# STATE ACTION ANTITRUST EXEMPTION AS APPLIED TO PUBLIC UTILITY REGULATION: *BOROUGH OF ELLWOOD CITY V. PENNSYLVANIA POWER CO.*

The Sherman Antitrust Act[1] and the Clayton Act[2] articulate a policy designed to prevent economic concentration through the promotion of small business competition.[3] Both Congress and the states increasingly have substituted administrative regulation for the competitive process.[4] Governmentally enforced activities, however,

1. 15 U.S.C. §§ 1-7 (1976). Congress designed the Sherman Act as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. *See* Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958) (railroad's preferential contract clauses amount to unlawful tying agreements). *See generally* R.H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) [hereinafter cited as BORK]; R. SHERMAN, ANTITRUST POLICIES AND ISSUES (1978) [hereinafter cited as SHERMAN].

2. 15 U.S.C. §§ 12-27 (1976). The Clayton Act supplements the Sherman Act, by arresting in their incipiency those acts and practices which might ripen into a true suppression of competition. Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3rd Cir. 1953), *cert. denied*, 346 U.S. 901 (1953) (Federal Reserve System order invalidated as contrary to purposes of Clayton Act). *See also* United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1952) *rehearing denied*, 343 U.S. 958 (1952) (agreement with restrictive conditions violated the antitrust laws).

3. 15 U.S.C. § 12(5) (1976).

4. In FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (involving violation of Clayton Act), Justice Jackson asserted that "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century." *See also* Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957) ("Review of administrative action, mainly reflecting enforcement of Federal regulatory statutes, constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits.").

Most states now have numerous major agencies, among them public service commissions, insurance commissions, workmen's compensation tribunals, zoning agencies, unemployment compensation commissions, departments of agriculture, departments of labor, occupational licensing agencies, and many others. *See* Skubel, *Antitrust—Neither State Agency's Approval of Electric Utility's Tariff nor Fact that Program Approved in Tariff Cannot Be Terminated Until New Tariff is Approved Constitutes Sufficient Basis for Implying Exemption from Antitrust Laws for that Program*, 26 CATH. U. L. REV. 606, 606 (1977); Case Note, 69 NW. U. L. REV. 71, 79 (1974).

themselves often create a restraint of trade or foster monopolization.[5] Courts have permitted these activities to coexist with the federal antitrust laws through development of the state action exemption.[6]

To qualify for the exemption, the particular action must pursue a legitimate state interest.[7] Courts have applied the exemption in the

5. *See generally* AMERICAN BAR ASSOCIATION, SECTION ON ANTITRUST LAW, MERGERS AND THE PRIVATE ANTITRUST SUIT. THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT, POLICY AND LAW (1977); P. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1978).

6. *See, e.g.*, Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (antitrust laws held not applicable to state-authorized activities); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567 (N.D. Ga. 1969) (state action found in activity of Georgia Milk Commission).

The Supreme Court created the concept of the state action exemption in Parker v. Brown, 317 U.S. 341 (1943), "the decision which opened the eyes of the antitrust bar to the possibilities of avoiding the impact of the antitrust laws, [through] state action involve[ment]." Hecht v. Pro-Football, Inc., 444 F.2d 931, 936 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *See also* Gordon v. New York Stock Exchange, 422 U.S. 659, 663-91 (1975) (expressing the federal correlate to the *Parker* rule, holding that the authority of the Securities and Exchange Commission to approve or disapprove exchange commodity rates, and its exercise of that power, immunized such rates from antitrust attack).

Express statutory provisions currently exempt certain conduct from the purview of the federal antitrust laws, if ordered or approved by the appropriate branch of the federal government. *See, e.g.*, 15 U.S.C. § 19 (1976) (Federal Reserve Board); 15 U.S.C. § 18 (1976), 49 U.S.C. § 1384 (1976) (Civil Aeronautics Board); 15 U.S.C. § 18 (1976), 49 U.S.C. § 5(1) (1976) (Interstate Commerce Commission); 15 U.S.C. § 18 (1976), 47 U.S.C. §§ 221(a), (b)(1) (1976) (Federal Communications Commission); 15 U.S.C. § 18 (1976), 46 U.S.C. § 814 (1976) (United States Maritime Commission); 15 U.S.C. § 18 (1976) (Federal Power Commission, Securities and Exchange Commission, and Secretary of Agriculture).

7. A "legitimate state interest" is an area of proper local concern. The state's regulation of such areas must not discriminate against interstate commerce or otherwise run afoul of the commerce clause. Inconsistency may not exist between the state program and any federal regulatory legislation. Nor can a Congressional intent preempt the field. *See* Handler, *Twenty-fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 6-7 (1972). In Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959), Justice Douglas' majority opinion spoke of the "great leeway [of the states] in providing safety regulations for all vehicles. . . ." In that case, however, he viewed the burdens imposed upon interstate movement of trucks and trailers as exceeding the permissible limits of the commerce clause. *See also* Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (invalidating a Madison city ordinance prohibiting local sale of pasteurized milk that had not been bottled at pre-selected plants within five miles of the city's center).

