

Antitrust Jurisdiction and Remedies in an Electric Utility Price Squeeze

Vertically integrated utilities frequently sell wholesale electricity to municipally owned utilities or rural electric cooperatives that resell the electricity in local markets.¹ These smaller utilities often compete with the vertically integrated utility for retail customers. If the larger utility charges a wholesale price so high that the smaller utilities cannot buy and distribute power at a retail price competitive with the retail price charged by the larger utility, a "price squeeze" occurs. A wholesale rate creating a price squeeze may violate federal law in two ways: it may be a monopolistic practice in violation of the antitrust laws, and it may be an "unreasonable" rate prohibited by the Federal Power Act.² A retailer injured by a price squeeze thus may seek relief from the wholesale rate before two different decisionmakers: a federal district court, which is the arbiter of antitrust disputes, or the Federal Energy Regulatory Commission (FERC),³ which is the agency charged with enforcing the Federal Power Act.

The relationship between federal district courts and the FERC is unsettled in price-squeeze cases. In order to eliminate a price squeeze in an antitrust suit, a court may have to become involved in the process of setting wholesale rates by requiring a defendant utility either to file a lower wholesale rate with the FERC or to refrain from charging a filed rate. In so doing a court may interfere with Congress's explicit delegation of control over wholesale rates to the FERC. Recognizing this problem, courts have disagreed

¹ The electric power industry comprises three distinct functions: the generation of power, the wholesale transmission of "bulk" power at very high voltages, and the retail distribution of power to consumers at lower voltages. When one firm, typically investor-owned, performs all three functions it is said to be vertically integrated. See generally Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 67-69 (1972).

² 16 U.S.C. §§ 791a-828c (1982). For a discussion of the price squeeze as a monopolistic practice, see *infra* notes 35-51.

³ On October 1, 1977, the President, acting pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), and Exec. Order No. 12,009, 3 C.F.R. 142 (1978), dissolved the Federal Power Commission (FPC) and transferred its functions to the Secretary of Energy and the FERC. This comment will use each designation as appropriate.

about the extent to which their jurisdiction and remedial powers in antitrust cases are limited when judicial action might interfere with or contradict FERC policies or decisions. The problem facing the courts is to determine what they should do when faced with an antitrust case involving allegations of a price squeeze. In particular, what issues should the courts hear? When should they defer to the FERC? What remedies should the courts order?

This comment argues that a district court hearing an antitrust case involving allegations of a price squeeze should avail itself of the FERC's expertise by invoking the doctrine of primary jurisdiction to refer to the FERC the factual issue of the existence of a discriminatory price squeeze. The FERC's findings on this issue, unless unsupported by substantial evidence, should then be binding on the court hearing the antitrust claim. The court should not, however, be bound by the FERC's determinations of what constitutes a reasonable or confiscatory wholesale rate, since the court's deliberations on these issues necessarily differ from the FERC's analysis under the Federal Power Act.

Part I of this comment presents an overview of the electric power industry and the price-squeeze problem. Part II examines the different substantive considerations that could lead a court and the FERC to reach different conclusions about the proper wholesale rate in a price-squeeze case. Part III surveys the confusion of doctrines by which the courts have attempted to resolve the conundrum of dual jurisdiction and remedies. Part IV suggests a resolution of the issue.

I. PRICE SQUEEZES IN THE ELECTRIC POWER INDUSTRY

Although the electric power industry is often referred to as a classic example of a "natural monopoly,"⁴ this characterization can be misleading. Because of economies of scale, a single large firm is often the efficiency-maximizer for the generation and wholesale transmission of electricity in a given market. A firm's average cost of generating and transmitting electricity can decrease to a very low level with large generators and increased transmission.⁵ In con-

⁴ A natural monopoly is characterized by decreasing average total costs as output increases, throughout the range of viable output levels. 2 ALFRED KAHN, *THE ECONOMICS OF REGULATION* 119 (1971).

⁵ The generation of electricity is said to be a natural monopoly because the high initial fixed costs of electricity production can result in a lower average unit cost of service when one firm supplies service in a particular area. See CHARLES PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES* 42 (1984). The economies of scale for the transmission of electricity, however, are a function not of the increased size of the system, but of the density of load on the

trast, the retail distribution of electricity within that same market is often done by a number of smaller utilities. Since the efficiencies of wholesale distribution are primarily the result of large-scale generation and transmission, smaller firms can compete in the localized distribution of retail power once the electricity has been transmitted to the region by a wholesale utility.⁶ A substantial number of municipally owned utilities (municipals) and rural cooperatives⁷ thus compete with vertically integrated utilities in local markets for the retail distribution of electricity they have purchased at wholesale from the vertically integrated utilities.⁸

This structure of limited retail competition and wholesale monopoly can give rise to a price squeeze.⁹ Vertically integrated utili-

transmission line. Doubling the voltage increases the carrying capacity by the square of the voltage change, while cost increases only in proportion to the change in voltage. Weiss, *Anti-trust in the Electric Power Industry*, in PROMOTING COMPETITION IN REGULATED MARKETS 144-46 & n.19 (A. Phillips ed. 1975).

⁶ The distribution of electricity in an area may still be characterized as a natural monopoly, since a single distribution line is usually able to supply all of the energy demanded at a lower average cost per unit than two or more lines. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L. REV. 563, 568 (1984). Because the voltage is decreased, however, the economies are also reduced. "Franchise" competition can nevertheless take place for the right to supply the transmission line to the area. Competition at the retail level can also occur through "individual load" competition, where firms compete for new industrial and commercial users within their service territories; "fringe area" competition, which takes place along the mutual borders of firms' service territories; and "yardstick" competition, where service and rate comparisons between utilities serve as an indirect form of competition. C. PHILLIPS, *supra* note 5, at 548.

⁷ As of 1982, state, municipal, and cooperative systems accounted for 14% of the industry's total distribution capacity. EDISON ELECTRIC INSTITUTE, STATISTICAL YEARBOOK OF THE ELECTRIC UTILITY INDUSTRY/1982, at 8. The cooperative-owned share is growing more rapidly than any other. See Pace & Landon, *Introducing Competition Into the Electric Utility Industry: An Economic Appraisal*, 3 ENERGY L.J. 1, 9-10 (1982).

⁸ The vertically integrated utilities are required to supply these retail competitors with wholesale power. Failure to provide wholesale power could be a refusal to deal in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-78 (1973).

⁹ See, e.g., *FPC v. Conway Corp.*, 426 U.S. 271, 274-75 (1976); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1176 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Mishawaka v. Indiana & Mich. Elec. Co.*, 560 F.2d 1314, 1316 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 765-66 (D. Del. 1979); *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1346 (W.D. Pa. 1979). In economic terms a price squeeze occurs when the ratio of a vertically integrated utility's wholesale price (P_w) to its marginal cost of wholesale service (MC_w) exceeds the ratio of its retail price (P_r) to its marginal cost of retail service (MC_r):

$$P_w/MC_w > P_r/MC_r.$$

Lopatka, *supra* note 6, at 588.

The economic definition views a price squeeze as a form of price discrimination: the prices charged by the vertically integrated utility discriminate in favor of its retail customers (and itself) and against wholesale customers. This kind of discrimination may or may not eliminate efficient retail competitors; a retail competitor may distribute electricity so

ties that supply wholesale power to municipals and rural cooperatives have an incentive to keep their wholesale rates high relative to retail rates. This allows the utility to charge retail rates lower than those of the municipal or rural cooperative, putting the local retail distributor at a competitive disadvantage.

To illustrate the price squeeze, assume that *A* is a municipal utility that purchases its wholesale power from *B*, a vertically integrated utility that is the only wholesaler within *A*'s service area. *A* sells and distributes this power at retail to industrial, commercial, and residential customers within its corporate limits. *B* may raise its wholesale prices even if its marginal costs of producing wholesale electricity have not changed. A price squeeze can occur if *B* does not raise the retail rates it charges its own customers. This will result in an increase in the marginal retail costs of electricity for *A* but not for *B*. The effect of such a price squeeze on municipals and rural cooperatives can be dramatic. It can impair *A*'s ability to compete with *B* for retail and industrial customers and increase pressure on the municipality operating *A* to sell or lease *A* to *B*.

A price squeeze can also occur without the wholesaler consciously intending to squeeze out its competition at the retail level. Dual federal and state regulatory authority over rates may create a differential in wholesale and retail rates. Retail rates of investor-owned utilities are within the jurisdiction of state utility commissions,¹⁰ while wholesale rates of energy sold in interstate commerce

efficiently that its marginal cost of retail distribution added to the wholesale price it pays still yields a lower retail price than that of the vertically integrated utility. The economic definition identifies those pricing practices of vertically integrated utilities that place retail competitors at a competitive disadvantage regardless of whether the disadvantage is fatal to the municipal utility. Lopatka, *supra* note 6, at 588-89.

