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IS THE PRICE SQUEEZE DOCTRINE STILL VIABLE IN FULLY-REGULATED ENERGY MARKETS?

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I. INTRODUCTION

Over the last several years, there have been substantial developments in the application of the price squeeze doctrine to fully-regulated electric utilities.¹ This article will examine the current developments in this area, and attempt to highlight the burdens potential litigants, both plaintiffs and defendants, must overcome to succeed.

Simply stated, a price squeeze occurs when a firm with monopoly power on the primary, or wholesale, level engages in a prolonged price increase that drives competitors out of the secondary, or retail level, and thereby extends its monopoly power to the secondary market.² A price squeeze will not be found, however, for any short-term exercise in market power. Rather, because anticompetitive effects of a price squeeze are indirect, the price squeeze must

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¹ The price squeeze doctrine originated in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-48 (2d Cir. 1945).

² *Cities of Anaheim v. FERC*, 941 F.2d 1234, 1250 (D.C. Cir. 1991).

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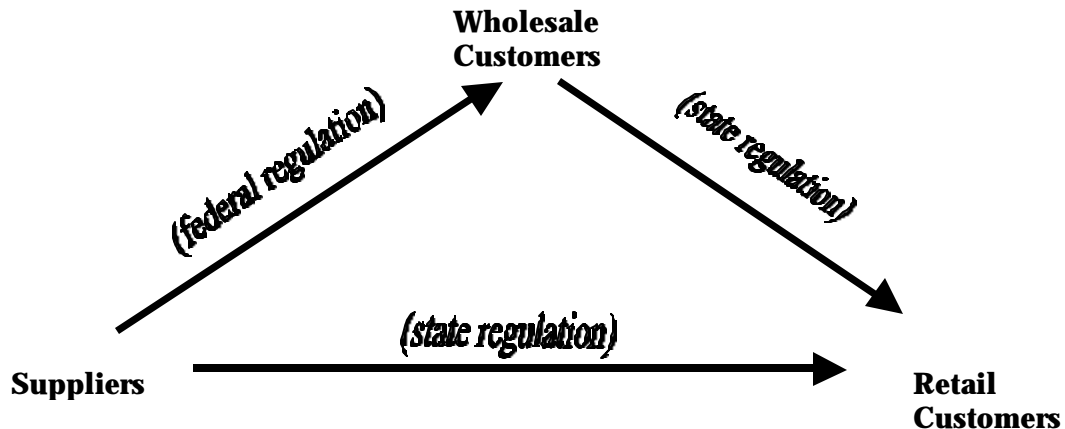
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last long enough and be severe enough to produce effects on actual or potential competition in the secondary market.³

In regulated electric industries, a price squeeze claim usually arises from the complex relationship between the supplier, the wholesale customer, the retail customer, and the federal and state regulators. The supplier sells electric power to both wholesale and retail customers. Wholesale transactions are regulated by federal regulators, and retail transactions are regulated at the state level. The wholesale customers in turn sell power to their retail customers.⁴ The D.C. Circuit rendered these relationships graphically:⁵



[*76] A price squeeze may occur if a utility's wholesale rate (in relation to costs) is higher than its retail rate (in relation to costs) and it becomes difficult for the wholesale customer to pay the wholesale rate and resell the power at rates competitive with its supplier's retail rates. If this disparity between wholesale and retail rates causes an anticompetitive effect (i.e., the wholesale

³ Id. See also Southern Cal. Edison Co., Opinion No. 284, 40 F.E.R.C. ¶ 61,371 at 62,166-67 & n. 62 (1987) ("potential competitive effect" defined as a reasonable probability, as opposed to a mere possibility, of harm occurring).

⁴ Mid-Tex Electric Coop. v. FERC, 864 F.2d 156, 161 (D.C. Cir. 1988).

⁵ Id.

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customer is likely to lose retail load, thereby “squeezing” the wholesale customer out of the retail market), liability may be found.⁶

The different regulatory procedures necessary for approving wholesale and retail rates provide fertile ground for allegations of anticompetitive price squeeze. Specifically, a utility’s wholesale rates under federal control go into effect automatically without agency approval,⁷ but retail rates generally must await state agency approval.⁸ As one court explained:

Behind the rate applications there are differing regulatory procedures, differing tests and standards to be applied, and differing accounting principles to be used in the computations. At best, a utility may find itself in a legal and practical maze, but for price squeezing the dual system also offers an obvious, ready made illegal opportunity with a legitimate gloss.⁹

A price squeeze may be caused by intentional actions of a wholesale supplier -- a so-called “predatory” price squeeze. It may also be the result of differences between the ratemaking policies of the Federal Energy Regulatory Commission (FERC or Commission), and state commissions -- a “regulatory” price squeeze.¹⁰

⁶ Cities of Anaheim, 941 F.2d at 1238. Despite the almost universal existence of franchised “monopolies” at retail, there are four generally recognized forms of retail competition: (1) franchise; (2) fringe-area; (3) industrial/locational; and (4) yardstick. Franchise competition occurs when one utility seeks to take over control of its retail competitor’s entire franchised service territory. Fringe area competition is similar, but is limited to the retail competitors’ contiguous borders. Industrial/locational retail competition is the competition to attract large industrial end-users to locate in a retail competitor’s respective service territory. Yardstick competition is not actually competition for retail load, but rather a mechanism where either the local regulator or the retail competitor compares retail rates and attempts to match those rates in order to stay competitive.

⁷ See generally, 16 U.S.C. § 824d (1988).

⁸ See, e.g., Cal. Pub. Util. Code § 701-703 (West 1975 & Supp.).

⁹ City of Mishawaka v. American Electric Power Co., 616 F.2d 976, 983-84 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

¹⁰ Cities of Anaheim, 941 F.2d at 1238. A regulatory price squeeze is an unintentional price squeeze resulting solely from the differences between state and federal rate practices and (Footnote Continued. . . .)