State regulations are permissible where they promote local health and safety without creating substantial interference of free economic competition across state lines. The Court has generally employed a balancing of interests approach in cases of this nature. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (sus-

area of public utility regulation from an early time.[8] The Supreme Court has recently reevaluated its proper scope,[9] leading to a restrictive application of the exemption for activities regulated under public utility law.[10] In *Borough of Ellwood City v. Pennsylvania Power*

taining a local air pollution regulation as applied to interstate shipping industry). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (1978) [hereinafter cited as NOWAK].

8. Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1134 (5th Cir. 1975), cited the regulation of public utility rates as "a classic example of the [state action] exemption." Referring to governmental rate formulation as "particularly 'sovereign,' " the *Jeffrey* court found the utility's disputed rate structure a result of the state's "meaningful regulation and supervision." (Footnotes omitted.) *Id.* at 1133-34.

In Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), *rehearing denied*, 405 U.S. 969 (1972), the Court held that although the rates and practices originated with the electric utility, they emerged as the products of the Georgia Public Service Commission. The Court stated, "[t]he [state action exemption] applies to the rates and practices of public utilities enjoying monopoly status under state policy . . . when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they [reflect] the considered judgment of the state regulatory authority." *Id.* at 1140. *See also* Princeton Community Phone Book v. Bate, 582 F.2d 706 (3rd Cir. 1978) (state action found in the close relationship between the state and the defendant); Mobilfone v. Commonwealth Tel. Co., 571 F.2d 141 (3rd Cir. 1978) (federal antitrust policy subordinated to the state's policy of regulating competition in the radio-telephone-paging field); Business Aides, Inc. v. Chesapeake and Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973) (state regulatory commission's approval of tariff shielded telephone company from antitrust liability); Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630 (W.D. Va. 1973) (regulatory commission's silent approval held to bring power company's tariff filing within the privilege of state action).

9. *See* City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978) (municipally-operated power companies not exempt from Sherman Act liability despite their status as governmental entities); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (prohibition on attorney advertising approved by Arizona Supreme Court exempt from antitrust laws); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (state regulated utility operating under state-approved tariffs liable for anticompetitive practice performed under neutral state policy); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule enforced by State Bar subject to antitrust liability when not issued pursuant to state policy). *See also* notes 27-42 and accompanying text *infra*.

10. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Federal Power Act does not insulate power company from antitrust laws); City of Michawaka v. Indiana and Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977) (power company's maintenance of dual rate structure not immune from attack under Sherman Act); United States v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471 (N.D. Ga. 1979) (practice of collective rate publication not within the category of private activities immune from antitrust laws under state action); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (state action immunity not granted to private taxicab firm); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp.

*Co.*,[11] a federal district court followed this restrictive approach, holding that state regulation of retail electricity rates does not immunize a company's wholesale rates from antitrust review.[12]

*Ellwood City* involved two small western Pennsylvania cities.[13] Each created a municipal corporation to provide electric power to customers within its boundaries.[14] The municipalities purchased power from, and competed with Pennsylvania Power Company (Penn Power).[15] Plaintiff municipalities alleged that defendant Penn Power violated the antitrust laws by setting wholesale rates at a level which impeded the municipalities' competitive ability in the retail power market.[16] Penn Power argued that federal[17] and state[18] regu-

1359 (D. Hawaii 1978) (regulation of propane gas not so pervasive as to require antitrust immunity).

11. 462 F. Supp. 1343 (W.D. Pa. 1979). The court stayed its decision on this rate-related issue pending determination of proceedings before the Federal Energy Regulatory Commission (FERC) regarding the defendant's wholesale rates. *Id.* at 1352.

12. *Id.* at 1348.

13. The boroughs of Ellwood City and Grove City, Pennsylvania brought this antitrust action against Penn Power. *Id.* at 1343.

14. *Id.* at 1346.

15. *Id.* at 1344. Electric power companies provide three basic services. They generate electricity, transmit it to distribution points, and distribute it to consumers. Individual companies may perform any one or more of these functions. To gain economies of scale, companies often join together to form large "power pools." This merging of resources allows each power company to compensate for cyclic demand, thereby reducing its share of excess capacity and eliminating the carrying costs associated with such excess. Penn Power, a large company providing all three of the basic industry services, joined with four other power companies to form a power pool. *Id.* at 1345.

Due to the prohibitive cost of duplicating the necessary facilities, companies engage in the distribution of power work within a natural monopoly. Many small distribution companies are therefore able to purchase bulk power profitably from large generating facilities for resale to industrial, commercial, and residential customers within their limited service areas. The plaintiffs offer a common illustration of municipalities serving their community's need for electric power distribution in this manner. *Id.* at 1345-46.

For excellent discussions of the competition within the electric industry, see Fairman & Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 HASTINGS L.J. 1159 (1977); Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64 (1972), cited with approval by the United States Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (antitrust suit involving power company's activity under Federal Power Act).

16. 462 F. Supp. at 1345. Penn Power's service area surrounds the plaintiffs' distribution systems. Consequently, the municipalities must deal with Penn Power for their supply of bulk power by purchasing either power generated directly by the com-

lation of retail utility rates amounted to antitrust immunity.[19] The

pany or power transmitted from a third source through its facilities. Plaintiffs argued that Penn Power had the ability to control the profitability of the cities' operations, and that it used its dominant position to their detriment. *Id.* at 1346. The plaintiffs brought this action, claiming violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and § 12 of the Clayton Act, 15 U.S.C. § 12 (1976), due to a price squeeze allegedly created by defendant's wholesale rates. 462 F. Supp. at 1344.

