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COMPULSORY WHEELING OF ELECTRIC POWER TO INDUSTRIAL CONSUMERS

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INTRODUCTION

THIS Article briefly addresses the compulsory transmission, or "wheeling," of power from the standpoint of the industrial consumer. The subject is one that seems to arise with increasing frequency as industrial users, faced with sharply increased rates at the hands of their local utilities, consider cheaper, albeit more distant, sources of supply.

Typically, an industrial consumer locates a source of power that is cheaper than the power available from the local utility that has traditionally served it—indeed, so much cheaper as to be advantageous even with the costs of the additional transmission taken into account. This situation will arise if (1) the industrial consumer generates electricity at one site, notably by cogeneration,[1] that it wishes to use at another site, or (2) the consumer wishes to purchase cheaper power from a supplier whose lines do not reach the purchaser's plant. To date, the wheeling of power directly to industrial consumers in either situation has been extremely rare.[2] Because the local utility in particular would often find a wheeling arrangement less remunerative than a direct sale to the user, that utility may refuse to wheel the cheaper power. The resulting conflict of economic interests raises the issue whether a utility may be compelled to wheel power to an industrial consumer.

Part I of this Article reviews the regulatory context of wheeling: who has jurisdiction over particular facets of a wheeling transaction

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1. Cogeneration refers to the use of energy sequentially. A boiler may raise steam, for example, first to produce electric power and then to provide thermal energy. *See* 16 U.S.C. § 796(18)(A) (1982).

2. *See* A. Holmes, A Review and Evaluation of Selected Wheeling Arrangements and a Proposed General Wheeling Tariff 1, 47-48 (Sept. 1983) (unpublished FERC staff working paper) (available in files of *Fordham Law Review*).

and what substantive standards apply. Part II discusses the grounds upon which an unwilling utility might be compelled to wheel power in the circumstances described above.

I. The Regulatory Framework

A. *Wheeling and Sales Rates*

1. The Wheeling Rate

Under section 201 of the Federal Power Act (FPA or Act),[3] the Federal Energy Regulatory Commission (FERC or Commission) has jurisdiction over the "transmission of electric energy in interstate commerce,"[4] except for transmission by instrumentalities of federal, state or local governments.[5] All electric utilities in the continental United States now are, or are in the process of being, physically interconnected. As a result, virtually all transmission of power by investor-owned utilities is deemed to be "in interstate commerce" and subject to FERC jurisdiction, even if the transmission is between two points in the same state.[6]

Section 205 of the FPA requires the utility to file a service agreement or tariff covering the wheeling with the FERC at least sixty days before it is to take effect.[7] The rate included therein is then subject to suspension for up to five months after the effective date[8] and to adjustment under sections 205 and 206 if it is found not to be just and reasonable or to be unduly preferential or discriminatory.[9] A just and

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3. 16 U.S.C. § 824 (1982).

4. *Id.* § 824(b). The Act does not, however, grant jurisdiction to the FERC over facilities used in local distribution or for the transmission of energy consumed wholly by the transmitter. *Id. But see infra* note 6 and accompanying text.

5. 16 U.S.C. § 824(f) (1982).

6. *See* FPC v. Florida Power & Light Co., 404 U.S. 453, 456-64 (1972); FPC v. Southern Cal. Edison Co., 376 U.S. 205, 206-16 (1964); Fairman & Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 Hastings L.J. 1159, 1177 (1977); Tiano & Zimmer, *Wheeling for Cogeneration and Small Power Production Facilities*, 3 Energy L.J. 95, 106 (1982). Certain systems in Texas have been ordered to interconnect with out-of-state systems pursuant to §§ 210, 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824i, 824j, 824k (1982), and are not subject to the FERC's jurisdiction under § 201(b), *id.* § 824(b). *See* Central Power & Light Co., Docket Nos. EL79-8, E-9558, 17 FERC Rep. (CCH) ¶ 61,078, at 61,170 (1981), *modified on other grounds*, 18 FERC Rep. (CCH) ¶ 61,100 (1982); *cf.* West Tex. Utils. Co. v. Texas Elec. Serv. Co., 470 F. Supp. 798, 814 (N.D. Tex. 1979) (intrastate defendants did not violate federal antitrust laws by refusing to interconnect with interstate utilities because Congress gave utilities a choice between intrastate and interstate operation).

7. 16 U.S.C. § 824d(d) (1982). Some utilities have on file at the FERC general wheeling tariffs stating the terms and conditions under which they will wheel. If a particular service is undertaken pursuant to the tariff, it can commence without an additional prior filing. *See* 18 C.F.R. § 35.1(c) (1983).

8. 16 U.S.C. § 824d(e) (1982).