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[*77] A predatory price squeeze plaintiff generally has two options available. First, a plaintiff may apply for an administrative remedy from the Federal Energy Regulatory Commission.¹¹ Alternatively, the plaintiff may elect to sue under section 2 of the Sherman Act¹² in federal district court.¹³

However, because of the different goals, each avenue has different criteria for success and different remedies. The goal of an administrative remedy is to ensure that rates are just and reasonable. As such, if a plaintiff seeks an administrative remedy before the FERC, the Commission does not focus its examination on the utility's intent,¹⁴ but rather on the anticompetitive effects of the alleged price squeeze on the wholesale customer/retail competitor and whether they are outweighed by the effect on the supplying utility's financial viability and its ability to serve its customers.¹⁵ Moreover, if a plaintiff proves a claim before the FERC, the Commission may remedy the price squeeze only by reducing the utility's wholesale rate within a "zone of reasonableness."¹⁶

In contrast, a section 2 claim seeks to remedy some kind of intentionally imposed anticompetitive harm. A section 2 plaintiff must therefore show some

policies. See, e.g., *Cities of Anaheim*, id. at 1239; *Mid-Tex*, 864 F.2d at 162. See also Order No. 474, F.E.R.C. Stats & Regs. preambles 1986-1990 ¶ 30,751, 52 Fed. Reg. 23,948 (1987) at 30,709-14 (1987). However, the standard under which the Commission evaluates a regulatory price squeeze is the same as that used to evaluate a predatory price squeeze. See *id.*

¹¹ See, e.g., 18 C.F.R. § 2.17 (1992).

¹² Sherman Act. § 2, 15 U.S.C. § 2 (Supp. III 1991), provides that, "[E]very person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony...."

¹³ Section 2 price squeeze claims against the wholesale and retail rates of fully-regulated utilities are not barred by either (1) the Commission's exclusive jurisdiction over wholesale rates; (2) the filed-rate doctrine; (3) state action immunity (*Parker v. Brown*, 317 U.S. 341 (1943)); and (4) the Noerr-Pennington doctrine. See, e.g., *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

¹⁴ *Cities of Anaheim*, 941 F.2d at 1234; *Southern California Edison Co.*, Opinion No. 284, 40 F.E.R.C. ¶ 61,371 at 62,182 n.18 (1987). See also *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 977-78 (D.C. Cir. 1984).

¹⁵ See, e.g., *Ellwood*, 731 F.2d at 970; Opinion No. 284, 40 F.E.R.C. ¶ 61,371 at 61,165 (anticompetitive effect is "alpha and omega" of the price squeeze inquiry).

¹⁶ 18 C.F.R. § 2.17(a)(5). See also, *FPC v. Conway*, 426 U.S. 271, 278- 79.

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degree of monopolistic intent, as well as some demonstrable harm to competition. If an anticompetitive injury is found, treble damages are available to punish the offender.¹⁷ Therefore, because a successful price squeeze plaintiff (1) can receive substantial monetary awards (as opposed to a reduction in the supplying utility's wholesale rate within the "zone of reasonableness"), and (2) will not have to share this award with other wholesale customers not party to the suit (because rate reductions benefit all customers receiving service under the utility's wholesale tariff), many parties choose to proceed under section 2 in the hope of receiving damage awards. Each avenue is reviewed in detail below.^[*78]

II. DISCUSSION

A. Administrative Remedy

1. Legal and Regulatory Framework

The boundaries of an administrative remedy for a predatory price squeeze originated in *F.P.C. v. Conway*.¹⁸ In *Conway*, a utility's wholesale customers challenged the utility's wholesale rate increase on the grounds that because the proposed rate allegedly was so high, the new filing would prevent them from competing with the utility in the retail market. The Federal Power Commission (FPC) denied the customers' petition on the ground that it lacked jurisdiction to consider the effect of wholesale rates on retail markets. The Supreme Court disagreed. The Court concluded that by ignoring the wholesale customers' allegations, the Commission could not satisfy its obligation under the Federal Power Act (FPA) sections 205 and 206¹⁹ to consider whether a proposed rate has anticompetitive or discriminatory effects. The Court held that the Commission must arrive at a wholesale rate level deemed by it to be just and reasonable, but in doing so "it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect" in relation to

¹⁷ Sherman Act §15, 15 U.S.C. § 15 (1988).

¹⁸ 426 U.S. 271 (1976).

¹⁹ 16 U.S.C. § 824e (1988).

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the utility's retail rates that are not within the jurisdiction of the Commission.²⁰
According to the Court:

When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the [Commission] to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers.²¹

In direct response to Conway, the Commission promulgated 18 C.F.R. § 2.17.²² Under section 2.17, any wholesale customer, state commission, or other interested person may file petitions to intervene in a wholesale rate proceeding alleging price discrimination and anticompetitive effects of a utility's wholesale rates. In order to litigate a possible price squeeze, the complainant must prove a prima facie case, including, at minimum:

- (1) Specification of the filing utility's rate schedules with which the intervening wholesale customer is unable to compete due to purchased power costs;
- (2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;
- (3) A showing that the retail rates are lower than the proposed wholesale rates for comparative service;
- (4) The wholesale customer's prospective rate for comparable retail service, the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs;

²⁰ Conway, 426 U.S. at 279.

²¹ Id. (citation omitted).

²² 18 C.F.R. § 2.17(a) (1992).

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- (5) An indication of the reduction in the wholesale rate necessary to eliminate [*79] the price squeeze alleged.²³

However, unlike a claim under the antitrust laws where a party who establishes a prima facie case is, as a matter of law, entitled to relief unless the defending party rebuts the case, the establishment of a prima facie price squeeze case before the Commission means only that enough has been shown to warrant inquiry into the price squeeze allegations in order to ascertain whether price discrimination exists.²⁴ The Commission's regulations permit the utility proposing the rates to rebut the allegations of price squeeze and to justify the proposed rates.²⁵ The Commission need not, however, resolve price squeeze claims before accepting and suspending a proposed wholesale rate for filing.²⁶

2. *Applicable Case Law*

a. Illinois Cities of Bethany v. FERC²⁷

Bethany marked the first attempt to define the boundaries of the Commission's authority to remedy allegations of price squeeze. The D.C. Circuit read Conway as permitting the Commission to adjust wholesale rates within a zone of reasonableness to respond either to a utility's efforts to depress retail rates to meet competition or to situations where the "imperfections of regulation" result in an unintended price squeeze. However, the court recognized that because ratemaking is an inexact science, even bona fide allocations of costs between wholesale and retail operations may be imperfect or rates of return set by different regulators at the wholesale and retail levels may make it impossible for purchasing wholesalers, no matter how efficient, to compete at the retail level. In such cases, the D.C. Circuit held that while

²³ Id.

²⁴ Illinois Cities of Bethany v. FERC, 670 F.2d 187, 195 (D.C. Cir. 1982).

²⁵ 18 C.F.R. § 2.17(b) (1992) ("The burden of proof (i.e., the risk of non persuasion) to rebut the allegations of price squeeze and to justify the proposed rates are on the utility proposing the rates under § 205(e) of the Federal Power Act").