The municipalities made three miscellaneous claims: 1) Penn Power refused to transport power to them from other available sources, thereby effectively precluding them from obtaining power suppliers other than Penn Power; 2) Penn Power refused to provide services that would allow the plaintiffs to obtain large commercial customers; 3) the power company engaged in ratemaking and service policies intended to lessen the plaintiffs' ability to compete in the retail market with it. *Id.* at 1345. The court denied recovery to the plaintiffs on each of these counts. *Id.* at 1352-54.

17. Congress created the Federal Power Commission (FPC) in 1920. In 1935, Congress empowered the FPC to regulate the construction of hydroelectric projects and approve the transaction and sale of electric power in interstate commerce by setting just and reasonable rates. Federal Power Act of 1935, § 213, 16 U.S.C. § 824e(a) (1976).

The Supreme Court's 1964 decision in FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964), extended the FPC's ratemaking authority to the interstate sale of wholesale power. In 1977 Congress transferred the ratemaking authority to the Federal Energy Regulatory Commission (FERC). Department of Energy Organization Act of 1977, 42 U.S.C. § 7101 (Supp. I 1977). *See* Recent Development, 12 IND. L. REV. 637, 638 n.7 (1979). *See generally* C. PHILLIPS, THE ECONOMICS OF REGULATION: THEORY AND PRACTICE IN THE TRANSPORTATION AND PUBLIC UTILITY INDUSTRIES (1969).

FERC extensively regulates wholesale rates of the utilities within its jurisdiction, which includes Penn Power. The Supreme Court held that the FPC, the predecessor of FERC, should consider allegations of anticompetitive rate charges, specifically price squeeze questitons, in determining a proper wholesale rate for a utility. FPC v. Conway Corp., 426 U.S. 271 (1976). *See generally* Brief for Defendant at 39-40, Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343 (W.D. Pa. 1979).

18. A public utility cannot provide service in Pennsylvania unless the Pennsylvania Public Utility Commission (PPUC) has issued a certificate of public convenience authorizing the service. 66 PA. CONS. STAT. ANN. § 1102(a) (Purdon 1979). The state requires PPUC approval of all utility tariff filings prior to their becoming effective. *Id.* § 1302. The Pennsylvania Public Utility Code defines a "tariff" as "[a]ll schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, . . ." *Id.* § 102. Further, Pennsylvania law provides that "[e]very rate made, demanded, or received by any public utility . . . shall be just and reasonable, and in conformity with regulations or orders of the commission." *Id.* § 1301. For an excellent discussion of state regulation of the electric industry, see A.E. FINDER, THE STATES AND ELECTRIC UTILITY REGULATION (1977).

19. Penn Power established its defense on a tripartite argument. First, according to Parker v. Brown, 317 U.S. 341 (1943), the state and federal governments' pervasive regulation of ratemaking, at both the wholesale and retail levels, acts to create immunity from antitrust review of rate decisions. *See* notes 23-25 and accompanying text

*Ellwood City* court held state regulation of retail electricity rates would not immunize the defendant from antitrust liability for an alleged price squeeze[20] when wholesale rates lay beyond state jurisdiction.[21]

Congress enacted the antitrust laws to inhibit monopoly and restraint of trade in activities affecting interstate commerce.[22] The

*infra*. Secondly, Penn Power alleged that a court may not grant antitrust review for any alleged antitrust violations based on retail rates as set by the PPUC. Thirdly, FERC's regulation of wholesale rates creates antitrust immunity according to Gordon v. New York Stock Exchange, 422 U.S. 659 (1975). 462 F. Supp. at 1347.

Penn Power based its second argument on the Supreme Court's decision in FPC v. Conway Corp., 426 U.S. 271 (1976). In *Conway*, a power company sold electricity to both wholesale and retail customers and competed with its wholesale customers for industrial sales. The wholesale customers opposed the planned increase in the company's wholesale rates. *Id.* at 274-75. The *Conway* decision expressed the unanimous view of the Court that FERC had jurisdiction to consider allegations of discriminatory and non-competitive wholesale rates in relation to the company's retail rates. *Id.* at 279. The court in *Ellwood City* did not view *Conway* as a jurisdictional decision dispositive of the issue. Thus it did not find an implied repeal of the antitrust laws, as urged by the power company. 462 F. Supp. at 1349.

20. Courts first used the term "price squeeze" in United States v. Aluminum Co. of America, 148 F.2d 416, 436 (2d Cir. 1945). The government accused the aluminum company (Alcoa) of selling raw materials at such a high price that it restricted competition. The court found that Alcoa, by charging a price higher than a "fair price," intended to monopolize the sheet aluminum market. *Id.* at 437. *Alcoa* did not give rise to a succession of antitrust claims based on price squeeze allegations. In fact, no cases define "price squeeze," as anticompetitive in and of itself. The municipalities in *Ellwood City*, however, alleged that the price squeeze created by Penn Power's two distinct rate structures amounted to an antitrust violation. Penn Power argued that it is irrational to assert that price squeeze antitrust violations may occur at all, particularly when the producer-seller has no control over prices due to extensive supervision by regulatory agencies. Brief for Defendant at 34.