9. *Id.* §§ 824d(e), 824e(a).

reasonable rate under the Act is one that allows the utility to recover its costs, fixed and variable, including a reasonable return on investment.[10] The FERC has severely limited the extent to which the wheeling utility can calculate its charge simply by taking a "percentage adder" based on the purchase price of the power to be wheeled.[11] The rates that a utility files with the FERC to cover a wheeling service must be cost-based and must satisfy traditional criteria of rate base, cost-allocation and return.[12]

In addition, the Commission generally bases rates on the utility's average, rather than incremental, transmission costs.[13] Accordingly, it has held that the rate base for transmission services should be determined by taking into account virtually all of the transmission facilities of the wheeling utility, on the premise that the utility is operationally integrated.[14] The Commission will not normally segregate out that portion of the transmission system actually used to perform the wheeling.[15]

2. The Sales Rate

Section 201(b) gives the FERC jurisdiction over wholesales (sales for resale) in interstate commerce, but not over sales directly to the consumer.[16] Thus, in a wheeling arrangement involving a direct sale from a remote supplier to an end user, with intermediate transmission by one or more third parties, the federal government would not regulate the sales rate. Rather, the state in which the sale occurs may regulate such rates.[17]

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10. *See* Anaheim v. FERC, 669 F.2d 799, 803-10 (D.C. Cir. 1981); Nepco Mun. Rate Comm. v. FERC, 668 F.2d 1327, 1335 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); 18 C.F.R. § 35.12(b)(2) (1983); Note, *Title I of PURPA: The Effect of Federal Intrusion into Regulation of Public Utilities*, 21 Wm. & Mary L. Rev. 491, 498-99 (1979).

11. *See* 18 C.F.R. § 35.23 (1983) (limiting percentage adder to costs incurred by the utility as a result of a transmission or purchase and resale transaction, not including the purchase price of the power or costs recovered under another rate component).

12. See *supra* note 10; *see also* Florida Power & Light Co., Docket Nos. ER77-175-000, ER78-19-000, 21 FERC Rep. (CCH) ¶ 61,070, at 61,240 (1982) (utility's wheeling rates reasonable because they represent fully allocated costs).

13. *See* New York State Elec. & Gas Corp., Docket No. ER82-410-000, slip op. at 5-6 (FERC Nov. 7, 1983); Missouri Util. Co., Docket Nos. ER77-354, ER78-14, 10 FERC Rep. (CCH) ¶ 61,297, at 61,599 (1980).

14. Missouri Util. Co., Docket Nos. ER77-354, ER78-14, 10 FERC Rep. (CCH) ¶ 61,297, at 61,599 (1980); *see* Public Serv. Co., Docket No. ER82-141-000, 22 FERC Rep. (CCH) ¶ 63,083, at 65,268-69 (1983), *aff'd*, 24 FERC Rep. (CCH) ¶ 61,007 (1983); Public Serv. Co., 56 F.P.C. 3003, 3034-35 (1976).

15. *See* Public Serv. Co., 56 F.P.C. 3003, 3035 (1976).

16. 16 U.S.C. § 824(b) (1982).

17. *See* 1 A. Priest, Principles of Public Utility Regulation 31 (1969).

When the entire transaction—sale, transmission and use—occurs within a single state, that state's law governs the retail sales rate. If, however, the power is wheeled from a seller in one state to a user in another, the outcome is less clear. Presumably, the question will turn on where, under the sales contract, delivery from the generating utility to the industrial consumer occurs. The public utility commission of the state where such delivery occurs would have the authority to set the rate if state law so provides.[18]

As a practical matter, an electric utility is not likely to be enthusiastic about making a sale in which delivery occurs in another state. First, the seller may thereby become subject to the jurisdiction of the state commission in the buyer's state. Additionally, the state commission in the buyer's state has no reason to be solicitous of the seller's economic well-being, and may therefore be inclined, if it regulates the sale, to be more restrictive with respect to the allowable rate.

B. *Prior-Approval Requirements*

The Federal Power Act does not require that a regulated entity obtain approval before undertaking a transmission service that is subject to the Commission's jurisdiction. The wheeling utility need only file the tariff or rate schedule under which it proposes to wheel at least sixty days before beginning service.[19] Moreover, because transmission in interstate commerce is under the exclusive jurisdiction of the FERC, a state would presumably be precluded from requiring local utilities to obtain state commission approval before undertaking to wheel.[20]

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18. Indeed, an attempt by a state to regulate the rate for sale and delivery of power in another state would likely be found unconstitutional under the Commerce Clause of the Constitution. *See* United States Brewers Ass'n v. Healy, 692 F.2d 275, 279, 282 (2d Cir. 1982) (invalidating attempt by Connecticut to regulate out-of-state wholesale price of beer), *aff'd*, 104 S. Ct. 265 (1983); *see also* Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (commerce clause precludes state regulation of commerce that takes place wholly outside of state borders, regardless of whether commerce has effects within the state).