²⁶ See Kansas Cities v. FERC, 723 F.2d 82 (D.C. Cir. 1983).

²⁷ 670 F.2d 187 (D.C. Cir. 1982).

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Conway acknowledges the Commission's discretion to press wholesale rates to the lower end of the zone of reasonableness:

The Conway doctrine is not, however, we emphasize, designed to subsidize particular retail customers. Rather, the doctrine allows the Commission some leeway where it finds that the process of price setting by regulation, and not the superior efficiency of the utility, might result in retail competitors being driven from the market.²⁸

The court found that the complainant in this case failed to make the requisite prima facie showing. Therefore, there was no occasion for the Commission to exercise its Conway discretion.²⁹ **[*80]**

b. Cities of Batavia v. FERC³⁰

Batavia was the second price squeeze case within the year for the D.C. Circuit. In Batavia, a utility's wholesale customers challenged a Commission order approving a rate increase on the ground that the utility's tariff produced wholesale rates so excessive that the customers were squeezed out of the retail market for industrial customers. The wholesale customers raised three arguments on appeal.

First, the customers argued that the Commission erred by allowing the utility to submit additional evidence to rebut their price squeeze claim. According to these customers, having established a prima facie price squeeze case, they were entitled to summary judgment. The D.C. Circuit disagreed. Citing Bethany, the court held that:

To call 18 C.F.R. § 2.17 a "regulation" . . . is to overstate its importance. It was promulgated as a statement of general policy to guide the [Commission's] Staff in dealing with price squeeze cases in the immediate aftermath of Conway; the Commission

²⁸ Id. at 200.

²⁹ Id.

³⁰ 672 F.2d 64 (D.C. Cir. 1982).

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has felt free to disregard its strictures when conducting its price squeeze proceedings.³¹

According to the court, the Commission is free, in any particular case, to establish a “very low threshold” for the establishment of a prima facie case and, so long as the Commission’s procedures for presenting and rebutting a prima facie case do not violate due process, those procedures will be judicially sanctioned.³²

Second, the customers argued that the Commission’s procedures and remedies for allegations of price squeezes were inadequate. Again, the D.C. Circuit disagreed:

The approach followed by the Commission here was dictated by its limited role of setting just and reasonable rates. The Commission can take certain anticompetitive consequences into account in setting just and reasonable rates; however, except for its ability to award refunds, it is unable to provide retroactive relief. Whatever is lost because of the pace with which the administrative process proceeds, can be sought along the public and private paths of the antitrust laws.³³

Finally, the D.C. Circuit found that even though there was a seventeen percent (17%) differential between the wholesale and retail rates, this differential was apparently due to the higher costs of serving the wholesale group. The court therefore concluded that if the wholesale customers could not compete with the utility for certain customers at retail, “that was the result of market conditions, not anticompetitive pricing.”³⁴ The court noted that neither Conway nor Batavia require the Commission to set a wholesale rate so that

³¹ Id. at 87 (citing, *Bethany*, 670 F.2d at 197 n. 39).

³² Id. at 87-88.

³³ Id. at 89. Indeed, the D.C. Circuit noted that “[w]hile [administrative] refunds ‘cannot revive a corpus,’ antitrust remedies are designed to do just that.” Id.

³⁴ Id. at 90.

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wholesale customers are guaranteed the ability to compete in the retail [*81] market.³⁵ Rather, the court, citing Bethany, held that:

[T]he Conway doctrine was not designed to subsidize particular retailers but rather to assure that genuinely competitive wholesale customers would not be squeezed out of a retail market because of the imperfections of regulation, an assumed propensity of utilities for unjustified monopoly power or the coordination problems due to the division of regulatory power between state and federal government.³⁶

c. ~~Boroughs of Ellwood City v. FERC~~³⁷

In contrast to Bethany and Batavia, where the D.C. Circuit focused on the extent of the remedy the FERC may impose, the Ellwood court focused on the relevant inquiry the FERC must conduct to see if a remedy is in fact required. In Ellwood, the D.C. Circuit found that the Commission took an unreasonably “restrictive view” of the price squeeze doctrine by misunderstanding the “paradox of dual regulation” in failing to remedy a blatant price squeeze. The court held that while the Commission is not obligated to necessarily lower the rate it had determined to be just and reasonable apart from allegations of discrimination, the Commission under Conway at a minimum must, when faced with a proven price squeeze, weigh the effects of a rate and a rate disparity on both the supplying utility and its customers.³⁸ Specifically:

[The Commission’s] decision not to ameliorate a proven price squeeze ordinarily must be based on the Commission’s determination that the anticompetitive effect of the price squeeze

³⁵ Id. at 90 n. 52. As an example, the court pointed out that if a state commission does not allow an adequate rate of return, the Commission is not obliged to follow, and indeed may not follow suit, for the rates it sets must fall within the zone of reasonableness. Id.

³⁶ Id. at 91.

³⁷ 731 F.2d 959 (D.C. Cir. 1984).

³⁸ Id. at 978.

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is outweighed by the effect of a remedy on the supplying utility's financial viability and its ability to serve all of its customers.³⁹

According to the court, this interpretation of the Conway doctrine places less emphasis on the explanation for a price squeeze (i.e., whether it lies on the "paradox of dual regulation" or in some other reasonable business judgment by the supplying utility), but instead seeks to advance the underlying goal of the price squeeze doctrine as outlined in Batavia (i.e., to assure that genuinely competitive wholesale customers are not squeezed out of the retail market):⁴⁰

Although there may be extraordinary circumstances in which the explanation -- whether the cause or the reason -- for a price squeeze may mitigate or even excuse price discrimination, . . . [i]t is primarily the effects of the price squeeze and its prospective remedy that should guide the Commission's exercise of discretion. . . .⁴¹

Consequently, the court held that it is more appropriate in the regulatory [*82] price squeeze context "to preclude lengthy investigations into a utility's motives and to focus instead on objective criteria."⁴² The Commission has subsequently adopted the court's analysis in Ellwood.⁴³

³⁹ Id. at 979.

⁴⁰ Id. at 978-79 (citing, Batavia, 672 F.2d at 91). See also Kansas Cities, 723 F.2d at 93 (price squeeze goes not to the reasonableness of rates, but to their discriminatory character, and affects where within the zone of reasonableness the proper rate should be fixed).

⁴¹ Ellwood, 731 F.2d at 979.

