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I. Abstract

This Comment traces the development of the administrative law doctrine of primary jurisdiction from its inception in early twentieth century interstate commerce cases through the so-called "inversion" in 1962 to its application to several antitrust cases in 1973. In general terms the doctrine of primary jurisdiction states that the courts will not determine a question within the jurisdiction of an administrative tribunal prior to a decision by that tribunal. This doctrine is applied when the expertise of the agency is desired or when a uniformity of ruling is important. However a corollary to the doctrine has developed recently. The courts retain primary jurisdiction in antitrust matters when Congress has not specifically legislated to the contrary. The corollary is applied since neither the expertise of the agency nor a uniformity of ruling in the rate-making sense is essential in an antitrust case.

II. Statement of the Doctrine: Early Cases

The foundation case on the doctrine of primary jurisdiction is *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*[1] This case was an action by an oil company to recover excessive rate charges which constituted an undue preference by the railroad. The net result of the rate policy was that the oil company was charged more for a short haul than for a long one. The action was instituted in state court and was appealed to the United States Supreme Court after the Texas Court of Civil Appeals reversed in favor of the oil company. The defendant railroad appealed to the Supreme Court on the basis that remedies created by the Interstate Commerce Act must be pursued in the federal courts or before the Interstate Commerce Commission. The Supreme Court found the main issue to be[2]

1. 204 U.S. 426 (1907).
2. *Id.* at 436.

> . . . the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission . . . and which it was the duty of the carrier under the law to enforce as against shippers.

The Court disposed of the federal jurisdiction question and the effect of the I.C.C. regulation as a single issue by holding that the jurisdiction of the I.C.C. precluded suits by plaintiff on common law rights in *either* state or federal court. The Court reasoned that[3]

> . . . if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

This is a clear statement by the court of the policy regarding primary jurisdiction. It is invoked to avoid major conflict between administrative agencies and the courts and is consistently applied throughout the litigation traced by this Comment. This clear, common-sense approach was arrived at by side-stepping an obstacle in the statute itself:[4]

> Sec. 22 of the act to regulate commerce, *viz*: " . . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

Plaintiff oil company's case had been founded on a right apparently granted by the statute. However, the court construed the statute in a fashion which denied an apparent common law right which would have defeated the intent of the statute as a whole. The court concluded that the Interstate Commerce Commission alone had original power to entertain proceedings for the alteration of an established schedule and remanded the case for further proceedings consistent with the opinion.[5]

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3. *Id.* at 441.
4. *Id.* at 446.
5. *Id.* at 448.

The role of the courts as opposed to the administrative agencies was further refined in *Great Northern Ry. Co. v. Merchants Elevator Co.*[6] This suit was an action brought in state court by an elevator company to recover $80 alleged to have been exacted in violation of the tariff filed with the Interstate Commerce Commission. The question was whether a reconsignment charge was applicable when a railroad car was reconsigned from an initial destination or whether the charge was inapplicable under an exception if the stop at the intermediate station was for inspection purposes. The specific issue was whether the general rule or the exception applied. Nevertheless the Court saw a broader issue as well:[7]

> The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction.

The court held that construction of a tariff was a question of law to be decided by a court. Preliminary resort to the Commission is required only in two classes of cases: first, where there is a need for determination of reasonable rates, rules or practices (a legislative or administrative function); and second, where a shipper has been wronged by exaction of an unreasonable or discriminatory rate (a judicial function). Preliminary resort to the Commission is required in these classes of cases because[8]

> . . . the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intrinsic facts of transportation is indispensible; and such acquaintance is commonly to be found only in a body of experts.

The state court decision was affirmed in favor of the shipper. In a footnote[9] the court cited cases in which the jurisdiction of the court had been sustained without preliminary resort to the Commission. This situation occurred when the question involved was solely one of construction of a tariff and not one of administrative discretion. In other listed cases, the Court had refused jurisdiction because no preliminary resort to the Commission had been made and the question presented was either one of fact or one involving administrative discretion.

A more modern case on an issue very similar to *Merchants* was

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6. 259 U.S. 285 (1922).
7. *Id.* at 290.
8. *Id.* at 291.
9. *Id.* at 295, n.2.

United States v. Western Pac. Ry. Co.[10] in which the court elaborated on the history, principles and policy of the doctrine of primary jurisdiction. Three railroads sued in the Court of Claims to recover from the government an overcharge resulting from the classification of napalm bombs shipped without burster charges and fuses as "incendiary bombs" rather than as "gasoline in steel drums." The "bombs" were steel cases filled with gasoline thickened by the addition of aluminum soap powder. The government paid the lower gasoline rate, and the railroads sued to recover the higher incendiary bomb rate. The government defended on the theory that the higher rate was unreasonable and such a question should first be referred to the Interstate Commerce Commission. The Court of Claims entered summary judgment for the railroads, but on certiorari the Supreme Court reversed and held that on the issue of tariff construction the dispute was within the exclusive primary jurisdiction of the Interstate Commerce Commission. The court commented at length on the policy behind the rule:[11]

> In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. [*Abilene* was cited.] More recently the expert and specialized knowledge of the agencies involved has been particularly stressed [citation omitted.] The two factors are part of the same principle, "now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over . . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than the courts by specialization, by insight gained through experience, and by more flexible procedure." [Citation omitted.]
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> The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural timetable of the lawsuit. It is a doctrine allocating the law-making power over certain aspects 'of commercial relations' ". "It transfers from court to agency the power to determine" some of the incidents of such relations.

Writers have not been in agreement as to the weight and mean-

10. 352 U.S. 59 (1956).
11. *Id.* at 64-5.

ing of the above paragraph.[12] Interpretation becomes easier, however, as the rule is developed in succeeding cases. The doctrine of primary jurisdiction, as expressed in *Western,* helps to explain the decisions in the antitrust cases treated below.