A meaningful definition of a price squeeze must take the wholesale utility's costs into account, otherwise it would include "squeeze" situations that are beyond the control of the utility. For example, the vertically integrated utility might be so much more efficient at distribution than the municipal utility that its retail price is lower than the municipal's costs even when the wholesale rate is no higher than the utility's costs.

Courts do not always define a price squeeze in economic terms; they are often content to find a price squeeze simply when "wholesale rates [are] so high that [the utility's] wholesale customers will be unable to compete with it in the retail market." *City of Kirkwood*, 671 F.2d at 1176 n.4. Nor do the FERC's regulations list imbalanced price-cost ratios in the wholesale or retail markets as an element of the *prima facie* case in a price-squeeze action. See *infra* note 21.

¹⁰ Lopatka, *supra* note 6, at 568 & n.28. Rates charged by municipally owned utilities generally are not subject to state regulation. *Id.* at 568 & n.29. For a discussion of state regulation of utilities, see generally 1 A. J. G. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION chs. 3-5, 7-8 (1969).

are subject to the FERC's jurisdiction.¹¹ The mechanics of this dual regulatory system often result in an unintentional price squeeze: wholesale rates filed with the FERC go into effect automatically after five months, subject to possible refund;¹² retail rates filed with state agencies, however, usually go into effect only after the completion of agency review and approval.¹³ Thus, increases in wholesale rates typically go into effect faster than increases in retail rates, creating a temporary price squeeze on retailer utilities.

Moreover, even if there is no difference in the timing of rate increases, the dual regulatory scheme can still create a price squeeze. If the state agency and the FERC evaluate differently any of the factors in the rate determination—for example, size of rate base, equitable rate of return, or operating expenses—the relative rates they will allow the utility to charge will differ.¹⁴ Thus, both the timing of the regulatory decisions and the rate-setting process at the state and federal levels make a price squeeze possible regardless of the intentions of the vertically integrated utility.¹⁵

II. THE STRUCTURE OF REGULATORY AND JUDICIAL RESPONSES

The limited competition in the electric power industry brings its operation within the reach of two distinct control mechanisms: direct agency regulation and judicial antitrust scrutiny. Regulation has been the traditional response to natural monopolies.¹⁶ How-

¹¹ Federal Power Act, 16 U.S.C. §§ 824, 824d (1982).

¹² Proposed rates must be filed with the FERC at least 60 days before they are to go into effect. The FERC may suspend the operation of a new rate for up to five months beyond the 60 days in order to hold a hearing on its legality. 16 U.S.C. § 824d(e) (1982).

¹³ Most state statutes require final action on the proposed rate within one year of filing. See Lopatka, *supra* note 6, at 587.

¹⁴ See *id.* at 595-97. Thus, if the FERC allows a wholesale increase of 10¢ per kilowatt-hour and the state agency only increases the retail price by 5¢ per kilowatt-hour, 5¢ of the municipal's competitive margin will be eliminated by the wholesale increase. If the wholesaler's marginal costs of production and its retail price have not risen along with its wholesale rate, the retailer's rates may become uncompetitive, resulting in a price squeeze.

¹⁵ The price-squeeze problem would not disappear with a unified regulatory scheme. Since some rate differentials between wholesale and retail rates must continue to exist in order to allow the wholesaler a margin of profit, the regulatory body would still have to make the difficult determination of whether a rate differential constituted price discrimination. See *infra* notes 22-25 and accompanying text.

¹⁶ See STEPHEN BREYER, *REGULATION AND ITS REFORM* 15 (1982). In certain industries, economies of scale make it efficient for the government to grant one or more firms monopoly power subject to regulation of prices and profits. These industries include natural gas pipelines, electricity distribution, waterworks, and local telephone systems. Even when administered well, however, rate regulation cannot ensure that rates will be identical to those in a competitive market. See Hjelmfelt, *Retail Competition in the Electric Utility Industry*, 60

ever, because limited competition can exist in a given market for the retail distribution of power, courts have applied the antitrust laws to protect retail distributors against abuse of the wholesale utility's natural monopoly power.¹⁷ The different substantive and procedural frameworks used in this dual jurisdictional scheme result in tension when one approach conflicts with the other.¹⁸

A. The Regulatory Response to Price Squeezes

The Federal Power Act gives the FERC authority to set wholesale rates for electric power. Although the FERC does not review every proposed schedule of wholesale rates, it can review the lawfulness of proposed rates upon its own motion or upon complaint.¹⁹ If the FERC concludes that any rate or practice is "un-

DEN. L.J. 1, 4 (1982).

¹⁷ See, e.g., *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 756-62 (1973).

¹⁸ There is no fundamental tension, however, between natural monopoly theory and the goals of antitrust law. The antitrust laws are not designed to promote competition simply because competition is thought to be of value in and of itself, regardless of the cost. Although the principles behind the antitrust laws are sometimes stated in such broad terms, see, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966) (Sherman Act passed "to prevent further concentration and to preserve competition among a large number of sellers"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (one of the purposes of the Sherman Act is "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other"), a better interpretation is that the antitrust laws promote competition because of its allocative efficiency: competition pressures producers to lower prices and increase quality. See ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978); cf. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1560 (1984) (Sherman Act "especially intended" to serve consumer interests). The existence of a natural monopoly is not inconsistent with antitrust law since it means that economies of scale are such that a single producer or supplier can serve a given market at the lowest average cost. Thus, natural monopolies may also serve allocative efficiency.

A tension between antitrust and regulation exists, however, in their responses to potential abuse by the natural monopolist. The natural monopolist has an incentive to limit supply in order to achieve monopoly pricing and maximize profits. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 253 (2d ed. 1977). The antitrust laws combat this by protecting limited competition—such as competition among franchises to serve a given market at the wholesale level—in order to pressure the natural monopolist to lower rates and give higher quality service. The regulatory model, on the other hand, seeks to prevent abuse of the natural monopoly by directly controlling market entry, the range of services offered, rates of return, and retail rate structures. Any tension in the utility context therefore results from the different approaches towards achieving a common goal: "antitrust laws seek to create or maintain the *conditions* of a competitive marketplace" while regulation attempts to "replicate the *results* of competition." S. BREYER, *supra* note 16, at 156-57 (emphasis in original).

¹⁹ Under the Act, a proposed rate can be challenged before the FERC as being "unjust, unreasonable, unduly discriminatory or preferential," and the FERC can set the "just and reasonable rate." 16 U.S.C. § 824e(a) (1982). The relevant part of the statute reads as follows:

(a) Just and reasonable rates. All rates and charges made, demanded or received by any

just, unreasonable, unduly discriminatory or preferential," it determines and enforces the "just and reasonable rate."²⁰ The proceedings before the FERC are wholly independent of any anti-trust action based on the utility's wholesale rate structure.

The FERC's analysis of a price-squeeze allegation involves three steps.²¹ First, the FERC must determine whether price discrimination exists. Then it must evaluate whether the discrimination is undue in light of countervailing considerations of public policy. Finally, if the discrimination is judged to be undue, the FERC must set a reasonable rate.

Identification of price discrimination by the FERC turns on whether the utility's filed rate equals the utility's revenue requirements.²² To evaluate the filed rate, the FERC must first make three determinations: a preliminary finding of the defendant's capital costs—its gross revenues minus its estimated current operating expenses; an evaluation of the rate base—the value of the facilities used to provide electrical services; and a final calculation of the rate of return to be applied to the rate base, to establish the return to be given investors.²³ These findings are used to determine the revenue requirement of the utility. The FERC designs a rate structure to meet this requirement, taking into account the utility's cost of service.²⁴ If the wholesale rates exceed the retail rates, and the

public utility . . . shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.(b) Preference or advantage unlawful. No public utility shall . . . (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates . . . either as between localities or as between classes of service.

16 U.S.C. § 824d(a)-(b) (1982).

In addition, regulations issued by the FERC allow "[a]ny wholesale customer, state commission or other interested person" to "file petitions to intervene alleging price discrimination and anticompetitive effects of the wholesale rates." 18 C.F.R. § 2.17(a) (1985).

²⁰ 16 U.S.C. § 824e(a) (1982).

²¹ The FERC has ruled that a prima facie case of a price squeeze must be established before it will consider a price-squeeze allegation in a rate proceeding. 18 C.F.R. § 2.17(a) (1985). Elements of a prima facie price-squeeze case include: (1) specification of the retail rate deemed prohibitive; (2) a showing that retail competition exists; (3) a showing that retail rates are lower than the proposed wholesale rates for comparable service; (4) the wholesale customer's retail rate for comparable service; and (5) the reduction in the wholesale rate necessary to remedy the price squeeze. *Id.* § 2.17(a)(1)-(5).