⁴² Id. at 969. Indeed, the court found that the Commission impermissibly permitted evidence of the utility's subjective intent in filing different rate schedules at the wholesale and retail levels. Id. at 977-78.

⁴³ See Opinion No. 284, 40 F.E.R.C. ¶ 61,371 at 62,166-67. There, the Commission held that:

If the Commission is to gain the experience necessary to fulfill its responsibilities under Conway, it must begin examining and evaluating critically evidence relating to the effect of utility rates. Thus, in price squeeze proceedings, either an actual or potential competitive effect based on the magnitude and duration of the quantified price discrimination should be indicated by those parties alleging price squeeze.

* * *

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d. Cities of Anaheim v. FERC⁴⁴

In *Cities of Anaheim*, the D.C. Circuit focused on the sufficiency of evidence needed to rebut a price squeeze plaintiff's prima facie case showing that a utility's wholesale rates would have anticompetitive effects on retail competition. The court began its analysis by noting that because of the presence of regulation at both the wholesale and retail level, it is less likely that a price squeeze in this industry will actually drive competitors from the marketplace. The court reasoned that with the addition of regulatory oversight, even if a utility is able to squeeze a competing distributor out of the retail market, the utility still cannot take over the competitor's franchise without approval from the local regulator. Moreover, the court noted that because a retail distributor supplies "relatively immobile customers," retail competition is relatively static.⁴⁵ With that in mind, the court concluded that the utility had made a sufficient showing rebutting the evidence that its wholesale rate had anticompetitive effects on the four types of retail competition.⁴⁶

The court found that with the addition of regulation at the retail level, fringe and franchise competition is unlikely. Moreover, the court found that the threat of annexation of fringe and franchise service areas is also reduced because these decisions are relatively permanent and involve an examination of numerous social and economic factors over a long-run context. Indeed, the court found that there was no evidence to indicate that fringe and franchise competition had been sufficient in the past. Similarly, there was also no evidence that retail competitors had attempted to match the utility's rate (i.e., yardstick competition). Finally, the court found that industrial/locational competition is unlikely because these decisions are made with the objective of

We point out, however, that as set forth in section 2.17 of the Commission's regulations, the burden of proof (i.e., the burden of non-persuasion) to rebut a showing of price squeeze remains on the utility. That is because, ultimately, under section 205(e) of the Federal Power Act, the utility has the burden of proving that its proposed increased rates are neither unjust, unreasonable, nor unduly preferential or discriminatory. *Id.*

⁴⁴ 941 F.2d 1234 (D.C. Cir. 1991).

⁴⁵ *Id.* at 1250 (citing, *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), cert. denied, 111 S.Ct. 1337, reh'g denied, 11 S.Ct. 2047 (1991) (discussed *infra*)).

⁴⁶ *Cities of Anaheim*, 941 F.2d at 1250 (discussed *supra* note 6).

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[*83] minimizing costs over a period of years and that industrial firms that are particularly sensitive to the cost of electricity will be more concerned with longterm rate relationships when choosing a site for new or expanded operations.⁴⁷ On remand, the Commission found that the customers did not refute the utility's showing, and permitted the utility to recover the amount that had been improperly refunded to the customers.⁴⁸

B. Antitrust Remedy

1. *Analytical Framework*

There are two traditional grounds for relief under section 2: monopolization and attempted monopolization. To prove monopolization, a plaintiff must prove: "(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."⁴⁹ To prove attempted monopolization, a plaintiff must show: (1) a specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success.⁵⁰ In the regulated industries context, a price squeeze plaintiff must also meet this standard -- i.e., (1) that the utility possessed monopoly power in the relevant market; (2) that the utility willfully acquired or maintained that power; and (3) that the plaintiff suffered a causal antitrust injury.⁵¹

Over the last decade, many parties have brought section 2 price squeeze claims against regulated utilities. Almost all of these suits have failed. As will be examined more fully below, the last two elements appear to be the most contested in cases involving regulated electric utilities. Specifically, does the

⁴⁷ Id. at 1250-51.

⁴⁸ Southern Cal. Edison Co., 58 F.E.R.C. ¶ 61,115 (1992).

⁴⁹ Eastman Kodak Co. v. Image Tech. Serv., Inc., 112 S.Ct. 2072, 2089 (1992); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

⁵⁰ Alaska Airlines, Inc. v. United Airlines, 948 F.2d 536, 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992).

⁵¹ Cities of Anaheim v. Southern Cal. Edison, 955 F.2d 1373, 1376 (9th Cir. 1992).

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mere filing of a rate increase demonstrate sufficient intent to violate section 2, or must a proponent show more? Moreover, in a fully regulated context, is it even possible for a utility to have the requisite intent? Finally, as discussed above, is it even possible to demonstrate antitrust injury in a fully-regulated retail market when franchise, fringe, and locational retail competition are often de minimis?

2. *Applicable Case Law*

a. ~~City of Mishawaka v. American Electric Power Co.~~⁵²

In Mishawaka, several municipalities brought suit under section 2 of the Sherman Act against a vertically integrated electric utility for creating a price squeeze via higher retail rates. The trial court found the utility guilty of a [***84**] price squeeze, basing its decision on three primary factors: First, the court found that the utility sought to have its “wholesale rates . . . higher and out of balance with lower retail rates. . . .” Second, it found that the utility’s rate program was supplemented by threats to the continuation of wholesale power supplies. Third, as a general matter, competition had been “crippled” in the past and that some municipal systems had been acquired by the utility.⁵³ The court reasoned that a section 2 Sherman Act violation had been established when monopoly power, even though lawfully acquired, was shown along with only a general intent to abuse that power, resulting in injury to the municipalities.⁵⁴ The trial court, therefore, assessed treble damages based on the excess of wholesale rates over retail rates.⁵⁵

The Seventh Circuit, while agreeing that the utility violated section 2, disagreed with the trial court’s general intent standard:

In the particular circumstances, however, of a regulated utility struggling with dual regulation, bearing in mind that the utility is entitled to recover its cost of service and to provide its

⁵² 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

⁵³ Mishawaka, 616 F.2d at 980-981.

⁵⁴ Id. at 984.

⁵⁵ Id. at 981.