19. See *supra* note 7 and accompanying text.

20. Until recently, it had been assumed that states simply lacked the authority to regulate transactions that § 201 of the FPA places under FERC jurisdiction. *See* Utah v. FERC, 691 F.2d 444 (10th Cir. 1982) (a state may not compel a utility to discontinue an interstate wholesale for which a tariff has been accepted and approved by the FERC). The basis for that view was the Supreme Court's 1927 holding that sales at wholesale in interstate commerce lay beyond the states' regulatory reach, even in the absence of any federal regulation of such sales. Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927). In Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 103 S. Ct. 1905 (1983), however, the Supreme Court stated that wholesales of electricity in interstate commerce over which the FERC lacked jurisdiction were not necessarily beyond the states' power to regulate.

Whether the sale (as distinct from the related transmission) to the end user requires prior approval from state authorities will depend, however, on the law of the state that regulates the sale. If delivery occurs in the state in which the power is generated, and as is common, public utilities within that state are subject to the jurisdiction of the state commission,[21] the commission might be able, consistently with the United States Constitution and the FPA, to prevent the sale from going forward.[22] The result may be the same even without a formal requirement of state commission approval. A selling utility is unlikely to undertake a significant sale to an out-of-state customer if it believes that its own state commission, with which it must deal on a day-to-day basis, may disapprove. Moreover, a state commission would not be expected to look favorably upon a sale to an industrial consumer, particularly an out-of-state consumer, at rates that are lower than the rates prevailing on the selling utility's own system. To the contrary, the state commission is likely to require, or at least encourage, the selling utility to price the power on an incremental basis.[23] Thus, by either directly or indirectly controlling the ability of a utility to sell low-cost power beyond state borders, a state commission may effectively decrease the probability that an industrial consumer will find out-of-state power available at a bargain price. Nevertheless, if the rates in the selling utility's state are lower than those prevailing in the consumer's state, relatively cheaper power may be available.

II. Compulsory Wheeling

If an industrial consumer is successful in acquiring low-cost power from a remote source (generated by the consumer itself or another utility), it is likely to meet resistance from its traditional supplier. The supplier will normally be reluctant to lose a significant customer, and its lines may provide the only economically practicable path for transmitting the power to the buyer's plant. Other utilities standing be-

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Id. at 1912-13. The Court upheld the authority of a state to regulate certain wholesales between a cooperative financed by the Rural Electrification Administration and the cooperative's member distributors, all of whom were located within the state. *Id.* at 1908, 1913. In so doing, the Court blurred the wholesale/retail dichotomy in regulation as it had been understood since *Attleboro.*

21. *See, e.g.*, Ga. Code Ann. § 46-3-12 (1982); Ill. Ann. Stat. ch. 111 2/3, § 8 (West Supp. 1983-1984); Ky. Rev. Stat. Ann. § 278.040 (Bobbs-Merrill 1981).

22. *But see* New England Power Co. v. New Hampshire, 455 U.S. 331, 335, 344 (1982) (State prohibition against exporting hydroelectric power produced within state when power is reasonably required for use within the state violates the Commerce Clause).

23. Incremental costs are the added costs incurred by the selling utility in making the sale. Since utilities normally put their lowest-cost generating resources to use first, incremental costs will typically exceed average system costs.

tween the distant supplier and the plant may also decline to wheel, even though they have the capacity to do so.

The question then arises whether those utilities can be compelled, either directly or indirectly, to transmit the power. A number of legal grounds that might support such compulsion must be considered.

A. *Section 203 of PURPA*

Section 203 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[24] provides the FERC with the authority, upon application by a utility, federal power marketing agency or geothermal power producer, to direct another utility to wheel.[25] The conditions attached to this authority, however, make it almost useless to industrial users seeking to import cheaper power from a distant source. The Commission's order under section 203 may not compel "the transmission of electric energy directly to an ultimate consumer."[26] Thus, the leg of transmission that is least likely to be provided voluntarily, the final leg to the plant, is the one that section 203 cannot secure. There must be more than one utility's transmission facilities intervening between the selling utility and the consumer for section 203 to be effective.

Section 203 also imposes several other conditions: First, the wheeling sought must "conserve a significant amount of energy, . . . significantly promote the efficient use of facilities and resources, or . . . improve the reliability of any electric utility system."[27] Mere cost savings to the consumer do not suffice. Second, the wheeling sought must not be "likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, . . . place an undue burden on an electric utility, . . . [or] impair the reliability . . . [or] ability of any electric utility . . . to render adequate service to its customers."[28] A local utility could assert that the loss of a major industrial customer would constitute an "uncompensated economic loss." Third, the wheeling order may not issue unless the FERC finds that it would "reasonably preserve existing competitive relationships."[29] The legislative history makes clear that this provision encompasses relationships "among utilities in competition with one another for the same customers."[30] Moreover, the Commission has held that this condition forbids the compelling of wheeling where to do so

24. Pub. L. No. 95-617, § 203, 92 Stat. 3117, 3136-38 (codified as amended at 16 U.S.C. § 824j (1982)). Section 203 amended the Federal Power Act by adding a new § 211(a).