²² The equation of rates and revenue requirements is a basic principle in electric utility rate regulation. See S. BREYER, *supra* note 16, at 36-37; 1 A. KAHN, *supra* note 4, ch. 2; 1 A. PRIEST, *supra* note 10, at 191-93.

²³ 1 A. PRIEST, *supra* note 10, at 45-46.

²⁴ Cost-of-service determinations are extremely complex and technical. One commentator noted that such determinations "can be difficult for professional rate engineers, let alone federal judges with no technical expertise." Lopatka, *supra* note 6, at 600 n.189 (citation

disparity is not explained by differences in costs, the FERC concludes that discrimination exists.²⁵

A finding of price discrimination does not by itself mean that a rate is unjust or unreasonable. The FERC must also determine if the price is "unduly" discriminatory in light of public policy and the "broad purposes" of the Federal Power Act.²⁶ The FERC's principal statutory directive is to assure an abundant supply of energy throughout the country with the greatest possible economy and conservation.²⁷ Other factors taken into account by the FERC include adequacy of service, reliability, financial integrity, length of time and extent of price discrimination, and the regulatory actions of state commissions.²⁸ In light of these countervailing policy considerations the FERC may decide that the discrimination resulting from a price squeeze is not undue and hence not in violation of the Act.²⁹

omitted). The cost-of-service determination includes four cost categories: customer, demand, energy, and capacity. Customer costs, such as accounting, billing, and metering, vary with the number of customers served. Demand costs, which include actual production and transmission costs, vary with the amount of demand placed on the system. Energy costs, such as fuel, labor, and plant maintenance, vary with the amount of kilowatt-hours supplied. Capacity costs, such as the rate of return on the rate base, taxes, and interest charges, are "joint costs" which cannot be traced to particular customers. *Id.* at 578-81.

Once these costs are established, they are assigned to a customer classification, such as residential, commercial, or industrial, in order to determine the relevant cost of service for each customer group. The assignment of customer, demand, and energy costs is on a causal basis—it is clear at the margin how service to each customer class affects each kind of cost. Because capacity costs are not allocable on a causal basis to a customer class, formulae for making such allocations must be developed. *Id.* at 577-79.

²⁵ See, e.g., *In re Missouri Power & Light Co.*, 26 Pub. Util. Rep. 4th 365, 370-71 & n.18 (1978); cf. *In re Boston Edison Co.*, 30 Pub. Util. Rep. 4th 477, 493 (1979) (absence of evidence about comparability of retail and wholesale costs in relation to rates precludes finding of price discrimination). The presence or absence of an intent to discriminate is irrelevant in determining whether price discrimination exists. See *Missouri Power*, 26 Pub. Util. Rep. 4th at 370-71 & n.17.

²⁶ 16 U.S.C. § 824d(b) (1982) (quoted in relevant part *supra* note 19); see *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 759-60 (1973).

²⁷ 16 U.S.C. § 824a(a) (1982).

²⁸ See, e.g., *In re Missouri Power & Light Co.*, 26 Pub. Util. Rep. 4th 365, 371-72 (1978).

²⁹ In *FPC v. Conway*, 426 U.S. 271, 279 (1976), the Supreme Court held that the FERC is required to consider the possible anticompetitive effects of a price squeeze. This consideration is not, however, of greater importance than other policy considerations underlying the Federal Power Act. *Conway* simply requires the FERC to consider price-squeeze effects in its deliberations. *Kansas Cities v. FERC*, 723 F.2d 82, 93 (D.C. Cir. 1983). The FERC has summarized its analysis in the following manner: "The commission does not enforce the antitrust laws. In carrying out its responsibility to set just and reasonable rates for public utilities, the commission must determine what is in the public interest. Such a determination may involve considerations which outweigh the anticompetitive effect of a particular filing." *In re Missouri Power & Light Co.*, 26 Pub. Util. Rep. 4th 365, 371 (1978) (footnote

Even if the FERC concludes that a wholesale rate creates undue discrimination, statutory and constitutional limits on the FERC's power may prevent it from being able to order a rate low enough to eliminate the price squeeze. Under the Federal Power Act, the FERC cannot set what is, in its view, an "unreasonable" rate.³⁰ Underlying this statutory constraint is a constitutional limit: if the FERC sets rates that do not allow the utility to earn a reasonable return on its investment, the FERC deprives the utility of its property without just compensation in violation of the fifth amendment.³¹ Because of this constitutional limit the FERC may not set the wholesale rate below the price at which, in light of the cost-of-service evaluation, the wholesaler would receive a reasonable return—even if that rate perpetuates a price squeeze. The FERC is thus constrained to set rates within a "zone of reasonableness."³² The concept of a zone of reasonableness acknowledges that there is a range of "reasonable" rates between a rate that is so low as to be confiscatory³³ and a rate that is discriminatory or which allows the utility an unreasonably high return.³⁴

As the preceding discussion shows, the FERC's remedial response to an alleged price squeeze is limited. If the FERC determines that price discrimination exists, it can reject a wholesale rate on price-squeeze grounds only if its discriminatory effect is undue in light of countervailing policy considerations. Even if the FERC determines that there is undue discrimination, it may be unable to

omitted).

³⁰ 16 U.S.C. § 824e(a) (1982).

³¹ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

³² *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

³³ See, e.g., *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938); *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393-94 (1938); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 692-95 (1923); see also Pond, *Restraining Regulatory Activism: The Proper Scope of Public Utility Regulation*, 35 AD. L. REV. 423, 427-28 (1983) ("while a commission may fix rates within a zone of reasonableness, it may not impose upon a public utility confiscatory rates").

³⁴ The zone of reasonableness does not have precise boundaries. See, e.g., *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint"). The FERC must permit the utility to "earn a return on the value of [its] property . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 692 (1923); see also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.").

eliminate the price squeeze completely if doing so would not assure the wholesaler a reasonable return.

B. The Judicial Response to Price Squeezes: The Antitrust Action

The antitrust laws make it a felony to monopolize or attempt to monopolize a market in interstate commerce.³⁵ To sustain an allegation of monopolization the plaintiff must show that the defendant possessed monopoly power³⁶ and intended to exercise that power for anticompetitive or exclusionary purposes.³⁷ A charge of attempted monopolization requires the plaintiff to show that the defendant had an intent to achieve monopoly power³⁸ and a "dangerous probability" of succeeding.³⁹

The antitrust laws have been held to apply to the electric power industry.⁴⁰ When an allegation of a price squeeze is made

³⁵ 15 U.S.C. § 2 (1982) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . .").

³⁶ Monopoly power is defined as "the power to control prices or exclude competition" within a relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

³⁷ See, e.g., *United States v. Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1983).

³⁸ See, e.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-32 (1948); *United States v. Griffith*, 334 U.S. 100, 105-06 (1948).

³⁹ See *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

⁴⁰ See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973). For example, in *Otter Tail* an electric utility was alleged to have attempted to monopolize the retail distribution of electric power in its service area. The utility argued that judicial antitrust review was precluded because the FPC had the authority to compel involuntary interconnections of power. 410 U.S. at 373. The Supreme Court, however, held that "[t]here is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws." *Id.* at 373-74.

There is some question, however, whether the antitrust laws are applicable to all cases involving a power industry price squeeze. Two antitrust doctrines in particular may affect a district court's antitrust jurisdiction in price-squeeze cases. First, the Noerr-Pennington doctrine, which grew out of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), provides that a concerted effort to influence public officials is a right of petition protected from the antitrust laws by the first amendment. Defendants in price-squeeze cases have argued that the filing of wholesale rates represents such a petition protected by Noerr-Pennington. See, e.g., *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). The Supreme Court has stated, however, that "nothing in the Noerr opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff . . . is a sufficient reason for conferring antitrust

under the antitrust laws,⁴¹ the plaintiff usually asserts that the wholesale utility has monopolized or attempted to monopolize the retail electric power market by increasing wholesale rates so that they impede the retail distributor's ability to compete effectively.⁴² As the vertically integrated utility is often found to possess monopoly power over wholesale or retail electricity sales within the relevant market of its service area due to a typically large market

immunity on the proposed conduct." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976); see also *Lopatka*, *supra* note 6, at 633-35 (arguing that the Noerr-Pennington exemption should never apply in the price-squeeze context). In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), moreover, the Supreme Court indicated that first amendment rights do not provide antitrust immunity if the end result is to bar competitors from access to the administrative or judicial processes. *Id.* at 515. Consequently, the Noerr-Pennington doctrine has been held not to protect the defendant in a price-squeeze case where the defendant's repetitive filing of increasingly higher wholesale rates precluded the retailer from "fair and effective" access to the regulatory process. *City of Mishawaka*, 616 F.2d at 981-83. Even if it is possible that the Noerr-Pennington doctrine could exempt some price-squeeze cases from antitrust scrutiny, *Cantor* and *City of Mishawaka* indicate that many price-squeeze cases will fall outside the scope of that doctrine.