21. 462 F. Supp. at 1349. The *Ellwood City* decision was not dispositive of the price squeeze-antitrust question, as the court stayed its ruling pending FERC's determination of the same issue. *Id.* at 1350.

22. The federal antitrust laws include the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), serves a broad purpose. First, it declares contracts, combinations, and conspiracies in restraint of trade to be unlawful. *Id.* § 1. Secondly, it forbids monopolization, combinations, conspiracies, and attempts to monopolize. *Id.* § 2. The Clayton Act, 15 U.S.C. §§ 12-27 (1976), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), forbids certain discriminations in pricing, services, tying arrangements, and certain mergers or other acquisitions between corporations. The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976), declares unfair methods of competition in commerce to be unlawful. *See generally* SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977) [hereinafter cited as SULLIVAN]. For further discussion on the purposes underlying the Sherman and Clayton Acts, see notes 1 & 2 and accompanying text *supra*.

Supreme Court has determined that Congress did not intend these laws to apply to state regulations covering local economic activity.[23] In furtherance of this determination, the Court created the state action antitrust exemption.[24] The conceptual basis of this exemption lies in the doctrine of state sovereignty.[25] Acknowledging this basis, lower federal courts have immunized a variety of state regulated private activities from the federal antitrust laws.[26]

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23. *See* Parker v. Brown, 317 U.S. 341 (1943). *Parker* concerned a program established by the state Director of Agriculture to prorate and limit the supply of raisins produced in California in accordance with the California Agricultural Prorate Act. The proration program required that growers place 70% of their raisin output with the Department of Agriculture. The Department disposed of the raisins in such a manner as to raise and stabilize the price. *Id.* at 347-48. The plaintiff-grower challenged this program, claiming, among other things, that it violated the Sherman Act. *Id.* at 348-49. The Supreme Court assumed, without deciding, that only purely private endeavors violate the antitrust laws. The Court found the program valid, classifying it as an action by the State of California, not as an act of private persons. *Id.* at 350.

*Parker* cited the legislative history of the Sherman Act as support for its concern with state sovereignty. 317 U.S. at 351. "No attempt is made to invade the legislative authority of the several states or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectively protect the people of the United States against the evils and oppressions of trusts and monopolies." H.R. REP. No. 1707, 51st Cong., 1st Sess., 1 (1890). *See also* 21 Cong. Rec. 2600 (1890) (remarks of Sen. George); 20 Cong. Rec. 1169 (1889) (remarks of Sen. Reagan).

24. *See* note 6 *supra*.

25. *See* Parker v. Brown, 317 U.S. 341 (1943). *Parker* supports the principle that states possess the freedom to make their own economic decisions whether or not those decisions comport with the economic principles favored by the federal judiciary. *Id.* at 350. *See* note 23 *supra*. The *Parker* doctrine reflects policies of federalism and judicial economic neutrality, which counsel against intervention in state regulatory decisions. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 334 (1975).

26. *E.g.*, Washington Gas Light Co. v. Virginia Elec. and Power Co., 438 F.2d 248 (4th Cir. 1971) (holding electric utility practices exempt from the antitrust laws under the *Parker* doctrine). In *Washington Gas Light*, state action was found to exist when the state regulatory agency failed to disprove the utility's installation program which resulted in many new residences using electricity rather than natural gas.

*Washington Gas Light* represents the high water mark of judicial solicitude for state prerogatives that underlie the state action exemption. The decision illustrates the extent to which *Parker* enabled private parties to shield their monopolistic behavior from the penalties of the antitrust laws by cloaking them in state action garb. *Accord*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (state action exemption applied to utility activity which was subject to meaningful regulation and supervision by state regulatory authority); E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (5th Cir. 1966), *cert. denied*, 385 U.S. 947 (1966) (airport operation and management considered a valid

The Supreme Court severely restricted the scope of the state action exemption in a recent line of cases.[27] In *Goldfarb v. Virginia State Bar*,[28] the Court found antitrust immunity exists only when the state, acting as sovereign, mandates the private monopolistic activity.[29] *Cantor v. Detroit Edison Co.*[30] presented the Court with a private action regulated in the public interest.[31] To determine the existence of

governmental function not subject to federal antitrust laws); Miley v. John Hancock Mutual Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957), *aff'd mem.*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828 (1957) (state action found in pervasive regulatory scheme applicable to insurance industry). *See generally* Coblentz, *Antitrust*-Cantor v. Detroit Edison Co.: *A Further Refinement of* Parker's *State Action Exemption*, 8 LOY. CHI. L.J. 619 (1977) [hereinafter cited as Coblentz].

27. *See* note 9 *supra*. For thirty-two years, until its 1975 decision in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court had virtually ignored the issue of the proper scope of the state action exemption through refusal to hear cases raising it. *E.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (natural gas company charged electric companies with conspiring to eliminate gas as competitive energy source); Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (use of governmental processes to accomplish anticompetitive advantages over other oil producers does not insulate the activity from antitrust liability).

28. 421 U.S. 773 (1975). *Goldfarb* considered a married couple's inability to retain an attorney at a fee less than the minimum prescribed by the county bar association. In a class action suit, the plaintiffs alleged that the minimum fee schedule constituted price fixing in violation of the antitrust laws. *Id.* at 778.