25. *Id.* § 824j(a).

26. *Id.* § 824j(c)(4).

27. *Id.* § 824j(a)(2).

28. *Id.* § 824k(a).

29. *Id.* § 824j(c)(1).

30. H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 92, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7826.

would permit a remote seller to take even a small share of the wholesale market now served by the wheeling utility.[31] Finally, the FERC order may not compel wheeling "which is inconsistent with any State law which governs the retail marketing areas of electric utilities."[32] As a result, exclusive local franchisees may not be ordered under section 203 to wheel power into their franchise areas.[33] These provisions further reduce the likelihood that section 203 could be invoked to advantage by an industrial customer seeking to import low-cost power.[34]

B. *Sections 205 and 206 of the FPA*

Sections 205 and 206 of the FPA forbid not only unjust and unreasonable rates, but also unreasonable differences in services and unduly discriminatory or preferential practices.[35] If a utility is wheeling on behalf of other utilities (or perhaps on behalf of one industrial user), its refusal to wheel to, or on behalf of, another industrial user, notwithstanding its physical capacity to do so, might constitute such a forbidden practice.

Whether such a refusal is actionable under the statute is unclear. In 1973, the Supreme Court stated that nothing in Part II[36] of the FPA (regulating electric utilities engaged in interstate commerce) enabled

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31. *See* Southeastern Power Admin. v. Kentucky Utils. Co., 25 FERC Rep. (CCH) ¶ 61,204, at 61,530-32 (1983).

32. 16 U.S.C. § 824j(c)(3) (1982).

33. Franchises are generally granted by cities or counties pursuant to statute. *See, e.g.*, Ga. Code Ann. § 46-3-4 (1982); Iowa Code Ann. § 478.1 (West Supp. 1983-1984); Wash. Rev. Code Ann. § 80.32.010 (1962); Hjelmfelt, *Exclusive Service Territories, Power Pooling and Electric Utility Regulations*, 38 Fed. B.J. 21, 21 (1979). Apart from authorizing the issuance of franchises as such, state law may proscribe any utility from serving a customer already served by another utility, unless the latter gives its consent. *See* La. Rev. Stat. Ann. § 45:123 (West 1982); *cf.* American Municipal Power-Ohio, Inc. v. Dayton Power & Light Co., 25 FERC Rep. (CCH) ¶ 63,075 (1983) (interpreting reference in wheeling agreement to since-repealed "anti-pirating" provision in Ohio statute).

34. Perhaps because of its narrow terms, there has been little litigation under § 203. In Southeastern Power Admin. v. Kentucky Utils. Co., 25 FERC Rep. (CCH) ¶ 61,204, at 61,539-40 (1983), an application to compel wheeling was denied on the ground that wheeling would permit the distant seller to take a portion of the wholesale market of the wheeling utility, thus failing to preserve existing competitive relationships. *Id.* at 24. Central Power & Light Co., Docket Nos. EL79-8, E-9558, 17 FERC Rep. (CCH) ¶ 61,078, at 61,170 (1981) (utilities must construct facilities to effect interconnection pursuant to § 203), *modified on other grounds*, 18 FERC Rep. (CCH) ¶ 61,100 (1982), is the only other reported case under § 203.

35. 16 U.S.C. §§ 824d(a),(b), 824e(a) (1982).

36. 16 U.S.C. §§ 824-824k (1982). Part I of the Act, *id.* §§ 791-823a, concerns hydroelectric licensing, FPC v. Idaho Power Co., 344 U.S. 17, 22 (1952), and has been held to enable the Commission, as a condition of such a license, to compel the licensee to wheel, *see id.* at 22-24.

the Federal Power Commission, the predecessor of the FERC, to compel wheeling.[37] Consequently, the Commission has refused to order a utility to wheel as a means of curing "undue discrimination" on the part of the utility.[38] The Second Circuit has reached the same conclusion, treating section 203 of PURPA as the sole basis upon which the Commission may order wheeling.[39]

The Commission might nevertheless employ sections 205 and 206 of the FPA to compel wheeling indirectly. If a utility were wheeling on behalf of some persons, but declined to extend the same service to others, the Commission might, upon the appropriate showing of undue discrimination, order the utility to eliminate that discrimination.[40] In theory, the utility could cure the discrimination by simply discontinuing its existing wheeling operations. Such a result would likely be precluded by the utility's contractual obligations to those on whose behalf it is already wheeling. Thus, the only way that the utility could comply with the Commission's order would be to extend wheeling service to the complaining party.