The second doctrine potentially applicable in the price-squeeze context is the state-action exemption doctrine, established in *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), which provides antitrust immunity for activity undertaken pursuant to a state economic regulatory scheme. Arguably, the state's involvement in approving and enforcing retail rates could bring a price-squeeze allegation within the ambit of this protection, particularly in cases of a price squeeze caused by the dual regulatory structure, see *supra* notes 10-15 and accompanying text. However, recent Supreme Court decisions have so limited the state-action exemption that it appears inapplicable in a price-squeeze case. To be protected, anticompetitive conduct must be undertaken by the state, not merely acquiesced in or approved by the state. See *Bates v. State Bar*, 433 U.S. 350, 361-62 (1977). In *Cantor*, no state exemption was found for a utility program of light bulb distribution, even though the state would have to approve any change in the program. 428 U.S. at 582-83. Because the state's role in a price-squeeze case is similarly limited to approval of rates filed by the utility, the state-action exemption doctrine has been rejected in such cases. See *City of Mishawaka*, 616 F.2d at 985. Courts have also emphasized that federal control over wholesale rates limits a state's ability to effectuate a price squeeze and thus limits the attribution of a price squeeze to state action. See *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 766-67 (D. Del. 1979); *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1348-49 (W.D. Pa. 1979).

⁴¹ For examples of antitrust challenges to alleged price squeezes, see cases cited *supra* note 9. One of the first examples of a price squeeze included in an antitrust action was *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436-38 (2d Cir. 1945). In contrast, it was not until the Supreme Court's decision in *FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976), that the FERC's power to consider allegations of a price squeeze in setting wholesale rates was established.

⁴² Plaintiffs often allege other antitrust violations in addition to charges of monopolization under the Sherman Act. See, e.g., *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1176 (8th Cir. 1982) (alleging territorial restriction and refusal to set a transmission rate for a municipal utility), *cert. denied*, 459 U.S. 1170 (1983); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 765 (D. Del. 1979) (alleging that the utility substantially lessened competition in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982)).

share,⁴³ the critical element in a price-squeeze action is usually proof of the requisite intent to eliminate competition.⁴⁴

Courts sometimes infer anticompetitive intent merely from the existence of price differentials or a disparity between wholesale and retail ratios of prices to costs.⁴⁵ The greater the price differentials, the more likely it is that the defendant intended a price squeeze. However, because of the complexity of the cost-of-service analysis used to determine whether a rate is discriminatory, courts may lack the expertise needed to judge the defendant's conduct or intent accurately. Moreover, the prevalence of regulation tends to diminish the likelihood that willful intent to monopolize is the cause of a price squeeze.⁴⁶ Since price differentials may be an unintended result of the two-tier regulatory system, courts often do not rely exclusively on anticompetitive effects to infer intent.⁴⁷ Thus, although general intent has traditionally been a sufficient basis for a finding of monopolization,⁴⁸ courts have required more than a general intent to monopolize in a price-squeeze case.

Once the elements necessary to constitute a violation of the antitrust laws are established, a court, unlike the FERC, need not further determine whether the antitrust violation is "undue." The

⁴³ See, e.g., *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1325-26 (N.D. Ind. 1979), *aff'd in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

⁴⁴ See, e.g., *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388 (N.D. Ill. Jan. 16, 1984) (available Nov. 20, 1985, on LEXIS, Genfed library, Dist file) (the issue of intent to monopolize is dispositive of the price-squeeze claim).

⁴⁵ See *City of Shakopee v. Northern States Power Co.*, No. 4-75-591, slip op. at 2 (D. Minn. Oct. 18, 1976); *cf.* *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1334-37 (N.D. Ind. 1979) (specific intent may be inferred from the defendant's maintenance of a price squeeze and attempts to discontinue wholesale sales to plaintiff), *aff'd in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). *But see, e.g.*, *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 808-09 (3d Cir. 1984) (price differentials do not establish monopolization without "evidence that the defendants deliberately produced the effect").

⁴⁶ See *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354-55 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980); see also *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 931-32 (2d Cir. 1981); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388 (N.D. Ill. Jan. 16, 1984) (available Nov. 20, 1985, on LEXIS, Genfed library, Dist file).

⁴⁷ See *supra* notes 14-15 and accompanying text; see also *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 771 (D. Del. 1979) (defendant argued that differential rate was unintentional); *cf.* *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 988 n.16 (7th Cir. 1980) ("Anticompetitive effects from this portion of the price squeeze, absent evidence that the utility deliberately depressed its retail rates, must be attributed to the state regulatory commissions and not to the utility."), *cert. denied*, 449 U.S. 1096 (1981).

⁴⁸ See, e.g., *United States v. Griffith*, 334 U.S. 100, 105 (1948) ("Specific intent . . . is necessary only where the acts fall short of the results condemned by the [Sherman] Act.").

antitrust laws do not authorize the courts to take into account countervailing policy considerations in determining whether a violation has occurred; unlike the Federal Power Act, the only policy embodied by the Sherman Act is one of ensuring vigorous competition.⁴⁹ Furthermore, if the court finds an antitrust violation, it is not constrained to setting a rate within the "zone of reasonableness"; in general, a court may order relief which "represents a reasonable method of eliminating the consequences of the illegal conduct,"⁵⁰ even if that relief may harm or adversely affect the party whose conduct is being regulated.⁵¹

C. The Jurisdictional Conflict

The preceding discussion indicates three fundamental differences between the regulatory and judicial responses to a price squeeze. First, the FERC determines whether a price squeeze is unlawful according to substantive legal standards unlike those employed by an antitrust court. For the FERC, a wholesale rate is reasonable if it is justified by the utility's revenue requirements. Even if the rate discriminates against retailer utilities, the FERC may still approve it in light of countervailing considerations of public policy. In contrast, the antitrust inquiry concentrates on intent—if the utility had monopoly power and intended to use it by setting wholesale rates in such a way as to injure its retail competitors, the rate is illegal. The utility's revenue requirements are relevant to but not determinative of the existence of anticompetitive intent, and countervailing policy considerations might not be rele-

⁴⁹ See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."). *But cf.* *Silver v. New York Stock Exch.*, 373 U.S. 341, 359-60 (1963) (statutory scheme of the Securities Exchange Act does not immunize exchange rules from antitrust laws; its acknowledgment of the value of exchange rules that restrict entry must be intermeshed with the goals of the Sherman Act); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274-75 (2d Cir. 1979) (legally acquired monopolies which do not exercise their power to increase their control of the market do not violate the Sherman Act), *cert. denied*, 444 U.S. 1093 (1980). Even though some monopoly power may be approved, courts do not do so from policy considerations; rather they do so because the monopoly has been achieved in compliance with the antitrust laws.

⁵⁰ *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 698 (1978).

⁵¹ See, e.g., *United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 326 (1961) (courts are "required[] to decree relief effective to redress the violations, whatever the adverse effect . . . on private interests"); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948) ("the policy of the antitrust laws is not . . . conditioned by the convenience of those whose conduct is regulated).

vant at all.⁵²

Second, even if the FERC and an antitrust court agree that a wholesale rate is illegal, each has different powers to remedy the offensive rate. Both the FERC and an antitrust court have the power to order a new wholesale rate, but the FERC can only order rates within the "zone of reasonableness." A court may go below that range. And an antitrust court, unlike the FERC, is empowered to award damages to the victims of a price squeeze.

Finally, institutional differences between the FERC and a federal district court may lead to an important functional difference in their approaches to a price squeeze. The identification of a price squeeze is made difficult by the complexity of rate regulation, especially in ascertaining the defendant's costs of producing wholesale electricity.⁵³ The FERC's experience in rate setting generally makes its determination of costs more accurate than that of the district court hearing the antitrust case.

These differences between the FERC's and the courts' substantive, remedial, and functional powers suggest that the ultimate legality of any given wholesale rate may depend upon whether the case is heard by the FERC or the courts.⁵⁴ When a retail utility seeks to challenge a wholesale rate proposed by a vertically integrated utility as giving rise to a price squeeze, it will have the choice of proceeding before the FERC in the rate-approval process, before the district court in a suit alleging antitrust violations, or in both forums. And because of the above-mentioned differences between the courts' and the FERC's powers, the outcome of the antitrust proceeding may conflict with the outcome of past, present, or future proceedings before the FERC, and vice versa. This potential for conflicting outcomes thus requires that courts formulate a consistent approach to the problem of the dual jurisdiction of the federal courts and the FERC over price-squeeze cases.

⁵² In light of these different considerations in the FERC's analysis, one court has held that the FERC's determination of a price-squeeze challenge was not *res judicata* in the court's determination of the antitrust action because "the ultimate issues before FERC were not identical to the ultimate issues here." *Borough of Lansdale v. Philadelphia Elec. Co.*, 517 F. Supp. 218, 222 (E.D. Pa. 1981).

