] However, the Federal Power Act makes no general provision for FPC determination of antitrust questions or for the imposition of penalties where violations were discovered.[38] The Court thus found that the antitrust laws were

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31 16 U.S.C. § 824a(b) (1970) states in pertinent part:

> Whenever the Commission . . . finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons . . . .

32 410 U.S. at 373.

33 For an example of an express exemption from antitrust laws, see, *e.g.*, section 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1970).

34 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). In this case, an agreement between two utilities which controlled pricing, expansion, territories and requirements with other customers was found to be violative of the Sherman Act.

35 *Id.* at 560. *See also* Mervin, *Antitrust Immunity of "Public Utilities" Regulated by the FPC*, 54 A.B.A.J. 687 (1968); Phillips, *Increasing Conflict between Regulation and Antitrust*, 87 PUB. UTIL. FORT. 29 (1971). *Contra*, Hale & Hale, *supra* note 5, at 75.

36 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). This principle has been espoused in cases dealing with other regulated industries. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (securities exchanges); United States v. Borden Co., 308 U.S. 188, 201 (1939) (agricultural cooperatives). *Cf.* Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 241-43 (1968) (ocean carriers).

37 *See* United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485-86 (1932).

38 Part II of the Federal Power Act provides for the regulation of interstate electric utilities with respect to rates, mergers, issuance of securities, accounting, etc. However, the FPC is not specifically authorized to act in regard to antitrust violations. *See* Kuykendall, *Antitrust Laws and Regulated Companies under the FPC*, 65 PUB. UTIL. FORT. 373, 375 (1960).

not incorporated in a "pervasive regulatory scheme" which would prevent court proceedings.[39]

Nonetheless, judicial action may still be preempted where Congress has manifested an intent to vest subject matter jurisdiction in the administrative body.[40] The Court's review of the legislative history of the Federal Power Act revealed that Congress had originally considered applying common carrier status to the utility industry, thus imposing a duty to "transmit energy for any person upon reasonable request."[41] Furthermore, the proposed legislation would have given the FPC the power to compel the wheeling of electricity if such action was found to be "necessary or desirable in the public interest."[42] These provisions, however, were ultimately rejected in order to preserve an atmosphere of voluntary cooperation among utilities in integrating their facilities at the transmission level.[43]

The dissenting opinion in *Otter Tail* strongly contested the jurisdiction of the district court to hear the factual issues pertaining to wheeling and the sale of wholesale power.[44] This view was based on an interpretation that Congress intended to create a "zone of freedom" whereby utilities could wheel or sell at wholesale at their discretion, but within the framework of regulatory control over rates, service, etc.[45]

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39 410 U.S. at 374-75. *See also* United States v. Radio Corp. of America, 358 U.S. 334, 350 (1959).

40 *See* Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 419-20 (1965); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 309-10 (1963); Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 162 (1922); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41 (1907). For an example of specific congressional intent to vest exclusive jurisdiction in a federal administrative agency, see section 221(a) of the Federal Communications Act, 47 U.S.C. § 221(a) (1970).

41 410 U.S. at 374 (quoting from H.R. 5423, 74th Cong., 1st Sess. 104 (1935); S. 1725, 74th Cong., 1st Sess. (1935)).

42 410 U.S. at 374 (quoting from H.R. 5423, 74th Cong., 1st Sess. 106 (1935); S. 1725, 74th Cong., 1st Sess. (1935)). *See also* Comment, *Public Utility Regulation: Wheeling and the Sherman Act*, 1972 LAW & SOC. ORDER 507, 508-09.

43 410 U.S. at 374 (citing S. REP. No. 621, 74th Cong., 1st Sess. 19 (1935)). The Federal Power Act was not intended to provide a comprehensive scheme of regulation over interconnections and wheeling. The Senate Committee described their intent as follows:

> While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202 (a) (formerly sec. 203 (a)) for the first Federal effort in this direction.