Although the Commission has never actually issued such an order to eliminate discrimination in wheeling, it has indicated that it might do so in an appropriate case.[41] One FERC administrative law judge,

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37. Otter Tail Power Co. v. United States, 410 U.S. 366, 375 (1973). The Court based its holding in part on the legislative history of Part II of the Act, which was originally drafted to include a duty to wheel. *Id.* at 374. The Court noted that "[t]hese provisions were eliminated to preserve 'the voluntary action of the utilities.' " *Id.* (quoting S. Rep. No. 621, 74th Cong., 1st Sess. 19 (1960)). The FPC had earlier reached the same conclusion. City of Paris v. Kentucky Utils. Co., 41 F.P.C. 45, 49 (1969).

38. New England Power Pool Agreement (NEPOOL), 56 F.P.C. 1562, 1585 (1976), *aff'd sub nom.* Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978); Southern Cal. Edison Co., 50 F.P.C. 1479, 1481 (1973). The Commission has recently indicated a willingness to reexamine its authority to order wheeling to remedy anticompetitive conduct. While noting that its authority to do so was "not entirely clear," Southeastern Power Admin. v. Kentucky Utils. Co., 25 FERC Rep. (CCH) ¶ 61,204, at 61,538-39 (1983), the Commission stated:

> It is argued that by virtue of owning the only transmission lines to the municipals Kentucky possesses monopoly power and that it has exercised its monopoly power by refusing to wheel SEPA's power and energy to the municipals. These arguments . . . might be relevant in a proceeding brought under sections 205 and 206 of the Power Act and might, on a proper record, justify us in ordering Kentucky to wheel.

Id. at 21.

39. New York State Elec. & Gas Corp. v. FERC, 638 F.2d 388, 400-403 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981). The Fifth Circuit has ruled to the same effect. Florida Power & Light Co. v. FERC, 660 F.2d 668, 678 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 800 (1983).

40. See *infra* notes 41-45 and accompanying text.

41. *See* New England Power Pool Agreement (NEPOOL), 56 F.P.C. 1562, 1585 (1976), *aff'd sub nom.* Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978). The Commission stated:

however, has subsequently held that only customers who are already being offered wheeling services by the utility are entitled to relief for undue discrimination by that utility.[42] The judge noted that discrimination cannot be used as a means of compelling the utility to wheel for new customers because electric utilities are not common carriers.[43] Two commentators have reached the same conclusion, reasoning that the voluntary nature of wheeling transactions precludes indirect compulsion through discrimination claims.[44] Another commentator has argued at length to the contrary, reasoning that because the statutory scheme is aimed at abusive and monopolistic practices, "the duty to consider antitrust policy entrusted to the agency would seem to demand the 'generous construction of its statutory authority.' "[45]

In any event, proving "discrimination" or "undue preference" will be difficult in most circumstances. The mere fact that a utility is already wheeling for one utility or industrial consumer does not necessarily establish that its refusal to wheel for another violates the statutory standard.[46] The likelihood of securing relief would be diminished further if the utility were to advance operating or capacity considerations to justify disparate treatment. Grounds for an FERC order "to eliminate the discrimination" may therefore be established only if a utility wheels to or on behalf of one person, refuses to wheel to or on behalf of another, and has no sound explanation for the differing treatment other than the utility's own private interest in retaining the latter as a retail customer.[47]

> As an additional prefatory matter we also emphasize the Supreme Court's statement in *Otter Tail Power* . . . that the Commission has no authority under Part II of the Federal Power Act to order wheeling. Of course to the extent that any provision of the NEPOOL Agreement is discriminatory or unduly preferential so as to violate Sections 205(b) and 206(a), a separate issue is presented. In the present procedural context of NEPOOL and specifically in relation to the issue of firm power transmission, if assuming *arguendo* the Commission found discrimination in the wheeling provision, it could not as a remedy order additional wheeling, but it could order that the discrimination be eliminated.

Id.

42. Florida Power & Light Co., Docket No. ER78-19, 12 FERC Rep. (CCH) ¶ 63,014, at 65,051 (1980), *modified on other grounds*, 21 FERC Rep. (CCH) ¶ 61,070 (1982).

43. *Id.*

44. *See* Tiano & Zimmer, *supra* note 6, at 98.

45. Reiter, *Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation Under the Federal Power and Natural Gas Acts*, 18 Land & Water L. Rev. 1, 52 (1983) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968)).

46. *See* Richmond Power & Light v. FERC, 574 F.2d 610, 623 (D.C. Cir. 1978).