⁵³ See *supra* notes 22-25 and accompanying text.

⁵⁴ The jurisdictional conflict between the FERC and the district court has arisen in only one case before the Supreme Court: *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). However, the Court declined to resolve the conflict because an FPC order requiring long-term interconnection by the utility was entered shortly after the district court issued its decree enjoining the utility from refusing to sell electric power at wholesale to municipal utilities within its service area. *Id.* at 375-77. This action avoided any conflict between the courts and the FERC.

III. CURRENT JUDICIAL RESPONSES TO DUAL JURISDICTION

Recent judicial responses to dual jurisdiction in price-squeeze cases alleging federal antitrust violations have varied significantly.⁵⁵ Courts have differed primarily in two main areas: if and when a court should allow the FERC primary jurisdiction in a price-squeeze case, and the extent to which the existence of the FERC alters a court's remedial powers. Several courts have invoked the doctrine of primary jurisdiction and remanded the antitrust dispute to the FERC for an initial determination of the validity of the challenged rate.⁵⁶ Other courts have decided that the FERC can contribute nothing to an antitrust action and have claimed complete control over the dispute.⁵⁷ Several courts have also determined that regardless of which forum has jurisdiction over a price squeeze, the FERC's authority over wholesale rates and its limited ability to remedy price squeezes place substantive limitations on the remedial powers of an antitrust court.⁵⁸ These different responses are discussed in detail in this section.

A. Primary Jurisdiction in the Price Squeeze Context

The doctrine of primary jurisdiction regulates concurrent judicial and administrative jurisdiction.⁵⁹ When invoked by a court, the doctrine allows legal or factual issues that are justiciable before both an administrative agency and a court to be referred to the agency for prior consideration. The purposes of the doctrine are to promote uniformity in regulatory programs and utilization of agency expertise.⁶⁰ The doctrine must remain flexible in order to

⁵⁵ See 16e JULIAN O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 44A.01[1], at 44A-5 to -10 (1984).

⁵⁶ See *infra* notes 62-65 and accompanying text.

⁵⁷ See *infra* notes 66-68 and accompanying text.

⁵⁸ See *infra* notes 69-87 and accompanying text.

⁵⁹ See generally 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22:1-22:11 (2d ed. 1983); 16e J. VON KALINOWSKI, *supra* note 55, §§ 44A.01[1], 44A.03[1]. The doctrine of primary jurisdiction originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The Supreme Court held that the Interstate Commerce Commission was the sole agency "vested with power originally to entertain proceedings" to determine the reasonableness of carrier rates. *Id.* at 448. Although *Abilene Cotton* was grounded in concern for nationally uniform regulations, *id.* at 440-41, the primary jurisdiction doctrine was later expanded in *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), and *United States v. Western Pac. Ry.*, 352 U.S. 59 (1956), to apply when administrative expertise was required.

⁶⁰ The agency expertise rationale recognizes that an administrative body's special competence can be of use to a court. Under this rationale, primary jurisdiction should be invoked where "the limited functions of review by the judiciary [would be] more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underly-

attain these goals; one consequence of this flexibility, however, is that the guidelines for applying the doctrine are not clearly delineated.

Primary jurisdiction does not assign final jurisdiction between courts and agencies, but is used only to set an appropriate *time* for judicial consideration. A court that invokes primary jurisdiction does not necessarily refrain from deciding the case before it; it may only be postponing its action on the case until after the agency has made a determination.⁶¹ Thus, a court's exercise of primary jurisdiction in a price-squeeze case may delay its consideration of a case, but it does not divest the court of its jurisdiction—the court retains control over the resolution of the dispute. The agency's action, however, can greatly simplify or render unnecessary further judicial action.

The district courts that have invoked the doctrine of primary jurisdiction in price-squeeze cases have done so principally to take advantage of the FERC's institutional expertise in determining certain factual issues.⁶² For example, one court which invoked primary jurisdiction stated that review of the utility's cost structure was "well within the experience of the FERC and beyond the normal expertise of the court."⁶³ It also noted that the FERC's determination of the reasonableness of the challenged rate would aid the court in its determination of anticompetitive intent.⁶⁴ In addition, the court reasoned that the use of primary jurisdiction would avoid a needless duplication of effort.⁶⁵

Some courts, however, have held that the primary jurisdiction doctrine should not be applied in price-squeeze cases. In *City of*

ing legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952); see also *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 307 (1973) (primary jurisdiction should be invoked when a "specialized agency" will make "determination[s] of fact" that "will be of great help to the antitrust court").

⁶¹ See 16e J. VON KALINOWSKI, *supra* note 55, § 44A.01[1], at 44A-10; KENNETH C. DAVIS, *ADMINISTRATIVE LAW TEXT* § 19.01, at 373 (3d ed. 1972); Fox, *The Antitrust Laws and Regulated Industries: A Reappraisal of the Role of the Primary Jurisdiction Doctrine*, 2 MEM. ST. U.L. REV. 279, 295-96 (1972).

⁶² See, e.g., *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1350-52 (W.D. Pa. 1979); cf. *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 772 (D. Del. 1979) (acknowledging that primary jurisdiction would be advisable, but declining to invoke it at the time because the FPC had indicated that it would not investigate a claim based on a price squeeze "too far back in history").

⁶³ *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1352 (W.D. Pa. 1979).

⁶⁴ *Id.* at 1351.

⁶⁵ *Id.* at 1352.

Mishawaka v. Indiana & Michigan Electric Co. (Mishawaka I),⁶⁶ for example, the Seventh Circuit refused to apply the primary jurisdiction doctrine because the court felt capable of determining antitrust issues without the FERC's views on the reasonableness of the defendant's rates. The court reasoned that the statutory considerations unique to the FERC's determination of reasonableness made the FERC's expertise irrelevant to the antitrust allegation.⁶⁷ Moreover, because the FERC would never be able to provide full relief for the plaintiff's antitrust claims, the court concluded that invoking primary jurisdiction would be a futile method of establishing a uniform regulation of price squeezes.⁶⁸ Because the court believed primary jurisdiction would enhance neither expertise nor uniformity, it retained complete jurisdiction over the dispute.

The jurisdictional overlap in price-squeeze cases thus presents an opportunity to apply the doctrine of primary jurisdiction. A court is more likely to invoke primary jurisdiction when it concludes that the FERC's expertise will help determine the merits of the antitrust challenge and promote a uniform national regulatory policy. However, courts have not exercised this option consistently because they disagree about whether the traditional purposes of primary jurisdiction apply in the price-squeeze context.

B. Remedial Powers of the District Courts

Courts also disagree about the proper scope of their remedial powers in the price-squeeze context. Although the antitrust laws give a federal district court broad injunctive powers to remedy an antitrust violation,⁶⁹ not all courts agree that these powers should be exercised to their fullest extent in a price-squeeze case. Clearly, after the exercise of primary jurisdiction an antitrust court's remedial injunctive powers are less likely to be needed, since the FERC may have ordered a wholesale rate that comports with antitrust standards. In such a case, a court may be wary of ordering relief which conflicts with the FERC's decision. But where the FERC's order does not bring the rate within antitrust standards, or where the antitrust laws would provide additional injunctive relief beyond the FERC's powers, there is less reason for a court to defer to the FERC's judgment and refrain from ordering different or addi-

⁶⁶ 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

⁶⁷ *Id.* at 1324.

⁶⁸ *Id.* at 1323.

⁶⁹ 15 U.S.C. § 26 (1982) provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief" for an antitrust violation.

tional relief. Nevertheless, some courts have hesitated to wield their full remedial powers in price-squeeze cases.⁷⁰ In general, courts have adopted four different approaches to the question of what remedial powers they should exercise in light of the FERC's parallel jurisdiction over price-squeeze cases.

First, because the Supreme Court has held that the Federal Power Act does not preclude the operation of the antitrust laws,⁷¹ most courts considering price-squeeze allegations have assumed that they may exercise their remedial powers broadly despite the FERC's concurrent jurisdiction. They conclude that they have the power to enjoin a defendant from charging a filed rate, order a defendant to file a lower wholesale rate, or prohibit the filing of a higher rate.⁷² These courts have also rejected the argument that the FERC's jurisdiction in price-squeeze cases is "exclusive." Utilities charged with creating a price squeeze in violation of the antitrust laws have argued that the existence of the FERC's power over wholesale rates completely divests a court of any power to hear a price-squeeze allegation.⁷³ The courts have reasoned, how-

⁷⁰ See, e.g., *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 990 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (*Mishawaka II*); *Mishawaka I*, 560 F.2d at 1323-24; *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769 (D. Del. 1979).

⁷¹ See *supra* note 39 and accompanying text.

⁷² See, e.g., *Mishawaka II*, 616 F.2d at 990-92 & n.18 (allowing limited injunctive relief); *Mishawaka I*, 560 F.2d at 1323 (court may order defendant to file a new wholesale rate application).