S. REP. No. 621, 74th Cong., 1st Sess. 19 (1935). *See also* H.R. REP. No. 1318, 74th Cong., 1st Sess. 27 (1935).

44 410 U.S. at 391-92 (Stewart, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part).

45 *Id.* at 386-87. The dissent turned the legislative history of the Federal Power Act into a two-edged sword. The lack of congressional interest in common carrier status was

However, absent an express statutory provision, the judicial policy against the presumption of antitrust immunity would invalidate the "zone of freedom" theory espoused by the dissenters.[46]

While wheeling was not brought under regulatory control,[47] in section 202(b) Congress did grant explicit statutory authority to the FPC to compel the interconnection of systems.[48] Nevertheless, the Court found this provision to be insufficient to oust its jurisdiction since a decision by the FPC, while considering relevant anti-competitive factors,[49] does not bind a court in determining if Sherman Act antitrust violations are present.[50] Therefore the Court concluded section 2 could be applied.[51]

Since the antitrust laws are now to be applicable to utility industry

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construed as an indication that certain discretionary powers should remain in the individual utilities and that they would voluntarily develop into large economical operations. *See id.* at 383-86.

46 *Id. See* note 36 *supra* and accompanying text.

47 410 U.S. at 375. Initial attempts to introduce compulsory wheeling in the Federal Power Act were unsuccessful. *See* note 43 *supra*. However, a felt need for such regulation prompted further legislative proposals. *See* S. 2324, 92d Cong., 1st Sess. § 103(c)(1)(B) (1971); H.R. 9970, 92d Cong., 1st Sess. § 103(c)(1)(B) (1971); S. 1071, 91st Cong., 1st Sess. § 3 (1969). These bills were also defeated. 410 U.S. at 386 n.4.

48 *See* note 31 *supra*.

49 410 U.S. at 373. Prior cases have established that the FPC shall consider the antitrust implications of activities which it approves pursuant to its statutory authority. *See* California v. FPC, 369 U.S. 482, 487-88 (1962); Atlantic Seaboard Corp. v. FPC, 404 F.2d 1268, 1272 n.10 (D.C. Cir. 1968); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968).

50 *See* 410 U.S. at 372, 374-75. The role of the Sherman Act was discussed in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

51 410 U.S. at 374-75. Public utilities have generally been regarded as natural monopolies and ill-suited to the application of antitrust principles. Meeks, *supra* note 1, at 65. A natural monopoly may be defined as a

> monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm; in a meaningful sense, competition here is self-destructive.

C. KAYSEN & D. TURNER, ANTITRUST POLICY 191 (1959). *See also* Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969); Note, *Federal Regulation of Natural Monopolies Under the Sherman Act*, 14 SYRACUSE L. REV. 635, 635 (1963).

refusals to deal, a jurisdictional conflict could emerge if the court enjoined future refusals to deal when Sherman Act violations were found to exist (thereby necessitating interconnection) and the FPC denied interconnection as not being necessary or appropriate to the public interest under section 202(b).[52] Although the Court recognized this possibility, it left the question open for future resolution as that presented a potential conflict which was not then before the court.[53]

While the final determination of which proceeding shall be conclusive yet remains, *Otter Tail,* by implication, reinforces recent decisions[54] holding that administrative agencies must consider antitrust policy in their determination of what actions may be in the public interest. This inference may be drawn from the Court's adoption, in principle, of the power of the district court to compel interconnection on its own order, albeit contingent upon FPC approval of the rates, terms and conditions.[55] If any agency ruling is to be dispositive of the issue of interconnection and thereby fully effectuate the goals of the Federal Power Act,[56] it must clearly demonstrate that public interest factors override any effects judged to be anti-competitive under Sherman Act standards.[57]

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52 410 U.S. at 376-77. *See* note 31 *supra.*

53 *Id.* An application for permanent interconnection was filed by the town of Elbow Lake and was pending before the FPC at the time the suit was brought by the Government. An order requiring long-term connection by Otter Tail was entered by the Commission four days after the district court entered judgment. *Id.* at 392 n.8. The town of Hankinson, against which Otter Tail's refusals to wheel and deal were also directed, renewed Otter Tail's franchise. *Id.* at 376.