47. *Cf.* Florida Power & Light Co. v. FERC, 660 F.2d 668, 679 (5th Cir. 1981) ("[I]n the absence of findings of specific anticompetitive activities . . . the Commis-

C. *Cogeneration—Section 210 of PURPA*

The FERC is authorized, under section 210 of PURPA,[48] to promulgate special regulations for the wheeling of power produced by a "qualifying cogeneration facility" or a "qualifying small power production facility," as such facilities are defined in section 201.[49] These facilities are sources of power whose development was deemed by the Ninety-fifth Congress to be particularly worthy of government encouragement.[50] Under section 210, a utility is required, in specified circumstances, to purchase power from such facilities at rates not to exceed the utility's incremental costs for alternative power ("avoided costs") determined by the FERC's rules.[51] Moreover, the cogenerator or small power producer may compel any electric utility to buy its power; the obligation to purchase is not limited to the closest utility.[52] The Commission, however, has adopted a rule under which a utility that would otherwise be required to purchase power from a qualifying facility may discharge its obligation, with the consent of the qualifying facility, by wheeling the power to another utility.[53] The recipient utility must then purchase the power from the qualifying facility at the avoided-cost rates established by the Commission's rules.[54]

This form of compulsory wheeling does not benefit an industrial user that cogenerates at one plant and wants to use its cogenerated power at another plant if the local utility that serves the recipient

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sion is without authority . . . to compel wheeling."), *cert. denied*, 103 S. Ct. 800 (1983).

48. 16 U.S.C. § 824a-3 (1982).

49. *Id.* § 796(17)-(18). A qualifying cogeneration facility "produces . . . electric energy, and . . . steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." *Id.* § 796(18)(A). A qualifying small power production facility produces electric energy "solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof." *Id.* § 796(17)(A)(i).

50. H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 97-99, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831-33.

51. 16 U.S.C. § 824a-3(b) (1982); *see* 18 C.F.R. §§ 292.303, 292.304 (1983). The FERC's rules with respect to avoided costs were upheld by the Supreme Court in American Paper Inst. v. American Elec. Power Serv. Corp., 103 S. Ct. 1921, 1933 (1983).

52. *See* 45 Fed. Reg. 12,220 (1980). If the qualifying facility does not desire the utility with which it is directly interconnected (the "first utility") to purchase the cogenerated electricity, but prefers that a utility interconnected with the first utility (the "second utility") purchase the power, it may sell the cogenerated power to the second utility only with the consent of the first utility. If the first utility refuses to wheel to the second utility, the first utility remains obligated to purchase the power from the qualifying facility at avoided-cost rates. *Id.*

53. 18 C.F.R. § 292.303(d) (1983).

54. *Id.*

plant refuses to wheel. The FERC's rule for cogenerated and small-facility power only enables an industrial consumer to compel that utility to buy the power at avoided cost.

The indirect benefits from the FERC's rule, however, may be tantamount to what would be gained from compulsory wheeling. By making a compulsory sale to the utility with the highest avoided cost (net of any transmission charges) and then purchasing power from the local utility under its existing rates, an industrial consumer may reap economic benefits equivalent to having consumed its own cogenerated power. Alternatively, by threatening to compel the local utility serving the recipient plant to buy cogenerated power at the FERC-specified rate, the industrial user may be able to induce that utility to undertake "voluntary" wheeling.

D. *Antitrust Implications*

In *Otter Tail Power Co. v. United States*,[55] the Supreme Court held that the refusal by Otter Tail to wheel power on behalf of two municipal utilities was both an attempt to monopolize and an actual monopolization of the local distribution of power in violation of section 2 of the Sherman Act.[56] The municipalities had taken over Otter Tail's distribution facilities in their respective areas after its franchises had expired, and although lacking any generation capacity of their own, had power available to them from the United States Bureau of Reclamation.[57] The only way to get that power into their systems, however, was through Otter Tail's transmission facilities, and Otter Tail refused either to sell power to the municipalities or to wheel the power from the Bureau of Reclamation.[58] Moreover, Otter Tail engaged in what the trial court found to be obstructive litigation intended to prevent competitors from entering the market.[59]

It cannot be assumed that the Court's conclusion in *Otter Tail* would apply in an action by an industrial customer against its local utility under the Sherman Act if the customer showed nothing more than the availability of cheaper power from a remote source and the defendant's refusal to wheel that power to the plaintiff's plant. First, the plaintiff would have to establish that the recalcitrant utility did in fact possess monopoly power over the relevant market that includes the industrial customer's plant, involving a factual inquiry to define

55. 410 U.S. 366 (1973).

56. *Id.* at 368. Although the Court recognized that Part II of the FPA precludes the Commission from ordering a utility to wheel, *id.* at 374, it stated that the Commission's limited authority did not immunize Otter Tail from antitrust regulation for refusals to deal, *id.* at 374-75.