29. *Id.* at 791. A unanimous Court held the county bar fee schedule and its enforcement had a sufficient effect upon a substantial volume of interstate commerce for purposes of the antitrust laws. *Id.* at 785. Pursuant to the recognized authority of the state to regulate its professions, the state bar was immune from antitrust liability, but the state action exemption did not insulate the county bar from the Sherman Act. *Id.* at 792.

The *Goldfarb* Court recognized Virginia's compelling state interest in regulating the practice of law within its boundaries. The Court refused, however, to grant the state action exemption, emphasizing that it is gained by state instrumentalities only for conduct required by the state acting as a sovereign. *Id.* at 791. *Goldfarb* stressed that the "[Sherman] Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." *Id.* at 788. The finding that the state did not require defendant's activities may merely represent a judicial determination that the state had not acted. Viewed in this light, the *Goldfarb* decision did not confront the issue of whether the Sherman Act must bow to inconsistent state regulation.

30. 428 U.S. 579 (1976).

31. In *Cantor*, the owner of a drug store, which sold electrical light bulbs, brought an antitrust action against an electric utility company. The plaintiff alleged that the electric utility damaged his business by distributing free light bulbs to residential subscribers in exchange for burnt-out bulbs. *Id.* at 581.

a state mandate, *Cantor* examined the public and private motivation and initiative in the program.[32] The Court denied the public utility antitrust immunity, finding the exemption unnecessary to effectuate the purposes of the regulatory act.[33]

Further development of this restrictive approach[34] occurred in *Bates v. State Bar of Arizona*.[35] In *Bates*, the Supreme Court stated

32. All six justices voting with the majority agreed that the authorization, encouragement, participation, or approval of private conduct by the state does not in itself warrant a finding of state action antitrust exemption. *Id.* at 592-93.

33. The Court held that neither the existing tariff structure of the electric utility nor the termination of the light bulb exchange program without commission approval constituted a sufficient basis for implying an exemption from the antitrust laws for that program. *Id.* at 598. The majority reasoned that the state had "no independent regulatory interest" in the utility's light-bulb program. *Id.* at 597-98.

The *Cantor* dissent attacked the majority's approach as a judicial usurption of state legislative prerogatives. The three dissenters argued that allowing the judiciary to reach an independent determination of the "necessity" of a particular regulatory provision enabled the Court to make *ad hoc* evaluations concerning the substantive validity of state regulatory goals. *Id.* at 627.

Justice Blackmun's concurrence applied a "rule of reason" analysis, which weighed the competing federal and state interests. The "rule of reason" calls for immunity from the federal antitrust laws only where the state can demonstrate that its regulatory scheme constitutes a reasonable attempt to promote its health, safety, market performance, or resource allocation. *Id.* at 611. The rule does not require a court to evaluate the equity of the restraint based on its effectiveness in achieving some desired state goal. It also avoids the substantive due process ramifications inherent in the majority's approach by abstaining from inquiry into the "necessity" of a particular state provision. Instead, the focus rests purely on whether the state intent served by the regulatory scheme justifies the subordination of the federal government's interest in the enforcement of its antitrust laws. *Id.* at 610-11. As stated in Skubel, *supra* note 4, "The Blackmun approach would establish a rule that is consistent both with the federal antitrust laws and the solicitude for state regulatory prerogatives, that underlie the state action exemption." *Id.* at 619.

34. Several recent cases demonstrate that the state regulatory agency's jurisdiction must lie sufficiently central to the purposes of the enabling statute in order to permit immunity from the federal antitrust laws. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 391 (1973), *rehearing denied*, 411 U.S. 910 (1973) (Stewart, J., concurring in part, dissenting in part) (power company not insulated from antitrust laws through the Federal Power Act); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963) (Bank Merger Act of 1960 did not immunize mergers approved under it from antitrust laws); United States v. Borden Co., 308 U.S. 188, 197-206 (Agriculture Marketing Act of 1937 does not bar application of the Sherman Act to competitive agreements not authorized by the Secretary of Agriculture). *See generally* Robinson, *Recent Antitrust Developments: 1975*, 31 REC. OF NYCBA 38, 57-58 (1976); Skubel, *supra* note 4, at 609.

35. 433 U.S. 350 (1978). *Bates* involved an action by the state bar against two attorneys who allegedly violated a disciplinary rule of the Arizona Supreme Court by advertising their legal services. *Id.* at 355-56. The United States Supreme Court re-

three conditions necessary to obtain state action immunity. First, the defendant must effectively act as a public official or agent.[36] Second, the effectiveness of the regulatory scheme must depend on granting the exemption.[37] Finally, the regulation must reflect a clear articulation of state policy.[38]

In *City of Lafayette v. Louisiana Power and Light Co.*,[39] the Supreme Court specifically considered application of federal antitrust laws to municipal regulatory activities.[40] In so doing, the Court further limited the state action exemption, denying municipalities protection from antitrust liability when acting solely on their own mandate.[41] The Court held judicial toleration of municipal monopoly is proper only when the state directs or authorizes anticompetitive actions.[42]

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jected the lawyers' claim that the disciplinary rule violated the Sherman Act because of its tendency to limit competition. *Id.* at 363. The Court granted state action immunity, holding that the rule imposing the restraint reflected an "act of government" by the state in its sovereign capacity. *Id.*

36. *Id.* at 361. This requirement does not demand that the defendant have the title of a public official or agent, but that he, in effect, act as such. The Court held that the State Bar of Arizona stood as a public agent, acting under the complete supervision of the Arizona Supreme Court which adopted and enforced its own rules. *Id.* at 359-60.