54 *E.g.,* Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968), where the court stated that

> it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.

Id. at 958 (see cases cited therein). *See also* California v. FPC, 369 U.S. 482, 487-88 (1962); City of Pittsburgh v. FPC, 237 F.2d 741, 754 (D.C. Cir. 1956); Note, *Federal Power Commission Required To Give Presumptive Weight to Antitrust Policy,* 1969 LAW & SOC. ORDER 92, 98-99.

55 410 U.S. at 376-77. Although the judiciary's decision on the interconnection with Elbow Lake had been in accord with the FPC order, the district court retained jurisdiction to carry out its blanket injunction against future refusals to deal in violation of the Sherman Act. *Id.* at 376.

56 One of the mandates of the Federal Power Commission was to assure

> an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . . .

Federal Power Act § 202(a), 16 U.S.C. § 824a(a) (1970).

57 *See* Note, *supra* note 54, wherein it was stated that

> [i]f a commission clearly considers antitrust policy in determining public interest, the courts will be reluctant . . . to limit the application of such national policy.

Id. at 98.

The dissent, having already adopted the interpretation that refusals to wheel and to deal were allowable within the purview of the Federal Power Act and therefore immune from antitrust provisions,[58] propounded an alternative argument for abstaining from judicial action. Since an FPC hearing concerning Elbow Lake's request for a compulsory interconnection was in progress at the time the antitrust suit was brought,[59] Justice Stewart suggested that deferral to the agency proceeding would have been appropriate.[60] He supported this argument by reiterating the criteria set out in *Ricci v. Chicago Mercantile Exchange*.[61] Although the facts were different, he argued for the application of a similar rationale.[62]

Ricci presented an unusual jurisdictional conflict since the conduct challenged under the Sherman Act was also allegedly in violation of the Commodity Exchange Act.[63] The Court there upheld a stay of antitrust proceedings to permit agency determination of whether violations of its rules had actually occurred.[64] That decision was found to be of "material aid in ultimately deciding whether the Commodity Exchange Act foreclose[d] this antitrust suit."[65] The question presented was not precisely one of primary jurisdiction,[66] but was closely related.[67]

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58 410 U.S. at 387.

59 *See* note 53 *supra*.

60 410 U.S. at 392.

61 409 U.S. 289 (1973). The criteria set forth in *Ricci* for a judicial deferral to administrative proceedings in antitrust cases are:

> (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are "incompatible with the maintenance of an antitrust action," . . . ; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question.

Id. at 302 (quoting from Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963)).

62 410 U.S. at 392-94. The essential element which brings *Otter Tail* within the scope of *Ricci* is the existence of a regulatory control over utility company refusals to deal which might supplant the application of antitrust principles. *Id.* at 392-93.

63 409 U.S. at 290-91.

64 *Id.* at 302.

65 *Id.* at 305.

66 Primary jurisdiction has been defined as applying

> where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956). However, in antitrust cases involving utilities, the question is not merely which body will make a factual determination, but rather how to apply antitrust principles, if at all, within the context of a regulatory scheme. *See* Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812, 814 (1967). *See also*

The district court in *Otter Tail* did not discuss the possible advantages of deferring the court proceedings pending a final FPC determination. Although the FPC and the court ultimately reached identical results on the issue of interconnection,[68] it would seem as though the lower court improperly proceeded to consider the merits of the aspect of the case pertaining to refusals to deal.[69]

Prior to *Otter Tail*, the question of the legality of utility company refusals to wheel or to deal had not been raised.[70] However, given the judicial policy of limiting antitrust immunity as outlined above, it would appear that the standards applied to competitive markets[71]

Petruccelli & Long, *Antitrust and the Regulated Industries: The Role of the "Doctrine" of Primary Jurisdiction*, 1969 U. TOLEDO L. REV. 303.