⁷³ This is an application of the doctrine of "exclusive jurisdiction." Exclusive jurisdiction provides immunity from the antitrust laws when a pervasive regulatory scheme indicates that Congress intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. See, e.g., *Gordon v. New York Stock Exch.*, 422 U.S. 659, 691 (1975) (SEC-established stockbroker commissions); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 389 (1973) (aviation collective agreements under the CAB); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922) (interstate carrier rates under the ICC). Most courts have rejected the application of the doctrine to price-squeeze cases because the FERC's limited remedial powers, see *supra* notes 26-34 and accompanying text, do not indicate congressional intent to exclude other means of regulation. See, e.g., *Mishawaka I*, 560 F.2d at 1321; *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1350 (W.D. Pa. 1979).

Although exclusive jurisdiction is inappropriate in price-squeeze cases, the courts' rationale for rejecting it is not convincing. It equates pervasiveness of rate regulation with the possession of remedial powers equal to those given by the antitrust laws. Indeed, the fact that Congress extensively regulated an area but provided only limited remedies could argue *in favor of* exclusive jurisdiction. Perhaps Congress intended to replace antitrust enforcement with regulation precisely because antitrust remedies were too broad. *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 771 (D. Del. 1979).

A better criterion for determining the exclusivity of the FERC's jurisdiction is whether the court's exercise of antitrust jurisdiction would disrupt the "work which Congress contemplated the [FERC] would do." *Id.* at 769. The FERC operates primarily to assure an effective and fair system of supplying wholesale power. This leaves the antitrust laws as the

ever, that the FERC would completely preempt the court's jurisdiction only if their remedial powers were identical; because Congress imposed limitations on the FERC's remedies that it did not impose on antitrust courts, the FERC's jurisdiction is not exclusive.⁷⁴ By adopting this line of reasoning, these courts are expressly claiming to possess power to order relief the FERC cannot—such as the power to set a rate outside the zone of reasonableness.⁷⁵

In a second approach, a court's willingness to impose different remedies from those ordered by the FERC depends upon the court's reason for invoking the doctrine of primary jurisdiction. Some courts defer to an administrative agency's jurisdiction merely as a "preliminary resort for ascertaining and interpreting the circumstances underlying legal issues."⁷⁶ In an antitrust action, this view of primary jurisdiction envisions the FERC's decision as merely an expert advisory opinion that does not affect the court's remedial powers.⁷⁷ On the other hand, primary jurisdiction is also

primary mechanism of protecting against anticompetitive conduct. Accordingly, an antitrust court's consideration of a price-squeeze allegation would not infringe directly on the FERC's regulatory jurisdiction. This view recognizes that the FERC might find a rate to be reasonable in light of countervailing policy considerations, but that a court, which does not make such considerations, might still find that the antitrust laws have been violated. Because the courts and the FERC are required to consider different factors in evaluating a price squeeze, invoking the doctrine of exclusive jurisdiction to resolve the dual jurisdictional question is inappropriate.

Another related approach is the filed-rate doctrine, formulated by the Supreme Court in *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). The doctrine states that a plaintiff cannot "litigate in a judicial forum [his] general right to a reasonable rate" when the determination of reasonableness has been given to an administrative agency. *Id.* at 251. The filed-rate doctrine is also inapplicable in the price-squeeze context. An antitrust challenge to a price squeeze does not involve a per se challenge to the FERC's reasonableness determination; it is not an attempt to relitigate a rate-setting which is committed to agency discretion. See *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

⁷⁴ See *City of Kirkwood*, 671 F.2d at 1178; *Mishawaka I*, 560 F.2d at 1321; *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1350 (W.D. Pa. 1979).

⁷⁵ See, e.g., *City of Kirkwood*, 671 F.2d at 1178.

⁷⁶ *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

⁷⁷ See, e.g., *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88-89 (1962) (judicial remedy survives the exercise of primary jurisdiction); *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956) (primary jurisdiction suspends "a claim . . . originally cognizable in the courts pending referral . . . to the administrative body for its views"); Fox, *supra* note 61, at 295-96 (primary jurisdiction refers to the timing of judicial resolution, rather than the court's power to consider a matter); Lopatka, *supra* note 6, at 607 (same); *cf. California v. FPC*, 369 U.S. 482, 489 (1962) (administrative determination carries only "momentum" into antitrust litigation); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1055 (1964) ("[J]urisdiction should be retained . . . if dismissal would prejudice one of the parties.").

thought by some to limit the court's power to impose remedies.⁷⁸ If the invocation of primary jurisdiction is characterized as a means of achieving regulatory uniformity, the court should have only the power to review the agency finding to determine whether it is supported by "substantial evidence."⁷⁹ Under this view, it would be inconsistent with the goal of uniformity for the court to have the power to consider additional remedies that the agency lacked statutory authority to implement in the first place. In the price-squeeze context, this approach would require that the court's antitrust remedial power not exceed the FERC's remedial power under the Federal Power Act.

Third, even if the court does not invoke primary jurisdiction, it might refrain from ordering certain kinds of relief for fear of interfering with the FERC's control over rates. In *City of Mishawaka v. American Electric Power Co. (Mishawaka II)*,⁸⁰ for example, the Seventh Circuit vacated a district court's injunction that would have lowered a utility's wholesale rates to the same level as its retail rates. The appellate court refused to apply the doctrine of primary jurisdiction, concluding that an antitrust violation could justify "temporary control of the wholesale rates by [a] court."⁸¹

⁷⁸ See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353-54 (1963) (although primary jurisdiction does not oust the court's jurisdiction, it may sometimes result in "channel[ing] judicial enforcement of antitrust policy into appellate review of the agency's decision"); *Far East Conference v. United States*, 342 U.S. 570, 578 (1952) (Douglas, J., dissenting) (court should not invoke primary jurisdiction since that leaves the plaintiff with only the remedy of the Federal Maritime Board); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907) (when primary jurisdiction applies, the plaintiff's independent right to maintain the action before the court is confined to such issues as can be "redressed by courts without previous action by the Commission"); cf. Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812, 813 (1967) (primary jurisdiction is a method by which the court allocates "the initial power, hence often the principal power, to decide a particular issue material to the court case").

⁷⁹ The Federal Power Act provides for review by the court of appeals of any final decision by the FERC. 16 U.S.C. § 825l(b) (1982) ("Any party to a proceeding under this chapter aggrieved by an order issued by the Commission . . . may obtain a review of such order in the United States court of appeals . . ."). This power of review allows for reversal of a FERC final order if the order is not supported by "substantial evidence." *Id.* Given this statutory provision, if the district court's status after invoking primary jurisdiction is that of a reviewing court, it also will be limited to substantial evidence review. The reviewing district court which invoked primary jurisdiction would then be powerless to modify any rate which met the FERC's statutory standards—even if the rate violated the antitrust laws—so long as the FERC's determination was supported by substantial evidence. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir.), *cert. denied*, 105 S. Ct. 293 (1984).

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

⁸¹ *Id.* at 991-92.

However, because "[t]he courts should not be in the rate fixing business," it would not award injunctive relief that would preempt the FERC's jurisdiction.⁸² In another case, a court limited its remedy to an injunction prohibiting the defendant utilities from initiating new anticompetitive rate structures.⁸³ The court refused to grant damages because it thought they would disrupt the FERC's authority to set rates based on the public interest.⁸⁴

Finally, some courts have seen restrictions on agency remedies as though they were limits on a court's power to remedy antitrust violations. As was noted above, the FERC cannot, consistently with the Federal Power Act and the fifth amendment, set a rate below the "zone of reasonableness."⁸⁵ In light of this, one court has stated that "[e]ven the district court . . . may not have power to set a wholesale rate below the level [at] which the FERC can set the rate."⁸⁶ Likewise, one commentator has argued that a court's power to review a FERC order does not extend to ordering the FERC to set an unreasonable rate.⁸⁷

⁸² *Id.* at 990.

⁸³ *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979).

⁸⁴ *Id.* at 770. The *Delmarva Power* court relied on the Supreme Court's decision in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), which involved a claim that common carriers had conspired to fix shipping rates. See *Delmarva Power*, 467 F. Supp. at 768. The Court in *Pennsylvania R.R.* allowed an injunction against the defendant's anticompetitive manner of initiating rates, but held that a recovery of damages would be inconsistent with the regulatory scheme established by Congress in the Interstate Commerce Commission. *Pennsylvania R.R.*, 324 U.S. at 455.