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investors with a reasonable rate of return, we believe that something more than general intent should be required to establish a Sherman Action violation.⁵⁶

Rather, the court required:

a consideration of all the evidence of the utility's activities, [demonstrating] not only a general intent . . . but also a specific utility intent to serve its monopolistic purposes at municipal expense.⁵⁷

The court was also quick to point out that a price disparity is not, in and of itself, sufficient to demonstrate sufficient intent under section 2. The court agreed with the trial court that the utility's behavior (i.e., intentionally seeking higher retail rates over wholesale rates, threatening power supplies, aggressive acquisition of municipalities), taken as a whole, supported a conclusion that the utility had violated section 2. As the Seventh Circuit explained, it was "the mix of various ingredients of utility behavior in a monopoly broth that produce[d] the unsavory flavor."⁵⁸ As this article will point out below, the Seventh Circuit's requirement that courts examine the complete picture, and not only the rate disparity, is probably the principal reason why no other court has found a utility to have engaged in a price squeeze in violation of section 2.

Finally, the court rejected the trial court's remedy of treble damages based on the rate disparity:

[r]ather, under the sui generis circumstances of this case, we believe that the municipalities must establish their antitrust damages by proof of specific injuries they have suffered as the

⁵⁶ Id. at 985.

⁵⁷ Id. (emphasis supplied).

⁵⁸ Id. at 986. Cf. *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984) "The mere fact of a rate disparity . . . does not establish unlawful rate discrimination under section 205(b) of the Federal Power Act." Id.; See also *Batavia*, 672 F.2d at 90 (seventeen percent rate differential was result of market conditions, not anticompetitive pricing).

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result of the utility's overcharges and other monopolistic [*85] practices.⁵⁹

As examples, the court suggested that the municipalities could demonstrate injury to franchise competition by showing that the utility's excessively high wholesale rates forced the plaintiffs to forgo or secure less favorable terms for capital improvements to expand or replace distribution equipment. For loss of fringe area competition (i.e., customers in overlapping service areas), the municipalities could show a loss of customers, revenues or profits.⁶⁰

b. ~~City of Groton v. Connecticut Light & Power~~⁶¹

In Groton, several municipalities brought two price squeeze claims against Connecticut Light and Power (CL&P). First, the municipalities claimed that for a five-month period, CL&P's rate for "large retail service" was lower than CL&P's wholesale rate. Second, the municipalities claimed that CL&P's rate to a particular industrial end-user was "intermittently below CL&P's wholesale rate during the 1970's." The court rejected both claims. The district court ruled against the municipalities' first claim for two reasons. First, in "taking all relevant factors into consideration the price to the municipalities was not higher than the price to the industrial customers," and second, even if there had been a price differential, its short duration "minimized the possibility of injury."⁶²

On appeal, the Second Circuit held that a five-month period is sufficient to support a price squeeze claim if the sums involved are "substantial." In this case, the amount at issue was over one million dollars. The Second Circuit disagreed with the trial court's finding that "when all of the relevant factors are taken into consideration," CL&P's wholesale price was not higher, because

⁵⁹ Mishawaka, 616 F.2d at 989.

⁶⁰ Id.

⁶¹ 662 F.2d 921 (2d Cir. 1981).

⁶² Id. at 934.

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the Second Circuit held that the trial court failed to describe those “relevant factors.”⁶³ The Second Circuit remanded this claim for further findings.

As to the municipalities’ second claim, the Second Circuit found that the district court did not decide whether there was actually a price differential because it took a “narrow view of what constitutes competition.” Specifically, the district court reasoned that because there was no indication that a large industrial customer contemplated moving, and there was no other evidence that a similar enterprise ever chose to locate in CL&P’s service territory instead of in one of the municipalities, the municipalities sustained no anticompetitive injury.⁶⁴ The Second Circuit rejected this approach, holding that:

Our definition of competition in the electric-power industry . . . is broader and [*86] includes competition for individual customers. Franchise competition, and fringe area competition. Under our definition of competition the subjective plans of individual customers are irrelevant. Competition exists if the monopoly utility and the municipalities are in geographic proximity and are generally each seeking to have retail business locate within their respective franchise areas. In a case where, as here, such competition exists, and where in addition there is a discrepancy with the retail and wholesale rates, a rebuttable presumption arises that the differential has an anticompetitive effect, and the burden is on the monopoly utility to provide evidence that there is no reasonable probability that the differential will have an effect upon the location of such potential customers.⁶⁵ The Second Circuit remanded this claim for further findings.

Notwithstanding, the Second Circuit, citing *Mishawaka*, ruled against the municipalities’ price squeeze claims:

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id. at 934-35.

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Viewing the municipalities' claims and proof as a whole as . . . City of Mishawaka require[s], we fail to find any indication that, even if the price-squeeze claims are valid, the overall "synergistic effect" of the rates, acts, and practices of [CL&P] gives rise to violations of either Section 1 or Section 2 of the Sherman Act. The municipalities demonstrated no long-term wholesale and retail rate disparity, no threats of discontinuing the municipalities' wholesale power supplies, and no continuing policy of acquiring municipal systems. In these respects the instant case differs significantly from City of Mishawaka. There was, in short, as [the trial court] found, no general intent to impede the municipalities' competitive position or to enhance [CL&P's] alleged monopoly power, and there was no anticompetitive or exclusionary conduct except, possibly, for two specific price squeezes about which we have remanded.⁶⁶

c. ~~Town of Concord v. Boston Edison Co.~~⁶⁷

In Concord, a municipality sued an investor-owned utility for a price squeeze, alleging that the utility's wholesale rate increases filed with the FERC were not matched by corresponding retail rate increases over a three-year period. A jury found the utility guilty of unlawful monopolization under section 2, and the district court declined to overturn the verdict. On appeal, the First Circuit defined the issue narrowly: "does Sherman Act Section 2 forbid a governmentally regulated firm with fully regulated prices -- prices that are regulated at both industry levels -- from asking regulators to approve prices that could create a price squeeze?"⁶⁸ After reviewing the different goals and remedies germane to regulated industries, the First Circuit answered the question in the negative.⁶⁹

⁶⁶ Id. at 935 (citations omitted).

⁶⁷ 915 F.2d 17 (1st Cir. 1990), cert. denied, 111 S.Ct 1337, reh'g denied, 111 S.Ct. 2047 (1991).

⁶⁸ Concord, 915 F.2d at 18-19.

⁶⁹ The reader should note that this opinion was written by Chief Judge Stephen G. Breyer, former Harvard Law School professor and noted expert in antitrust, administrative and economic regulation law.