67 410 U.S. at 392; *cf.* Ricci v. Chicago Mercantile Exch., 409 U.S. at 307.

68 410 U.S. at 376. The district court and the agency reached the same result on the remedy for refusals to deal, but by different means. The court is authorized under 15 U.S.C. § 4 (1970) to grant broad injunctive relief against Sherman Act violations, while the FPC has a limited grant of power:

> [T]he Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

Federal Power Act § 202(b), 16 U.S.C. § 824a(b) (1970).

69 *See* 410 U.S. at 391-92 (Stewart, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part). The failure of the district court in *Otter Tail* to discuss the attendant jurisdictional problems is puzzling, since the existing statutory scheme manifested by section 202(b) afforded Elbow Lake the opportunity to remedy its situation. Furthermore, if Elbow Lake had been denied relief by the Federal Power Commission, judicial review of the FPC decision could have been obtained. Part II, Federal Power Act, § 313(b), 16 U.S.C. § 825*l*(b) provides that:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

This review would normally include a determination of whether anticompetitive effects had been properly weighed. *See* City of Lafayette v. SEC, 454 F.2d 941, 955 (D.C. Cir. 1971); Municipal Elec. Ass'n v. FPC, 414 F.2d 1206, 1209-10 (D.C. Cir. 1969).

70 The FPC had only recently decided that it lacked statutory authority to compel wheeling. *See* City of Paris v. Kentucky Utils. Co., 41 F.P.C. 45 (1969). One commentator has speculated that this lack of agency control prompted government action to apply antitrust principles against utility company refusals to wheel. Comment, *supra* note 42, at 509.

71 In United States v. Colgate & Co., 250 U.S. 300 (1919), the Court set the judicial standard against which refusals to deal could be measured:

> The purpose of the Sherman Act is . . . to preserve the right of freedom to trade. In the *absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Id. at 307 (emphasis added). Thus a rule of reason test was applied to determine whether individual refusals to deal would be illegal under section 1 of the Sherman Act, 15 U.S.C.

should be extended to regulated monopolies.[72] Groundwork had already been laid for this result in *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*[73] and *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*[74] In each case the court held that a broadcasting monopoly granted by the FCC did not protect a television station from antitrust prosecution.[75] The courts adopted the theory that the defendant's refusals to sell air time to customers who competed with them in related activities could represent an abuse of monopoly power by deterring competition—thus violating the Sherman Act.[76]

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§ 1 (1970), which prohibits restraints of trade. In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), the Court stated that where no direct evidence was available, a reasonable inference might be drawn that the defendant's conduct was in furtherance of a monopoly. *Id.* at 375. Later cases demonstrate that an evaluation of the factual context is necessary to determine whether a particular refusal to deal is unlawful. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953) (no specific intent to violate antitrust laws found); Lorain Journal Co. v. United States, 342 U.S. 143, 154-55 (1951) (predatory business practices found); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32, 39 (D. Minn. 1945) (lawful refusals may not be used to achieve unlawful results). *See generally* Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

The same rule of reason should apply to individual refusals to wheel power. If such activities deny competitors access to transmission facilities which are essential to the conduct of their business, they should not be allowed under the Sherman Act unless a reasonable basis is therefore demonstrated. *See* United States v. Otter Tail Power Co., 331 F. Supp. at 61, 64. This theory, as adopted by the district court, was set out in several cases involving group efforts or conspiracies to eliminate competitors by restricting the use of certain facilities to their members. *See* Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952). *See also* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 68 (2d ed. 1970).

72 *Cf.* Meeks, *supra* note 1, at 75-76. The contrary position which has been expressed is that although utility industry companies may possess monopoly power in their service area, "it does not follow that such firms are thereby to be categorized as monopolists for purposes of analyzing refusals to deal." Shenefield, *Antitrust Policy within the Electric Utility Industry*, 16 ANTITRUST BULL. 681, 697 (1971). A public utility does not have the authority to set its prices, but must apply to the FPC for approval of its rate structure. 16 U.S.C. § 824d(e) (1970). Furthermore, utility monopoly power is not achieved through the exclusion of competition, but is granted subject to federal or state regulation. *See* 410 U.S. at 389; Meeks, *supra* at 66 n.8.