Pennsylvania R.R. is distinguishable from a price-squeeze case because the Interstate Commerce Act establishes a more pervasive regulatory scheme than the Federal Power Act. Unlike the Federal Power Act, the Interstate Commerce Act empowers the ICC to grant reparations. 49 U.S.C. § 10,707(d)(1) (1982). While the denial of broader remedial powers to agencies such as the FERC does not necessarily mean that the power granted was not intended to be the exclusive remedy, see *supra* note 73 and accompanying text, the grant of broad remedial powers which mirror a court's antitrust powers *does* suggest that the remedy should be exclusive. The ICC's power thus indicates congressional intent that the reparations remedy be exclusive of an antitrust court's damage remedy. Although the *Delmarva Power* court recognized this distinction, it did not find it sufficiently compelling. 467 F. Supp. at 770.

Other courts considering a price squeeze have not been troubled by the awarding of damages in addition to injunctive relief. See, e.g., *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178-79 (8th Cir. 1982), *cert. denied*, 459 U.S. 1070 (1983); *Mishawaka II*, 616 F.2d at 986-90; *Mishawaka I*, 560 F.2d at 1323-24; *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1354 (W.D. Pa. 1979).

⁸⁵ See *supra* notes 30-34 and accompanying text.

⁸⁶ *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1350 n.2 (W.D. Pa. 1979).

⁸⁷ Lopatka, *supra* note 6, at 600.

IV. PRIMARY JURISDICTION AND REMEDIES: A PROPOSAL

As the preceding discussion shows, there is considerable confusion among the courts regarding how a court should respond to the jurisdictional and remedial problems associated with the dual jurisdiction of the FERC and the courts over price-squeeze cases. A proper resolution of this confusion requires that courts recognize some peculiar aspects of the price-squeeze situation. On the one hand, antitrust courts apply substantive legal standards and remedial powers that differ substantially from those of the FERC. On the other hand, the FERC possesses institutional expertise superior to that of a court. Jurisdiction and remedial power should be allocated between the FERC and the courts so as to further the purposes behind each decisionmaker's powers and to maximize accuracy and uniformity in their decisionmaking.

These considerations favor a limited use of the doctrine of primary jurisdiction. A district court should defer to the superior expertise of the FERC to determine when price discrimination exists. Yet the court should not be bound by the FERC's determination of reasonableness since that determination is based on considerations of public policy inapplicable to an antitrust claim. Nor should the court's remedial powers be limited after the exercise of primary jurisdiction. If an antitrust violation requires the court to set a new rate, it need not be confined to the FERC's zone of reasonableness, but should determine independently what rate is justifiable.

A. Applying Primary Jurisdiction in Price-Squeeze Cases

There are several reasons why a district court should invoke the doctrine of primary jurisdiction to refer certain factual determinations to the FERC. First, invoking the FERC's primary jurisdiction will enable courts to improve the accuracy of their decisions in price-squeeze cases. A court will generally find the FERC's expertise crucial because, "[s]imply put, a court may not be able to determine whether a price squeeze *exists* without expert assistance."⁸⁸ To determine whether a wholesale rate is justifiable requires complex and technical cost-of-service determinations: "The cost of electricity . . . varies on the basis of a myriad of factors, [which the] FERC is infinitely more adept at assessing . . . than a court."⁸⁹ In this context, the FERC's expertise is essential because

⁸⁸ *Id.* at 607 (emphasis in original).

⁸⁹ *Id.* at 608 (footnote omitted); see *supra* notes 22-25 and accompanying text; see also

its determinations about price discrimination will bear directly upon the issue of the defendant's anticompetitive intent.⁹⁰ Use of the FERC will therefore further the accurate resolution of the antitrust question before the court.⁹¹

Second, application of primary jurisdiction in price-squeeze cases will also result in more uniform antitrust adjudication. The complex factual situations of price-squeeze cases can readily lead courts to treat similar situations differently.⁹² Antitrust proceedings involving allegations of a price squeeze by a utility would become more uniform if the existence of price discrimination—an essential part of an antitrust allegation—were determined in a standardized manner by a single, expert body.

Moreover, courts have misunderstood the nature of primary jurisdiction insofar as they think limits on the FERC's powers reduce their ability to refer to the FERC particular factual determinations relevant to the antitrust case.⁹³ Primary jurisdiction serves only to allocate jurisdictional priority; a court invoking primary jurisdiction retains complete jurisdiction over the case at hand and should accept, subject to review for error, the findings of the administrative agency only on those issues which it has asked the agency to decide.⁹⁴ The scope of the jurisdiction the court retains will therefore depend on the nature of the issue it referred to the

City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 769 (D. Del. 1979) (stating that the Federal Power Act contemplates the FERC's "expert eye" to oversee wholesale rates).

⁹⁰ See, e.g., Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343, 1351 (W.D. Pa. 1979).

⁹¹ The emphasis placed on administrative expertise here is not contrary to the Supreme Court's holding in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), that primary jurisdiction should not be invoked if the administrative expertise applies to a wholly separate issue, *id.* at 305-06. In *Nader*, an action against an airline for fraudulent misrepresentation and overbooking of flights did not fall under the CAB's primary jurisdiction because its statutory power to abate deceptive practices was not synonymous with power over common law fraud and misrepresentation. The issue in *Nader*, unlike the price discrimination issue, was not one in which an accurate decision "could be facilitated by an informed evaluation of the economics or technology of the regulated industry." *Id.* at 305; cf. Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility Industry*, 54 ST. JOHNS L. REV. 103, 125 (1979) (arguing that the FERC has no special expertise which is relevant to determining whether a rate is appropriate under the antitrust laws).

⁹² See, e.g., *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 934 (2d Cir. 1981) (construing a utility's wholesale rate as creating a price squeeze), *rev'g* *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040, 1055-57 (D. Conn. 1980) (construing defendant's action as nonmonopolistic).

⁹³ See *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1351 (W.D. Pa. 1979) ("The inadequacy of agency remedial powers does not preclude the application of primary jurisdiction in an antitrust action.").

⁹⁴ See 16e J. VON KALINOWSKI, *supra* note 55, § 44A.03[1].

administrative agency for decision. If the court invokes primary jurisdiction for the sole purpose of obtaining a specific factual determination from the agency, it need only accept those findings regardless of the outcome of the agency proceeding. The court may retain jurisdiction to provide any justified antitrust remedy even if it is unavailable to the FERC.

Given these advantages, it is unclear why some courts have resisted using the doctrine of primary jurisdiction in price-squeeze cases. While courts have emphasized the differences between the legal standards and remedies relevant to a price squeeze in the regulatory and antitrust contexts, they largely have ignored an important similarity: the determination of price discrimination. As this determination is the first step in both contexts, the courts should seek to take advantage of the FERC's expertise on that issue.

The primary jurisdiction of the FERC should thus be invoked in price-squeeze cases within the following guidelines. When an antitrust challenge to a price squeeze is filed, the court should defer to the FERC for a period of time long enough to allow the FERC to initiate (if necessary) and complete its proceedings. That period should not, however, be so long as to allow severe financial injury to the plaintiff.⁹⁵ When FERC proceedings are complete, the antitrust court should accept the FERC's findings about price discrimination, subject only to "substantial evidence" review. Those findings may also be used by the court in evaluating the defendant's intent. However, a court should not be bound by the FERC's determination as to whether a rate is "unduly discriminatory" because the FERC's determination of reasonableness may be affected by consideration of countervailing public policies that are foreign to the court's antitrust inquiry.

B. A Court's Remedial Powers

1. *Primary Jurisdiction and Remedial Powers.* Judging from the various limitations that courts have imposed on their remedial

⁹⁵ It may take the FERC years to complete its proceedings. See, e.g., *Cities of Bethany v. FERC*, 727 F.2d 1131, 1134-35 (D.C. Cir.) (3 years), *cert. denied*, 105 S. Ct. 293 (1984); *Kansas Cities v. FERC*, 723 F.2d 82, 83-84 (D.C. Cir. 1983) (2-½ years); *Mishawaka I*, 560 F.2d at 1316-17 (3 years). Because some small utilities might be virtually destroyed by the financial drain of a price squeeze continuing that long, antitrust relief should be available if the FERC proceedings extend beyond the plaintiff's ability to endure. This approach was adopted in *Monsanto Co. v. United Gas Pipe Line, Co.*, 360 F. Supp. 1054 (D.D.C. 1973), *aff'd*, 489 F.2d 1272 (D.C. Cir. 1974). There the court recognized that a delay could be materially harmful to the plaintiff and decreed that if FPC hearings were not completed by an established date, the antitrust suit would resume. *Id.* at 1057.

powers in price-squeeze cases, invoking primary jurisdiction is apparently thought to restrict a court's ability to exercise those powers.⁹⁶ Some courts limit their remedial powers to correspond with the limits upon the FERC's powers. Others conclude that they must uphold a finding of the agency unless it is not supported by substantial evidence.⁹⁷ Still other courts deem themselves bound by the FERC's determination of what constitutes a confiscatory rate and will not exert their powers to lower the utility's rate below the lower bound of the zone of reasonableness.⁹⁸

Under the approach to primary jurisdiction just outlined, however, a court's power to remedy antitrust violations is not impaired. A court can invoke primary jurisdiction simply to take advantage of the FERC's expertise in determining the existence of price discrimination, and need not inquire whether the FERC deems the rates to be reasonable. Accordingly, in deciding whether the antitrust laws were violated the court would be bound by the FERC's determinations as to price discrimination. It would only be free to reject those findings through its power of review. The broader question of whether the antitrust laws have been violated, however, is wholly distinct from whether the FERC deemed a wholesale rate to be reasonable in light of countervailing policy considerations. Thus, if the court limits its deferral to the primary jurisdiction of the FERC to a determination of price discrimination, the FERC's decisions as to other matters do not limit the court's power to remedy an antitrust violation if it finds one.⁹⁹

In addition, referring a case to the FERC only for a determination of price discrimination will enable a court to enforce the antitrust laws without directly interfering in the regulatory authority of the FERC. A proposed wholesale rate may be reasonable

⁹⁶ See *supra* notes 78-84 and accompanying text.