37. *Id.* at 361-62. *Bates* viewed regulation of the bar as "the core of the State's power to protect the public." *Id.* at 361. In *Cantor*, on the other hand, the State of Michigan had no such independent regulatory interest in the market for light bulbs. *Id.*

38. *Id.* at 362. The *Bates* Court considered the Arizona disciplinary rules a clear articulation of that state's policy with regard to professional behavior. *Id.* The Court saw no articulation of an analogous state policy in the state approved activity of the private entity in *Cantor*. The utility alone possessed the freedom to undertake the light bulb program. The state in no way compelled the activity. *Id.*

39. 435 U.S. 389 (1978).

40. In *City of Lafayette*, plaintiffs, two Louisiana cities, moved to dismiss a counterclaim which alleged certain antitrust violations. The plaintiffs contended that the state action exemption withdrew the municipalities' action from the scope of Sherman Act liability. *Id.* at 392. The Supreme Court rejected this claim, finding no implied exclusion of cities as municipal utility operators from coverage under the antitrust laws. *Id.* at 398-409.

41. *Id.* at 414. In this regard, the Court stated: "When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by one of them may express its own preference, rather than that of the State." *Id.*

42. *Id.* at 413. The Court acknowledged that a finding of state action immunity might result where the cities act "pursuant to [a] state policy to displace competition with regulation of monopoly public service." *Id.*

Most lower federal courts have applied the Supreme Court's three-pronged analysis of the state action exemption.[43] The Third Circuit, however, established a different test in *Mobilfone v. Commonwealth Telephone Co.*[44] The *Mobilfone* test, like the one in *Bates*, grants state action immunity upon a finding of three elements. First, the defendant must demonstrate an independent state interest in the subject of the regulation. Second, the regulation must clearly and affirmatively articulate the state's interest. Finally, the state must actively supervise and participate in the regulation.[45]

Two district courts within the Third Circuit have recently applied the *Mobilfone* test, arriving at conflicting holdings in factually similar cases.[46] In *City of Newark v. Delmarva Power and Light Co.*,[47] the

43. *See, e.g.*, Industrial Dev. Corp. v. Mitsui and Co., 594 F.2d 48 (5th Cir. 1979) (state action doctrine does not preclude Sherman Act from regulating labor industry's anticompetitive activities); Virginia State Bar v. Surety Title Ins. Agency, Inc., 571 F.2d 205 (4th Cir. 1978) (issue of the extent of the state's interest in its bar association's activity remains in light of *Goldfarb* and *Bates*); United States v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471 (N.D. Ga. 1979) (collective rate publication practice not within state action exemption).

44. 571 F.2d 141 (3rd Cir. 1978). The *Mobilfone* court based its test on the Supreme Court decisions in *Goldfarb*, *Cantor* and *Bates*. *Id.* at 143-44. The court noted that only four Supreme Court justices—not a majority—specifically restricted application of the state action exemption to suits against public officials or agents. *Id.* at 144.

45. *Id.* at 144.

46. Both of the district court cases involved municipal corporations which, due to the economics of the electric industry, simultaneously purchased power from and competed with the defendant power companies. The municipalities alleged a price squeeze resulting from a lack of coordination between the power companies' wholesale and retail rate structures. FERC regulated the defendants' wholesale rates, whereas the state regulatory commissions controlled retail rates. *See generally* notes 17 & 18 *supra*.

47. 467 F. Supp. 763 (D. Del. 1979). In *City of Newark*, several municipalities both purchased power wholesale from Delmarva Power and Light Company (Delmarva), and competed with it in the retail market. *Id.* at 765. The municipalities alleged that Delmarva violated both the Sherman and the Clayton Acts, by conspiring to monopolize interstate trade and commerce in the wholesale and retail distribution of electricity, and by imposing unreasonable restraints on interstate trade and commerce in the sale of electricity. *Id.*

Delmarva cited FPC v. Conway, 426 U.S. 271 (1976), in support of a motion to dismiss for lack of jurisdiction. *See generally* note 17 *supra*. The *City of Newark* court, however, denied defendant's motion, stressing the essentiality of maintaining available antitrust relief in that forum. The court noted that:

> [N]either the [FERC] nor the [state regulating authority] have full authority over the relationship between a utility's retail and wholesale rates. [W]hile the [FERC] can consider that relationship, it cannot afford a complete remedy in

Delaware District Court granted state action immunity to a power company.[48] Holding that the facts satisfactorily met the appellate court's first two criteria,[49] the court found active state supervision despite the state utility commission's lack of authority to regulate the wholesale rates that allegedly created the price squeeze.[50]

In *Borough of Ellwood City v. Pennsylvania Power Co.*, the District Court for Western Pennsylvania refused to grant antitrust immunity.[51] Without commenting on the first two criteria in the appellate court's test, the court held that absence of state regulation over wholesale rates necessarily implies a want of active state supervision.[52] The *Ellwood City* court further based its decision on *Cantor*,[53] which balanced state regulation and federal antitrust law to deter-

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cases where the retail rate is so low that a price squeeze would continue to exist with the wholesale rate reduced to the lowest boundary of reasonableness. 467 F. Supp. at 768. *See also* City of Mishawaka v. Indiana and Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977) (availability stressed for all forms of antitrust relief in a price squeeze situation).