73 255 F.2d 708 (3d Cir. 1958).

74 365 F.2d 478 (5th Cir. 1966).

75 255 F.2d at 709; 365 F.2d at 483.

76 255 F.2d at 710; 365 F.2d at 483. Since the activities over which monopoly power was being exercised were outside of normal regulatory control, these cases were readily adaptable to conventional section 2 treatment. *See* note 71 *supra*. Although Otter Tail's actions were intended to preserve a position achieved through municipal franchises subject to FPC regulation, competition could not be illegally precluded. *Cf.* Alabama Power Co. v. Ickes, 302 U.S. 464, 480 (1938); Rural Electrification Admin. v. Central La. Elec. Co., 354 F.2d 859, 864 (5th Cir. 1966) (in both cases, private utilities with non-exclusive franchises attempted to prevent competition from municipal systems).

Otter Tail's strategic dominance in the transmission of electricity and its refusals to wheel or to sell at wholesale constituted a major deterrent to municipalities who sought to replace it at the retail level.[77] Thus, the district court found that Otter Tail's actions represented an abuse of monopoly power similar to that identified in *Packaged Programs* and *Six Twenty-Nine Productions*.[78] Adopting this line of reasoning, the Supreme Court condemned Otter Tail's refusals to wheel or to deal as demonstrating predatory proclivities[79] which had the effect of foreclosing potential competition and illegally extending its retail monopoly position.[80]

Although the Court affirmed the illegality of the defendant's refusals to wheel and to deal, Otter Tail's efforts to keep its municipal customers from establishing their own distribution systems via litigation were not struck down.[81] Rather, the Court remanded this part of the case for further consideration of the facts in light of *California Motor Transport Co. v. Trucking Unlimited*,[82] which held that the first amendment did not confer immunity from Sherman Act prosecution where the defendants were using administrative and judicial proceedings to resist highway carrier certification of potential competitors in trucking operations.[83] The Court imposed the same restrictions upon

77 For example, Hankinson, after having approved the establishment of a municipal electric system, requested Otter Tail to sell wholesale power to it. When Otter Tail refused, the town dropped this proposal and reinstated Otter Tail's franchise. 331 F. Supp. at 61.

78 *Id.*

79 *See* 410 U.S. at 381.

80 *Id.* at 377. Destruction of competition through the use of monopoly power was struck down in United States v. Griffith, 334 U.S. 100, 107 (1948), where the defendant theatre owners forced film distributors to grant them favorable clearances in towns where they were faced with competition. This was done under threats of withholding their purchase of films for the entire chain. *Id.* at 103-04.

The dissent in *Otter Tail* argued against the application of the same standards used in competitive markets, since the municipalities, if successful, would merely replace Otter Tail as the prevailing monopoly. 410 U.S. at 388-89. This theory fails to account for the moderating influence that ready access to wholesale power would have upon Otter Tail's monopoly position. *See* Meeks, *supra* note 1, at 79.

81 410 U.S. at 380.

82 404 U.S. 508 (1972).

83 *Id.* at 509, 514. The Court clearly found such activities to be beyond constitutional protection:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

Id. at 514. The rights of parties to attempt to influence legislative and executive bodies had previously been established by the Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), on the basis that such activities are an assertion of the fundamental constitutional right to petition the Government and are essential to the flow of information inherent in a representative form of government. *Id.* at 137-38. *California Motor Transport* extended the so-called "*Noerr* doctrine" to encompass ad-

these activities as were set out in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[84] In each case it was found that attempts to influence governmental action are not protected when they comprise a "mere sham" and are actually made only to suppress competition.[85]