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The First Circuit began its analysis by holding that it would analyze the price squeeze allegations using the “traditional antitrust principles” under section 2 -- i.e., that it was required to “compare the challenged practice’s likely [*87] anticompetitive effects with its potentially legitimate business justifications.”⁷⁰ However, the court recognized that:

a practice is not “anticompetitive” simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm’s fortunes at the expense of its competitors. Rather, a practice is “anticompetitive” only if it harms the competitive process. It harms that process when it obstructs the achievement of competition’s basic goals -- lower prices, better products and more efficient production methods.⁷¹

The court then took into account the differing “administrative considerations” between courts and regulatory agencies when adjudicating competitive issues in the fully-regulated electric industry.⁷² According to the court, although regulators and the antitrust laws “typically aim at similar goals -- i.e., low and economically efficient prices, innovation, and efficient production methods,”⁷³ these goals are achieved in very different ways:

Economic regulators seek to achieve them directly by controlling prices through rules and regulations; antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.⁷⁴ The court therefore cautioned that:

An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve. Thus, where regulatory and antitrust regimes coexist, antitrust

⁷⁰ Concord, 915 F.2d at 21.

⁷¹ Id. at 21-22 (citations omitted).

⁷² Id. at 22.

⁷³ Id.

⁷⁴ Id. (citations omitted).

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analyses must sensitively “recognize and reflect the distinctive economic and legal setting” of the regulated industry to which it applies.⁷⁵

Based on these “principles,” the First Circuit then concluded “that a price squeeze of the sort at issue here does not ordinarily violate Sherman Act Section 2 where the defendants’ prices are regulated at both the primary and secondary levels.”⁷⁶ The court was quick to point out, however, that this holding did not stand for the proposition that the “antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere.”⁷⁷ Rather,

we are saying that, in light of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary, and, for that reason, it does not violate the Sherman Act.⁷⁸

The court set forth five reasons in support of its conclusion. First, the panel held that regulation significantly diminishes the likelihood of “entry barrier” harm:

[N]amely the risk that (1) prices will rise because (2) new firms will hesitate to enter the market and compete after (3) a squeeze has driven pre- existing independent competitors from the market place. All three are made doubtful by [*88] regulation.⁷⁹

The First Circuit noted that: (a) regulators control prices directly in a regulated industry; (b) regulatory factors are more likely to determine new entry into a regulated industry than a “new entrant’s fear of a two-level monopolist’s enhanced retaliatory power;” and (c) regulation in the electricity industry makes it less likely that a price squeeze will actually drive

⁷⁵ Id. (citation omitted).

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 25.

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independent distributors from the market, because even if an integrated utility managed to set prices that severely squeezed a distributor, the utility could not take over the municipality's distribution area without the regulator's permission.⁸⁰

Second, the court held that regulation significantly diminishes the likelihood of anticompetitive harm because regulators generally try to set prices that reflect costs. As such, an integrated utility can squeeze independent distributors only if these distributors operate less efficiently, i.e., at higher costs.⁸¹

Third, the First Circuit held that merely filing new rates is insufficient to constitute the requisite intent necessary to violate the antitrust laws. The court concluded that if this was the case, "an antitrust rule making the price squeeze illegal threatens consumers."⁸² According to the court:

A rule that penalizes the filing of wholesale rate increases would not necessarily lead firms to abandon wholesale rate increases; it could, instead, simply lead them to seek a retail rate increase whenever they seek a wholesale rate increase. (Conversely, it would discourage a utility from conceding that a retail price cut is reasonable unless it is also prepared to concede that a wholesale price cut is reasonable.)

* * *

Such a rule of law (which could lead to unnecessary regulatory proceedings and unnecessary rate increases) would seem to work at cross purposes with basic antitrust objectives.⁸³

⁸⁰ Id. at 25-26. See also *Cities of Anaheim*, 941 F.2d at 1250-52; *West Texas Util. v. Texas Elec. Serv. Co.*, 470 F.Supp. 798, 819-824 (N.D. Tex. 1979) (No antitrust liability where actual and potential retail competition was de minimis).

⁸¹ *Concord*, 915 F.2d at 26.

⁸² Id.

⁸³ Id. at 27.

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Fourth, the court reasoned that because of the “special administrative difficulties in the regulatory context,” a utility is not always liable for a price squeeze whenever it cannot demonstrate that it earned an equal profit at both the wholesale and retail levels. In particular, the court noted that (a) the Constitution guarantees a regulated firm a reasonable return on its investment; (b) the utility may believe that different risks at different levels of the industry call for different rates of returns; and (c) it will be difficult for a fact finder to apportion the amount of the firm’s investment on which its rate of return is calculated between providing wholesale and retail service.⁸⁴

Finally, the First Circuit recognized that price squeeze plaintiffs in fully-regulated [*89] industries have an administrative remedy. According to the court, a price squeeze plaintiff,

can challenge a utility’s rates and practices before the [Federal Energy Regulatory] Commission as unjust, unreasonable or “discriminatory.” See 16 U.S.C. §§ 824d(a)(b), 824e(a); 18 C.F.R. § 2.17(a) (1990). As part of its challenge, it can ask the Commission to consider the alleged price squeeze harm. See, *FPC v. Conway*, 426 U.S. 271, 96 S. Ct. 1999 (1976). If FERC permits the rates to take effect after suspension and later determines that a price squeeze exists, it can order an appropriate refund.⁸⁵

d. ~~*City of Anaheim v. Southern California Edison Co.*~~⁸⁶

Here, several transmission-dependent municipalities sued a fully-integrated utility under section 2, claiming that a price squeeze occurred when the utility’s wholesale rate exceeded the utility’s industrial rate for one year. The district court found in favor of the utility and the municipalities appealed.

⁸⁴ Id. at 27-28. Indeed, this point is in accord with cases involving both administrative remedies (*Batavia*, 672 F.2d at 90) and claims under section 2 (*Mishawaka*, 616 F.2d at 986). See also *Ellwood*, 731 F.2d at 975 (possible prospect of price squeeze remedy imposed in future does not require utility to forego its “constitutional right” to file for a rate within the zone of reasonableness providing for full cost recovery).

⁸⁵ *Concord*, 915 F.2d at 28.

⁸⁶ 955 F.2d 1373 (9th Cir. 1992).

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On appeal, the Ninth Circuit compared Town of Concord to City of Mishawaka. The Ninth Circuit Court of Appeals agreed with the First Circuit's ruling in Concord that a mere showing that a squeeze developed is not sufficient to cause antitrust liability. However, the Ninth Circuit held that it was not necessary to "react as forcefully against [Mishawaka] as the court did in Town of Concord in order to prevent that result."⁸⁷ According to the Ninth Circuit,

Town of Concord said that it must be a case with "exceptional circumstances." We think that is too restrictive. Rather, we think the approach of Mishawaka II is more promising.