48. 467 F. Supp. at 766-68. The *City of Newark* decision does not reflect a final determination of the price squeeze-antitrust issue raised. The court stayed its ruling pending the outcome of a FERC hearing on the same issue.

49. The *City of Newark* court found that Delaware had both an interest in protecting its citizens from unreasonably high or discriminatory rates and in maintaining the financial fitness of its public utilities so that they will remain capable of delivering the energy its citizens require. *Id.* at 767. The court also found a clearly articulated state policy with respect to these interests. *Id.*

50. *Id.* at 769. The court liberally construed the *Mobilfone* criterion of active state supervision, viewing it as an expression of Congress' desire that the antitrust laws not interfere with "activity authorized by a state in active pursuit of an established state policy." *Id.* Having recognized regulation of a public utility's retail rates as "a legitimate exercise of state authority," the court granted antitrust immunity to the power company. *Id.*

51. 462 F. Supp. 1343, 1349 (W.D. Pa. 1979). The *Ellwood City* court took a different view of FPC v. Conway, 426 U.S. 271 (1976), than had the *City of Newark* court. *See* note 47 *supra*. *Ellwood City*, citing *Conway*, held that the jurisdiction of FERC over defendant's wholesale rates did not require an implication of state action immunity. "[T]here is adequate variance in the zone within which wholesale rates may be set as to enable the [FERC] to set a rate which would ameliorate the condition of wholesale customers subject to the price squeeze." 462 F. Supp. at 1349.

52. 462 F. Supp. at 1349. In rejecting the defendant's claim of state action immunity, the *Ellwood City* court stated, "[S]ince wholesale rates are not within the PPUC purview, at least the third element of the *Mobilfone* holding, active supervision, is necessarily absent. *Mobilfone*, therefore, supports plaintiffs' position and not that of Penn Power. *Parker* immunity based on state regulation is absent." *Id.* at 1348-49.

53. *Id.* at 1348.

mine the propriety of a state action immunity grant.[54] The *Ellwood City* court deemed an exemption unwarranted, as the wholesale rates creating the alleged price squeeze fell outside the purview of the state regulatory scheme.[55]

The district court's holding in *Ellwood City*, like the Supreme Court's recent rulings,[56] limits application of the state action exemption in the area of public utility regulation. The Supreme Court decisions deny state action antitrust immunity to a public utility by requiring, *inter alia*, that the private defendant in the antitrust suit act as a public official or agent.[57] The Third Circuit's test sets forth no such requirement, but calls instead for a finding of active state supervision.[58] The *Ellwood City* court narrowly construed this supervision requirement, by refusing an exemption when the private power company retains a sufficient role in the decisionmaking process.[59] Conversely, the court in *City of Newark* liberally construed the state supervision criterion, acknowledging that state regulation of utilities through a public commission itself clearly constitutes state action.[60]

The *Ellwood City* court's narrow interpretation of the state supervision criterion eliminates state action antitrust immunity for public

54. Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976). *See* notes 32-33 and accompanying text *supra*.

55. 462 F. Supp. at 1348. *See* note 67 *infra*.

56. *See* note 9 *supra*.

57. *See* note 36 and accompanying text *supra*.

58. *See* text accompanying notes 44-45 *supra*. The Supreme Court's analysis focuses on the particular defendant's status and function. Thus, it denies state action immunity to utilities on the basis that power companies represent a form of private enterprise. The Third Circuit test centers on the supervisory role of the state. This approach provides public utilities the opportunity for state action antitrust immunity when the state actively regulates the industry. The mode of analysis employed by the appellate court is more in tune with the reality of the electric power industry. Power utilities and state regulatory commissions often work together for the promotion of public welfare. *See* text accompanying notes 36-38 & 44-45 *supra*. *See generally* Coblentz, *supra* note 26.

59. The court narrowly construed the strict supervision requirement of the *Mobilfone* test, so as to bring their decision in line with *Cantor*. In so doing, it required a finding of active state supervision over the wholesale rates in particular, rather than over the rate structure in general. As the court found the wholesale rates under the purview of FERC, not the PPUC, it refused the power company state action exemption from the federal antitrust laws. 462 F. Supp. at 1348-49. *See* notes 51-55 and accompanying text *supra*.

60. 467 F. Supp. 763, 769 (D. Del. 1979). *See* note 50 *supra*.

utilities at the slightest finding of private activity.[61] As a natural consequence, utilities will withhold their expertise from the regulatory commissions, fearing incurrence of Sherman Act liability.[62] Such conduct will necessarily inhibit the performance of state commissions which, due to the technical nature of the industry,[63] must depend upon participation by the utilities.[64] Withdrawal of private expertise thus imperils continued effective regulation of the electric utility industry.