The Court then considered the legality of Otter Tail's transmission contracts which the company claimed validated its refusals to wheel.[86] It found that the contracts constituted territorial allocation schemes[87] and were per se violations of the Sherman Act.[88] The Court thereby extended the rule of per se illegality, which previously had been primarily applied to section 1 Sherman Act cases,[89] to the section 2 vio-

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ministrative and judicial proceedings and to protect the first amendment rights of all individuals to unite in furtherance of common interests. 404 U.S. at 510-11. *Noerr* also held, and *California Motor Transport* reaffirmed, that an intent to achieve anti-competitive ends by such activities does not, by itself, prevent the exercise of such rights. 365 U.S. at 139-40; 404 U.S. at 515.

84 365 U.S. 127 (1961).

85 404 U.S. at 511; 365 U.S. at 144.

86 410 U.S. at 378-79.

87 *Id.* Territorial allocation schemes may be classified as either horizontal or vertical. A horizontal restraint has been defined as "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972). Vertical restraints have been defined as "combinations of persons at different levels of the market structure." *Id.* The Court, in White Motor Co. v. United States, 372 U.S. 253 (1963), stated that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except [the] stifling of competition," and that "vertical territorial limitation[s] may or may not have that purpose or effect." *Id.* at 263. Although the *Otter Tail* Court did not expressly discuss this distinction, it did rely on classic horizontal territorial restraint language in finding that the contracts had the effect of denying a potential competitor "access to the fenced-off market." 410 U.S. at 378 (quoting from Northern Pac. Ry. v. United States, 356 U.S. 1, 12 (1958)). For a general discussion of territorial market divisions, see Note, *Territorial and Customer Restrictions: A Trend Toward A Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123 (1971).

88 410 U.S. at 378-79. "Per se" standards evolved as a judicial effort to expedite antitrust proceedings because

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). For a general discussion of "per se" standards as pertaining to territorial restrictions, see von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A.L. REV. 569 (1964); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964); Note, *Rule of Reason Applied to Division of Territories*, 3 B.C. IND. & COM. L. REV. 107 (1961); Note, *Section 2 of the Sherman Act—Is a Per Se Test Feasible?*, 50 IOWA L. REV. 1196 (1965); Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971).

89 *See, e.g.*, United States v. Topco Associates, Inc., 405 U.S. 596, 608-09 (1972); United States v. Sealy, Inc., 388 U.S. 350, 357-58 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

lations in *Otter Tail.* Such agreements would have a pernicious effect on competition at the wholesale level of utility industry operations and would thus justify per se treatment.[90]

On the issue of business justification as a defense to refusals to deal,[91] the Court took a less stringent stand than it did in its resolution of prior issues. Although asserting that '[t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct,' "[92] the Court did infer that some economic justification could protect the defendant's refusals to deal in the presence of monopoly power.[93] It suggested that the lower court in any subsequent proceeding should be sensitive to the impact of its decision upon the defendant's operations.[94] Since in this case the district court had retained

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90 This position was taken in Montana-Dakota Util. Co. v. Williams Elec. Cooperative, Inc., 263 F.2d 431 (8th Cir. 1959), where the court found that

> the rule has been promulgated and consistently applied that contracts between quasi-public corporations, having for their object the division of territory between such companies, are against public policy, and being so, are absolutely void, untempered by any application of the "rule of reason."

Id. at 434. *See* United States v. Florida Power Corp., 1971 TRADE CAS. ¶ 73,637 at 90,655 (M.D. Fla. 1971) (consent decree). *Contra,* Shenefield, *supra* note 72, at 693-94.

91 Self-defense of a business interest was held not to be unlawful in Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961), where the court of appeals explained that

> a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred.

284 F.2d at 584 (footnote omitted).

92 410 U.S. at 380 (quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967)). *Schwinn* concerned the attempts of a bicycle manufacturer to improve his eroding market position by restricting the sale of his product to franchised dealers only. The franchising system was found to be subject to a rule of reason analysis, but the territorial restrictions which it imposed were per se unlawful under section 1 of the Sherman Act. 388 U.S. at 381-82.