* * *

We agree with the district court and with Mishawaka that the requirement of specific intent is an appropriate way to erect a dike which is sufficient to prevent an outward invasion of the land of legal monopolies by the sea of antitrust law.⁸⁸

However, the Ninth Circuit was also quick to emphasize that "the specific intent need not be proved by direct admissions of wrongdoing. Rather, the actions of the utility, taken as a whole, can and should be considered."⁸⁹

The Ninth Circuit then proceeded to apply this standard to the facts of the case. The court agreed with the trial judge's finding that the utility "applied for its rate increases at both the [California Public Utilities Commission] and the FERC with knowledge that a rate differential was likely to develop."⁹⁰ The court held, however, that this fact "alone may show general intent, but that alone should not suffice for a finding of liability."⁹¹ Rather, the court reasoned that:

⁸⁷ Id. at 1378.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

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It can hardly be argued that monopolistic acts have taken place simply because a [*90] company seeks what it actually believes is a fair rate of return from two separate administrative agencies. Of course that is not a complete answer if other motivations are shown. We are well aware of a monopolist's special duties regarding its competitors, but those are only applicable "when there is no justification for refusing to aid a competitor." In fact, even if the monopolist does refuse aid partially because it wishes to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct.⁹²

After review, the Ninth Circuit agreed with the trial court's determination that the utility had a legitimate business justification for its actions. According to the court, the utility "simply sought rate orders that it considered to be just and reasonable from both agencies."⁹³ As such, the court held that the utility did not have the sufficient anticompetitive intent necessary to violate section 2.⁹⁴

C. Comparing Conway to Section 2

Conway and its progeny indicate that while a price squeeze remedy is available from the FERC, a prospective price squeeze plaintiff will nonetheless have a difficult burden to overcome. First, the D.C. Circuit makes it clear that the Commission cannot focus exclusively on the existence of a rate disparity, because this disparity can result either from the deliberate actions of the utility or the inadvertent result of different regulatory policies at the state and federal

⁹² Id.

⁹³ Id.

⁹⁴ The Ninth Circuit's use of the phrase "business justification" appears to follow the First Circuit's holding that a price squeeze claim does not have a distinct standard -- rather, the claim must be evaluated under a traditional section 2 analysis. See, e.g., *State of Ill. v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991), cert. denied, 112 S. Ct. 1169 (1992) ("[T]he intent relevant to a § 2 Sherman Act claim is only the intent to maintain or achieve monopoly power by anticompetitive means." As such, "conduct that tends to exclude competitors may survive antitrust scrutiny if the exclusion is the product of 'normal business purpose.'"); See also *Kodak*, 112 S.Ct. at 2091 (Section 2 liability turns on whether "valid business reasons" can explain the defendant's actions).

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level. Instead, the D.C. Circuit instructs that the Commission must focus on the end effect of the rate disparity, and determine whether the anticompetitive effect of the price squeeze on the wholesale customer is outweighed by the effect of a remedy (i.e., lowering the utility's wholesale rate within the zone of reasonableness) on the supplying utility's financial viability and its ability to serve all of its customers. The significance of this test is its attempt to balance the interests of both the utility and the wholesale customer. To date, however, no utility has argued that the imposition of a remedy would adversely affect its ability to serve its native load.

Second, the recent *Cities of Anaheim* decision shows that because of regulatory safeguards and the static nature of large industrial end-users, a price squeeze plaintiff will have very difficult time proving that a price squeeze can actually cause an anticompetitive effect (i.e., the loss of retail load) in a fully-regulated retail electric market. Indeed, with the exception of *Ellwood*, it appears that price squeeze plaintiffs have yet to overcome this burden. As discussed below, several courts analyzing price squeeze claims under Sherman Act section 2 also find that because of regulatory safeguards and relatively [*91] immobile retail customers, it is difficult to show anticompetitive injury in the secondary, retail, market.

Third, both *Bethany* and *Batavia* recognize that, absent a showing that the rate differential created a specific anticompetitive effect, a utility's "superior efficiency" or "market conditions" (e.g., higher costs for serving the wholesale customers) are not sufficient grounds for the Commission to exercise its authority to lower the utility's wholesale rate in order to guarantee the retail competitor an ability to compete. This also appears to be closely in line with the standard under section 2 -- i.e., that a utility is liable for a price squeeze only when: (1) the utility possessed monopoly power in the relevant market; and (2) the utility willfully acquired or maintained that power as distinguished from "growth or development as a consequence of a superior product, business acumen, or historic accident."⁹⁵

Finally, the D.C. Circuit recognizes that the Commission's authority to remedy a proven price squeeze is limited. While the Commission can remedy a proven price squeeze by lowering the utility's rate within a zone of

⁹⁵ See *Kodak*, 112 S. Ct. at 2089; *Grinnell*, 384 U.S. at 570-71 (discussed *infra*).

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reasonableness, with the exception of its authority to require refunds, the Commission cannot order retroactive relief. Accordingly, the D.C. Circuit encourages prospective price squeeze plaintiffs to pursue relief under the antitrust laws. This relief, however, may be illusory.

The review of section 2 case law above shows that a section 2 predatory price squeeze plaintiff is also going to have a very difficult time proving both the requisite monopolistic intent and anticompetitive injury necessary to succeed. The first is hard to show because of regulatory requirements on the seller; the latter is hard to prove because of regulatory protections for the purchaser.

First, the necessary intent requirement: three out of the four cases discussed clearly hold that a plaintiff must show a specific intent to squeeze the municipal customer out of the retail market. These cases also hold that the mere filing of a higher wholesale rate is not sufficient to constitute the specific intent necessary to find a violation under section 2. Rather, a plaintiff must show other examples of predatory conduct by the utility such as threats to wholesale bulk power supplies or threats of hostile takeovers. Moreover, the First Circuit holds that because of the fully-regulated nature of electric markets, it is almost impossible as a matter of law for a utility to possess the requisite intent. Finally, a utility may not be liable for a price squeeze if the utility can demonstrate that it had a “legitimate business justification” for its actions.