57. *Id.* at 370-71.

58. *Id.*

59. *Id.* at 372.

the relevant market and calculate the utility's market power therein.[60] Second, allowing an industrial consumer to compel its local utility to wheel whenever a cheaper source of power is located could expose residential and other captive customers on high-cost systems to even higher rates, insofar as these customers would have to bear a larger share of the system's fixed costs. On the other hand, in the longer term, the loss of such a large-volume customer could diminish the need for new and more expensive generating facilities, thereby reducing the fixed costs per unit for the system as a whole.[61] The effect of wheeling on other customers was not addressed in *Otter Tail*.[62]

These and other considerations notwithstanding, the decisions in this area are few, and the antitrust basis for compelling wheeling remains largely undefined.[63] Certainly, there is no case law that flatly precludes a plaintiff from prevailing on a Sherman Act theory in the circumstances considered above. Moreover, section 4 of PURPA in particular makes clear that section 203, the compulsory wheeling provision, does not diminish the relief available under the antitrust laws.[64]

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60. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 369-70 (1973); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Byars v. Bluff City News Co., 609 F.2d 843, 849-50 (6th Cir. 1979).

61. This effect is discussed, with respect to competition for wholesale customers, in Pace & Landon, *Introducing Competition into the Electric Utility Industry: An Economic Appraisal*, 3 Energy L.J. 1, 29 (1982).

62. In *Otter Tail*, the Supreme Court noted that the "promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct," 410 U.S. at 380 (quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967)), in response to Otter Tail's argument that its conduct was necessary to prevent Otter Tail from "go[ing] downhill." *Id.* The Court also stated, however, that it did not suggest, in making the determination that the antitrust laws have been violated, that a court must be "impervious" to assertions that "compulsory interconnection or wheeling will erode [the utility's] integrated system and threaten its capacity to serve adequately the public." *Id.* at 381. On the factual record before it, the Court affirmed the district court's finding that Otter Tail's claims of erosion were unsupported. *Id.*

63. For a recent decision granting a preliminary injunction against a utility's refusal to wheel during the pendency of antitrust litigation, see City of Chanute v. Kansas Gas & Elec. Co., 564 F. Supp. 1416, 1424-26 (D. Kan. 1983), *appeal docketed*, No. 83-1818 (10th Cir. June 24, 1983). Decisions in which alleged refusals to wheel were not remedied include: Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 314 (3rd Cir. 1982) (utility refusing to wheel lacked monopoly power); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 926, 932-33 (2d Cir. 1981) (insufficient proof of refusals of specific, as opposed to general, wheeling requests); Town of Massena v. Niagara-Mohawk Power Corp., 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,810, 76,812 (N.D.N.Y. 1980) (no unconditional refusal to wheel—engineering and technical concerns remained unresolved); Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343, 1354 (W.D. Pa. 1979) (plaintiffs never specifically requested wheeling).

64. 16 U.S.C. § 2603 (1982).

> Nothing in this Act or in any amendment made by this Act affects—(1) the applicability of the antitrust laws to any electric utility or gas utility (as

E. *Nuclear Regulatory Commission License Conditions*

Under section 105(c) of the Atomic Energy Act,[65] the Nuclear Regulatory Commission (NRC) may impose certain conditions in connection with the granting of a construction permit for a nuclear power plant if it has found, after consulting with the Attorney General, that "the activities under the license would create or maintain a situation inconsistent with the antitrust laws."[66] Although, on its face, section 105(c) does not add any substantive rights to those available under the antitrust laws, the mere fact that a utility may suffer extended and costly delays in putting a planned nuclear plant into operation while an antitrust issue is being litigated before the NRC may make it advantageous for an industrial customer to press a specific wheeling claim before the NRC.[67] Indeed, a large number of NRC licensees and permittees have accepted conditions under which they are obligated to wheel for others.[68]

> defined in section 3202 of title 15), or (2) any authority of the Secretary or of the Commission under any other provision of law (including the Federal Power Act [16 U.S.C. 791a et seq.] and the Natural Gas Act [15 U.S.C. 717 et seq.]) respecting unfair methods of competition or anticompetitive acts or practices.

Id. The conference report applies this principle to wheeling: "Specifically with regard to certain authorities to order interconnections and wheeling under title II, it is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the Federal Energy Regulatory Commission." H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 68 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7802; *see* Florida Power & Light Co. v. FERC, 660 F.2d 668, 676 n.20 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 800 (1983); Sunflower Elec. Coop., Inc. v. Kansas Power & Light Co., 603 F.2d 791, 800, 801 (10th Cir. 1979).

65. 42 U.S.C. § 2135(c) (1976).