⁹⁷ Compare, *e.g.*, cases cited *supra* note 77 with cases cited *supra* note 78.

⁹⁸ See *supra* notes 85-87 and accompanying text.

⁹⁹ The only court considering an antitrust challenge to a price squeeze that has expressly ruled on the scope of its review after invoking primary jurisdiction held that its powers were unchanged. *Borough of Ellwood City v. Pennsylvania Power Co.*, 570 F. Supp. 553, 559-60 (W.D. Pa. 1983).

It is apparent that other courts considering primary jurisdiction in price-squeeze cases have also assumed, without clarifying their reasoning, that their ability to decide the antitrust issue is unaffected by FERC's primary jurisdiction. See, *e.g.*, *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982); *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388 (N.D. Ill., Jan. 16, 1984) (available Nov. 20, 1985, on LEXIS, Genfed library, Dist file) (a court can "merely note" the FERC's determination as "independent confirmation" of facts also produced in the district court); *cf.* *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1352 (W.D. Pa. 1979) (noting that a FERC reasonableness finding "could be determinative of elements of the antitrust claim").

under the FERC's standards yet still violate the antitrust laws. A court's exercise of its remedial powers after referral is only an initial application of the antitrust laws, not a reevaluation of the FERC's determination of the rate's reasonableness. At most the court might prohibit a utility from charging a FERC-approved rate or order a defendant to file a lower wholesale rate; but this would not change the way in which the FERC sets rates according to criteria unrelated to the antitrust issue.¹⁰⁰ While the court's action would change the actual rate set by the FERC, this would only incidentally affect the FERC's overall approach to energy policy. Since a court's exercise of its remedial powers after invoking primary jurisdiction would interfere with the FERC's authority only to the extent necessary to enforce the antitrust laws, these remedial powers should not be presumed to be repealed.

As the Supreme Court recognized in *Otter Tail Power Co. v. United States*,¹⁰¹ some tension between the courts and the FERC is inevitable.¹⁰² Yet this tension can be eased by applying the doctrine of primary jurisdiction in a way that accommodates the FERC's expertise without eviscerating enforcement of the antitrust laws. As a general rule of statutory construction, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible."¹⁰³ This is particularly important where, as in the conflict between the antitrust laws and the Federal Power Act, the two statutes have different goals. Recognizing this, the primary jurisdiction approach suggested here helps to give effect to both statutes, while at the same time increasing the accuracy and uniformity of factual determinations in price-squeeze cases.

2. *The Zone of Reasonableness and Remedial Powers.* After the court has invoked the doctrine of primary jurisdiction, the FERC may refuse to set a wholesale rate low enough to eliminate what it has found to be undue price discrimination because it deems the necessary rate to be constitutionally confiscatory and thus outside the zone of reasonableness. Some courts and commentators have suggested that, whatever the binding nature of the FERC's other determinations, this decision would bind the court in a price-squeeze case.¹⁰⁴ According to this view, whether a utility

¹⁰⁰ See, e.g., *Mishawaka I*, 560 F.2d at 1323 (the court's ordering of defendant to file new wholesale rates after antitrust violation was found not to interfere with the FPC).

¹⁰¹ 410 U.S. 366 (1973).

¹⁰² *Id.* at 373-74.

¹⁰³ *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

¹⁰⁴ See *supra* notes 85-87 and accompanying text.

will earn a reasonable return at a particular rate is a question of fact within the statutory expertise of the FERC; if courts were to set wholesale rates below the FERC's zone of reasonableness it would disrupt the entire FERC rate-setting process.¹⁰⁵

This analysis is incorrect because it misunderstands the flexible nature of primary jurisdiction and the autonomy of the courts' antitrust jurisdiction in the price-squeeze context. Limited referral of a price-squeeze case to the FERC simply will have no effect on the court's power to remedy antitrust violations. If the court turns to the FERC only for a factual determination of the existence of price discrimination, it is not bound by the rate approved or set by the FERC. The countervailing policy considerations which may lead the FERC to find some prices not unduly discriminatory may also affect its determination of which rates are confiscatory. These policy judgments are foreign to the antitrust laws. The court need not exercise primary jurisdiction in order to receive such findings, so it is not bound by them. In addition, the court, unlike the FERC, is not constrained to setting rates within the zone of reasonableness; the court may order rates below that zone if necessary to eliminate the antitrust violation. Thus, when the court finds an illegal price squeeze after the FERC's factual determination, its remedial powers are not affected by the FERC's finding that a particular rate is confiscatory.¹⁰⁶

¹⁰⁵ See Lopatka, *supra* note 6, at 600.

¹⁰⁶ A district court also is not limited in its power to review a FERC determination that a certain rate is confiscatory. Federal courts are not bound by an agency's determination with regard to facts necessary to the adjudication of constitutional rights. See *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38, 51-52 (1936); *Crowell v. Benson*, 285 U.S. 22, 56-57, 64 (1932) (separate review by the courts preserves the judiciary's role as an independent arbiter of constitutional questions); cf. *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 450 n.7 (1977) (in determining private rights, "fact finding by an administrative agency [is] only as an adjunct to an Art. III court"). The determination of what constitutes a confiscatory rate is such a question. See *supra* notes 31-34 and accompanying text. One who challenges the constitutionality of a wholesale rate is entitled to a "fair opportunity to [submit his case] to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920). While this doctrine has been applied to set aside rates that an agency has found not to be confiscatory, see, e.g., *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 401 (1938); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 695 (1923), it also means that a court cannot be bound by an agency determination that confiscation has occurred. This is not to say, however, that the courts' power to review constitutional facts de novo requires attaching no weight to the agency's determination. The determination of what is confiscatory will often rest on primary findings of fact within the FERC's area of expertise. See *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) (courts will not interfere without "clear showing" that agency has incorrectly set confiscatory rate); *St. Joseph Stock Yard*, 298 U.S. at 53-54 (only a "clear case" justifies setting aside an agency determination of confiscation).

Nor are there prudential reasons for the court to refrain from setting rates below the zone of reasonableness. After invoking primary jurisdiction, the court will become involved in rate-setting only to the extent necessary to remedy the antitrust violation, by such means as ordering the defendant to file a lower rate or prohibiting the filing of a higher rate. The court would not order the FERC itself to violate its directive by setting what it views as an unreasonable rate or dictate to the agency the policies it should follow in setting wholesale power rates. The court's response to an antitrust violation therefore would not involve undue interference with the FERC's procedures and policies, despite its effect on the outcome of the rate-setting process.

CONCLUSION

Federal courts have differing views of their role in an antitrust challenge to an alleged price squeeze among competing utility companies. They disagree about the extent to which the FERC's concurrent authority over price-squeeze cases affects both a court's jurisdiction over an antitrust case and its powers to remedy violations of the antitrust laws. Proper allocation of jurisdiction between the court and the agency is extremely important in price-squeeze cases because it can affect the accuracy and uniformity of the court's factual findings, particularly if the court can draw upon the FERC's technical expertise on certain issues which are essential to the court's antitrust inquiry. And, proper application of the court's remedial powers is central to ensuring enforcement of the antitrust laws without interfering unduly with the FERC's regulatory role in the electric power industry.

To satisfy both of these concerns, this comment suggests that a court use the doctrine of primary jurisdiction in price-squeeze cases to refer to the FERC the factual determination of the existence of price discrimination. After this referral, courts need only accept as binding the FERC's findings with regard to price discrimination. The FERC's determination of whether a wholesale rate is unduly discriminatory, unreasonable, or confiscatory need not be followed by the court. This leaves the court free to consider on its own any other issues relating to the alleged antitrust violation and to remedy any violation by using the full scope of its remedial powers. Such a scheme will further the substantive pur-

poses of both the Federal Power Act and the antitrust laws while improving uniformity and accuracy in the determination of whether price discrimination exists.

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