Second, the anticompetitive injury requirement: these cases also hold that even if a plaintiff can demonstrate the requisite intent, the plaintiff often fails to demonstrate anticompetitive injury in regulated retail electric markets. Indeed, *Mishawaka* makes clear that anticompetitive injury cannot be measured by using the rate differential. Rather, a section 2 plaintiff must prove some injury to competition in the market. As these cases point out, this is often difficult to do. For example, injury to franchise or fringe area competition [*92] is difficult to prove because state regulators must always approve any change in franchised retail distribution territories. Moreover, injury to locational competition is also difficult to prove because large industrial end-users rarely make sitting decisions based on short-term retail rates. Because of these difficulties, however, the latest trend in the antitrust courts is to advise potential price squeeze plaintiffs to pursue an administrative remedy before the FERC.

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D. Impact of the Energy Policy Act of 1992 on the Price Squeeze Doctrine

On October 24, 1992, President Bush signed into law the Energy Policy Act of 1992.⁹⁶ Under title VII of the Energy Policy Act, specifically sections 721 and 722, Congress empowered the FERC with new and improved authority to order transmission access at the wholesale level in order to promote greater competition, and therefore create greater supply opportunities, for bulk power in energy markets. The question therefore becomes: How does the Commission's new authority to mandate transmission access affect the applicability of the price squeeze doctrine to fully-regulated energy industries under both Conway and its progeny and under section 2 of the Sherman Act?

As stated above, the price squeeze doctrine, under either forum, is designed to remedy anticompetitive harms. Therefore, in order to create an anticompetitive harm, the utility must possess some kind of monopoly power. Monopoly power, in turn, generally involves the ability either to profitably maintain prices above competitive levels for a significant period of time, or to lessen competition on dimensions other than price, such as product quality, service or innovation.⁹⁷ However, monopoly power can be mitigated, *inter alia*, if entry into the relevant market is so easy that "entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."⁹⁸ This is precisely what greater transmission access is designed to do.⁹⁹ The enactment of the Energy Policy Act therefore, will probably exacerbate a potential price squeeze plaintiff's already difficult burden to demonstrate the requisite anticompetitive harm before either the Commission or an antitrust court.

⁹⁶ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

⁹⁷ Department of Justice and Federal Trade Commission Joint 1992 Merger Guidelines (Merger Guidelines) § 0.1 and n.6.

⁹⁸ Merger Guidelines § 3.0.

⁹⁹ See, e.g., *Entergy Serv., Inc.*, 58 F.E.R.C. ¶ 61,234 at 61,758-60, order on reh'g, 60 F.E.R.C. ¶ 61,168 (1992), appeal pending, *Cajun Elec. Power Coop. v. FERC*, Nos. 92-1461, (D.C. Cir. filed October 23, 1992) (open-access tariffs will mitigate utility's market power because: (1) wholesale customers will have greater access to new suppliers; and (2) utility could not construct or erect any barriers to entry).

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For example, if in the post-Energy Policy Act world the wholesale customer/retail competitor has adequate access to numerous competitively-priced sources of bulk power (which is the stated goal of the legislation), then its traditional wholesale supplier (and competitor at retail) will not possess market power in the bulk power/primary market. Additionally, if the wholesale supplier has no market power in the primary market, it logically follows that the supplying utility has no monopoly power to extend to the secondary, retail [*93] market.¹⁰⁰ Accordingly, if the utility cannot exercise market power in the primary market, and cannot exercise market power in the secondary market, then it will be extremely difficult, if not impossible, for a price squeeze plaintiff to demonstrate that the utility's actions created the requisite anticompetitive injury needed to succeed.¹⁰¹

III. CONCLUSION

In light of the above, how viable is the price squeeze doctrine today in fully-regulated electric markets? While not outright abolished, the doctrine appears to have lost much, if not all, of its bite -- regardless of forum.

For example, while a section 2 claim requires a showing of intent, both a section 2 claim, and a claim before the FERC, require a showing of some anticompetitive harm resulting from the alleged squeeze. However, both avenues recognize that because utilities and their wholesale customers compete in a fully-regulated retail market with relatively immobile customers, it is difficult, if not unlikely, for a price squeeze plaintiff to demonstrate some kind of anticompetitive harm. In addition, if the Energy Policy Act achieves its goal (i.e., increased bulk power competition with numerous competitively-priced supply options) it will be even more difficult, if not impossible, for a price squeeze plaintiff to prove that the wholesale supplier exercised its market

¹⁰⁰ See supra text accompanying note 2.

¹⁰¹ Of course, if the price squeeze plaintiff can demonstrate that it does not have sufficient supply options in the primary/wholesale market in the post- Energy Policy Act world, this plaintiff remains free to seek a remedy either under the antitrust laws of before the Commission under the analyses discussed above. However, as discussed throughout, this is a very difficult burden to overcome.

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power in the primary market to create an anticompetitive effect in the secondary, retail market.

Moreover, all of these cases (both section 2 and administrative) recognize that every alleged harm is not necessarily an anticompetitive harm. Instead, these courts are cognizant of the fact that a rate disparity does not necessarily result from anticompetitive conduct, but rather from market conditions such as different costs of service at the wholesale and retail level. It is for this reason that both avenues clearly hold that a rate differential, in and of itself, is not sufficient grounds to find a utility liable of a price squeeze.

Third, both forums require an examination of the harms imposed on the utility's obligation to serve its native load and the harms created by the alleged price squeeze. For example, while *Conway* and its progeny require the Commission to focus on the anticompetitive effect on the wholesale customer, these cases also require the Commission to examine whether or not the anticompetitive effect is outweighed by the effect of imposing a remedy on the supplying utility's financial viability and its ability to serve its native load. Similarly, if a utility can demonstrate a legitimate business justification for the alleged price squeeze, the utility will not be held liable under section 2.

Thus, it appears that while the two avenues offer different remedies (i.e., a reduction in wholesale rates within a zone of reasonableness versus treble damages), the respective analytical frameworks are essentially the same. **[*94]** There must be some kind of anticompetitive harm, and that harm must be weighed along with the utility's obligation to serve its existing native load customers.

Notwithstanding, despite the fact that the analytical prerequisites for obtaining a price squeeze remedy either before the FERC or an antitrust court are remarkably similar, there appears to be some degree of "buck-passing" mentality when adjudicating price squeeze claims. Courts reviewing regulatory remedies suggest that the plaintiff may have a better possibility of success under section 2 (e.g., *Batavia*), while courts reviewing section 2 claims suggest that plaintiffs would be more successful pursuing a remedy before the FERC (e.g., *Concord*). However, both avenues appear hostile to any would-be price squeeze plaintiff.

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