The *Ellwood City* approach presents two inherent difficulties. First, it provides the federal judiciary an opportunity to evaluate the "necessity" of a particular state provision.[65] The *City of Newark* ap-

61. To the *Ellwood City* court, the lack of complete state control in the regulation of the public utility's rate structure dismissed the issue of a possible state action exemption. 462 F. Supp. at 1348-49. *See* notes 51-52 and accompanying text *supra*. The court's construction of the "active state supervision" requirement, *id.*, presented a stricter challenge to a grant of state action immunity than the Supreme Court had offered in Bates v. State Bar of Arizona, 433 U.S. 350 (1978). The *Bates* Court based state action immunity on a finding that the Arizona State Bar acted as an agent for the state, controlled through the Arizona.Supreme Court. *Id.* at 361. *See* note 36 and accompanyng text *supra*. *Bates*, however, granted immunity to the State Bar, even though it had a hand in controlling its own operations.

62. By excluding private companies from the state action exemption when they maintain enough of a role in decisionmaking, the *Ellwood City* court's ruling may penalize the right of the public utility companies to propose suggested tariff filings to the regulatory agencies. Justice Stewart suggested such consequences would result from the Supreme Court's decision in *Cantor*, stating that private businesses subject to state regulation would refuse to participate in the regulatory process due to the threat of treble damage liability under the Clayton Act. Cantor v. Detroit Edison Co., 428 U.S. at 627.

63. For a general summary of the nature of the electric power industry, see note 15 *supra*.

64. The electric industry must constantly adapt its equipment, services, and procedures to meet the changing demands of the energy consuming public. Open and constant lines of communication must therefore exist between the regulatory commission and the utilities. *See* Coblentz, *supra* note 26, at 639.

65. This approach seems similar to the federal courts' expansive review of state legislation during the "Substantive Due Process Era." From 1900 to 1934, the Supreme Court did not defer to the opinion of other government branches regarding the legitimate ends of legislation or the proper means of achieving those ends. *See, e.g.*, Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (fixing the weight of loaves of bread); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (setting minimum wages for women); Lochner v. New York, 198 U.S. 45 (1905) (outlawing "yellow dog" labor contracts).

In Nebbia v. New York, 291 U.S. 502 (1934), the Court revealed, for the first time, a willingness to shift its thinking with respect to state economic legislation. Today, the Court allows other government branches great latitude in dealing with issues of

proach avoids such inquiry into the reasonableness of state action, employing a "rule of reason" test designed to balance the competing federal and state interests.[66] Second, in *Ellwood City*, two distinct regulatory commissions separately controlled the public utility's rate structure.[67] In such cases, the defendant utility has neither responsibility nor any direct control over price squeezes allegedly resulting from a lack of coordination between the rates approved by the two regulatory bodies. The Supreme Court has recognized the basic unfairness of imposing Sherman Act liability on such defendants.[68]

*Ellwood City* continues the Supreme Court's limitation of the state action antitrust exemption as applied to public utility regulations.[69] The district court's strict application of the active state supervision requirement denies antitrust immunity to public utilities in price squeeze claims.[70] The decision in *City of Newark* illustrates that the issue of proper application of the state action exemption remains an active one.[71] Until the Third Circuit or the Supreme Court offers a

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economic and social welfare. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding Kansas statute prohibiting non-lawyers from engaging in business of debt adjusting); Olsen v. Nebraska, 313 U.S. 236 (1941) (upholding Nebraska statute limiting maximum fee of private employment agencies); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding federal statute prohibiting interstate shipment of adulterated milk). *See also* NOWAK, *supra* note 7, at 397-410.

66. *See* note 33 *supra*.

67. In *Ellwood City*, FERC regulated the power company's wholesale rates, while the PPUC supervised its retail rates. *See* notes 17 and 18 *supra*.

68. *Cantor* recognized "fairness" as a proper defense against the imposition of treble damages where the regulation increases the likelihood of antitrust violation or where the defendant relies upon a justified understanding of immunity. 428 U.S. at 599-600. The Court noted the Sherman Act's intention to exempt state-regulated utilities only to the extent of compliance with state rules regulating natural monopoly powers, as opposed to business activity in competitive areas of the economy. *Id.* at 593. It reasoned that where "the private party exercise(s) sufficient freedom of choice," courts should conclude that the party "be held responsible for the consequences of his decision." *Id.* The decision thus holds that where a party lacks the requisite freedom of choice in his actions due to comprehensive public regulation, no Sherman Act liability should ensue.

69. For a discussion of the Supreme Court's restrictive interpretation of the scope of the exemption, See notes 27-42 and accompanying text *supra*.

70. *Ellwood City* required a finding of active state supervision in the activity specifically charged as creating the antitrust violation. 462 F. Supp. at 1348-49. In price squeeze cases, this may impliedly eliminate antitrust immunity, as the wholesale rates, allegedly creating the anticompetitive effect, rest outside the state's regulatory jurisdiction. *See* notes 52, 59, 61 and accompanying text *supra*.

71. *See* notes 50 & 61 and accompanying text *supra*.

dispositive ruling on this issue, public utilities will act without full knowledge of the possible antitrust consequences inherent in their actions.[72]

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72. The *Ellwood City* court denied state action antitrust immunity to a public utility charging state approved rates. The Supreme Court has yet to extend its narrowing of the state action exemption to such an extreme degree. The *Cantor* decision involved a state approved act of a public utility ancillary to its primary function and purpose. Professor Skubel, commenting on *Cantor*, noted that it appeared "doubtful that the Court [had] intend[ed] the decision to apply to pervasive state regulatory schemes." Skubel, *supra* note 4, at 619.