Otter Tail had asserted that its refusals to deal should be considered as protection for its valid business interests, and therefore subject to a "rule of reason" analysis. *See* 331 F. Supp. at 58. Although the district court appeared to find Otter Tail's actions per se illegal, its conclusion that Otter Tail's prophesies of financial disaster were unfounded seems to indicate that the proffered business justifications were inadequate. *Id. See* Comment, *supra* note 42, at 512-13.

93 410 U.S. at 381.

94 *Id.* The Court recognized that the lower court's injunction could have severe adverse effects upon the defendant's operations. *Id.* The dissent characterized this treatment as "cursory" in view of the Commission's opinion ordering interconnection with Elbow Lake. *Id.* at 393. It quoted from the FPC decision, where the agency found that

> [w]hile it is our responsibility to take all possible steps to insure to Elbow Lake's customers a high standard of service reliability, our terms and conditions must not invite improvident ventures elsewhere.
>
> We also share the Examiner's view that Otter Tail is legitimately concerned about the possible erosion of its system. If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to

jurisdiction to modify its decree and would subject the conditions for future interconnections to FPC approval, the Supreme Court concluded that no abuse of judicial discretion had occurred.[95]

Otter Tail has left unanswered the important question of whether the agency or the court will ultimately decide when compulsory interconnection of public utilities shall be required. The judicial review of regulatory proceedings as provided in the Federal Power Act has been temporarily replaced by a de novo consideration of company activities in spite of the fact that regulatory provisions should preclude the harm that the antitrust laws seek to prevent.[96] Unless this jurisdictional question is finally resolved in favor of the agency, further legislation may be needed to reinforce the policies of the Federal Power Act and to prevent sporadic court action which might be harmful to the operational flexibility required by the industry.[97] In addition, by extending antitrust remedies to wheeling, the judiciary has undertaken a quasi-administrative role in regard to that phase of industry conduct, but without offering clear standards[98] to guide utility companies or judges in future decisions.

On the other hand, the result of the case can be defended on the grounds that some benefits may be realized by the consumer as a result of greater possibility for competition in the retail market from municipalities having ready access to wholesale power. However, the long-

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be rescued by overly-generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported.

Village of Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675, 678 (1971) (quoted in 410 U.S. at 393-94 (Stewart, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part)).

95 410 U.S. at 381-82. However, the dissent contended that the injunction usurped the power granted to the FPC under section 202 of the Federal Power Act, 16 U.S.C. § 824a(b) (1970), to decide whether interconnection should be compelled. 410 U.S. at 395.

96 *Otter Tail* did not suggest that the FPC's interconnection power was inadequate to protect municipal utilities from refusals to deal by transmission companies, although that conclusion would seem to be a prerequisite to a finding that individual monopoly power had been abused. *See* Shenefield, *supra* note 72, at 698. However, the ability of the FPC to protect the public interest has been questioned. *See* Note, *Threat of Corporate Destruction Does Not Legitimize Exclusionary Conduct*, 50 TEXAS L. REV. 1023, 1029 (1972).

97 410 U.S. at 391-92. *Cf.* United States v. Radio Corp. of America, 358 U.S. 334, 350 (1959).

98 One commentator has proffered several factors to be considered in evaluating refusals to wheel under the Sherman Act, namely:

(1) The existence and extent of monopolistic power; (2) the offensiveness of the conduct of the alleged monopolist; (3) the probability of obtaining industry economies by the purchase of the wheeled power; (4) the effect of wheeling on power and system reliability; and (5) the possibility that wheeling would require substantial investment by the wheeler of power.

Comment, *supra* note 42, at 525.

standing rejection of common carrier status and compulsory wheeling indicates a lack of legislative approval of the displacement of investor-owned systems by municipal utilities. The Court in *Otter Tail* has imposed free enterprise concepts on utility operations where they are not clearly warranted and in spite of this congressional philosophy.

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