66. *Id.* § 2135(c)(5). For most purposes under the Act, a "construction permit is deemed to be a 'license.' " *Id.* § 2235.

67. In that respect, § 105(c) contrasts with § 204 of the FPA, 16 U.S.C. § 824c (1982), at least as construed by the FERC. Section 204 requires a public utility to obtain the consent of the FERC prior to issuing certain securities. In Gulf States Utils. Co. v. FPC, 411 U.S. 747 (1973), the Supreme Court held that, in making its decision, the Commission must consider allegations of anticompetitive conduct on the part of the issuing utility. *Id.* at 762. In *Gulf States*, those antitrust allegations included certain refusals to wheel. *Id.* at 752. Subsequently, however, the FPC determined that, notwithstanding the Court's decision, it would bifurcate contested § 204 proceedings so that the securities could be issued even while the allegations of anticompetitive conduct were being litigated. Gulf States Utils. Co., 50 F.P.C. 1945, 1948 (1973), *modified on other grounds*, 53 F.P.C. 1259 (1975). The allegations would simply be treated as if contained in a complaint under § 306 of the FPA. *Id.* The result is that, unlike the case of NRC enforcement proceedings, an objection based upon allegedly anticompetitive conduct will not hold up the utility's business operations.

68. *See* Reiter, *supra* note 45, at 78.

On the other hand, to the best of the authors' knowledge, none of the licenses issued to date has obligated the recipient to wheel directly to an industrial customer. Rather, those conditions concern wheeling among electric utilities. As a practical matter, moreover, few utilities are presently seeking NRC construction permits for new nuclear plants.[69] It is the processing of the application for authority to construct, rather than the construction or ongoing operation under the license, that gives rise to the statutory antitrust review.[70] Only rarely, then, will the NRC procedure be available to an industrial customer.

F. *State Commission Orders*

Finally, an industrial user may seek to compel its local utility to wheel through its state commission, which has the most pervasive control over the utility's operations.[71] Industrial consumers that participate in retail rate proceedings will be particularly familiar with the agency's procedures, and the agency may be attuned to the needs of a large power user that contributes substantially to the state economy.

This approach, however, presents jurisdictional problems. As noted earlier, transmission of power "in interstate commerce" is subject to regulation by the FERC,[72] and efforts by states to regulate activity within the Commission's jurisdiction have been unsuccessful.[73] Moreover, in section 203 of PURPA, Congress has defined the specific conditions under which wheeling may be compelled.[74] If, as some courts have held, PURPA represents the only ground upon which the FERC can order wheeling,[75] then any state commission order to the same effect would logically be precluded.

There may, however, be indirect means by which the state commission's powers can be invoked to compel wheeling. In particular, if a

69. *Id.*

70. *See* 42 U.S.C. § 2135(c)(2) (1976). It should be noted, however, that after the sponsor of the plant has completed construction, the plant must be licensed by the NRC before operation can begin. *Id.* At the licensing stage, new antitrust conditions may be added on the basis of changed circumstances. *Id.* Furthermore, there are procedures for the NRC to consider allegations that a utility, once licensed, has violated its license conditions. 10 C.F.R. § 2.206 (1983). Mere pendency of enforcement proceedings, however, would not impede the construction or operation of the plant.

71. *See* A. Priest, *supra* note 17, at 31-32.

72. See *supra* note 4 and accompanying text.

73. *See* Utah v. FERC, 691 F.2d 444, 446-47 (10th Cir. 1982); Consolidated Edison Co., Docket No. ER81-183-000, 15 FERC Rep. (CCH) ¶ 61,174, at 61,405 (1981). See *supra* note 20 and accompanying text.

74. See *supra* pt. II(A).

75. See *supra* note 39 and accompanying text.

state commission is persuaded that a utility's refusal to wheel had left transmission capacity idle, the commission could refuse to impose the resulting costs upon the utility's retail sales customers.[76] Those costs would, in effect, be imposed upon the utility's shareholders in the form of a reduction in revenues. The prospect of such action by the state commission might serve as inducement for a utility to wheel.

Conclusion

Except for section 203 of PURPA, which has extremely limited practical application, there are no well-defined methods of securing involuntary wheeling. There are, however, available theories—notably, monopolization under the Sherman Act, and to a lesser extent, discrimination under the Federal Power Act—that, although undeveloped in the context of compulsory wheeling, merit examination by industrial consumers seeking to secure such wheeling.

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76. *Cf.* Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, [Current State Looseleaf] Util. L. Rep. (CCH) ¶ 24,101 (Sept. 22, 1983) (affirming state commission order reducing utility's purchased power expense because utility's purchase of power from its corporate parent was an abuse of managerial discretion in light of the availability of alternate, more economical supplies of electricity).