In *Western* the court retreated from the position taken in *Merchants,* refusing to consider whether the commodity in question was a bomb or drummed gasoline and calling it a question of fact for the agency to decide because of its expertise. Justice Douglas dissented on the ground that the principles of *Merchants* were applicable to *Western.*[13] The court in 1922 was willing to take upon itself the task of interpreting the meaning of a railroad rate tariff, but was not willing in 1956 to attempt the interpretation of tariff rates for gasoline and bombs. The difference is in the approach, not in the subject matter. That is, the more recent Supreme Court approach to the interpretation of regulations such as railroad tariffs is to defer to the expertise of the administrative agency. This is true whether the subject matter is reconsignment charges as in *Merchants,* or gasoline and bombs as in *Western.*

III. The So-Called "Inversion" of the Doctrine

The doctrine of primary jurisdiction was clearly announced in the *Western* decision. But in 1962 the Court appeared to take a different direction in the antitrust case *California v. FPC.*[14] El Paso Natural Gas Company had acquired the stock of the Pacific Northwest Pipeline Corp. and then applied to the Federal Power Commission for authority to acquire the assets pursuant to section 7 of the Natural Gas Act.[15] This request was made less than one month after the Department of Justice had commenced an action under the Clayton Act against El Paso Natural Gas, charging that the stock acquisition was illegal. El Paso's motion to dismiss or delay the antitrust suit was denied. The Department of Justice then asked the Federal Power Commission to delay its proceedings pending the outcome of the antitrust suit. The FPC refused but invited the Department of Justice to participate in the administrative hearings, but it did not. The FPC obtained a continuance of the antitrust suit in the District Court until the administrative pro-

12. K.D. Davis, Administrative Law Treatise, § 19.01 at 5 (1958); L. Kastenbaum, Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions, 55 Geo. L.J. 812, 813 (1967).

13. U.S. v. Western Pac. Ry. Co., 352 U.S. 59, 76 (1956).

14. 369 U.S. 482 (1962).

15. 15 U.S.C. § 717f(c) (1938).

ceedings were concluded. The merger was ultimately approved and became effective on December 31, 1959.

California, having intervened in the administrative proceedings, obtained review by the Court of Appeals and then by the Supreme Court. The latter reversed the judgment of the Court of Appeals, vacated the FPC order approving the merger, and remanded the case to the Commission, holding that the FPC should not have proceeded to a decision while the antitrust suit was pending:[16]

> Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. [*Abilene* cited]. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission.

The Court further supported its decision by pointing out that where the FPC approves a merger and the courts later hold it to be illegal in an antitrust suit, an unscrambling becomes necessary. The FPC action may also tend to influence any subsequent decision by the court.

The *California* decision has not received favorable comment from legal scholars. Professor K.D. Davis called it a "surprising decision, seemingly running counter to other recent developments . . . ."[17] Professor E. Gelhorn also commented unfavorably:[18]

> There is one surprising and aberrant case in this area, however, where the Supreme Court inverted the doctrine and then applied it to require the FPC to delay consideration . . . until an antitrust court could rule upon the merger's legality, *California v. FPC*. . . .

However, applying the factual situation in *California* the twofold test set forth in *Western* of the doctrine of primary jurisdiction results in jurisdiction being given to the courts. First, in *California* the expertise of the administrative tribunal was not necessary to decide a question of fact—the courts routinely decide antitrust issues by themselves. Second, in *California* a uniformity of ruling was not essential in order to comply with the purposes of a regulatory statute. Antitrust decisions are not continuous processes of

16. California v. F.P.C., 369 U.S. 482, 491 (1962).
17. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 19.06 at 635 (Supp. 1970).
18. E. GELLHORN, AMINISTRATIVE LAW AND PROCESS IN A NUTSHELL.

regulation like rate-making, but infrequent actions. Therefore, in review the *California* decision (1962) is neither surprising nor aberrant. The case is entirely consistent with the rule set forth in *Western* (1956) and the primary jurisdiction doctrine established by *Abilene* (1907).

In addition to the determination of primary jurisdiction on the basis of the need for administrative expertise and uniformity of rules, the issue of Congressional intent in regard to who shall enforce antitrust laws is also pertinent and was examined in *California.* Is the Clayton Act to be enforced by the courts or by the administrative agency? The Clayton Act provides that[19]

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission.

Professor K.C. Davis states that this statute should have given the court difficulty.[20] But the court in *California* did not hesitate to reaffirm its power by denying power in the FPC by stating:[21]

> The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues.

Confusion on this point stems in part from the fact that Congress granted some commissions the sole authority to adjudicate antitrust issues but did not grant such power to others:[22]

> [Congress] . . . has included in many regulatory statutes either an express exemption from the antitrust laws, or a "saving clause", providing that the antitrust laws remain applicable despite agency approval of a transaction. Congress has, however, remained silent on this issue in three regulatory statutes: The Bank Merger Act, the Federal Power Act, and the Natural Gas Act.

In summary, the correct interpretation of *California* is that the doctrine of primary jurisdiction was considered and correctly applied. The primary issue was an antitrust issue and, pursuant to Congressional intent, the court and not the agency was to decide it. A supporting reason for the decision was that an "unscrambling" would be called for should the agency approve the merger and the court later disapprove. Moreover, the decision of the

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19. 15 U.S.C. § 18 (1950), *formerly* ch. 25 § 7, 38 Stat. 631 (1914).
20. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 19.06, at 63536 (Supp. 1970).
21. 369 U.S. 482, 486.
22. Comment, *The Applicability of the Antitrust Laws to Combinations Approved Under the Bank Merger Act, Federal Power Act and Natural Gas Act*, 37 N.Y.U.L. REV. 735, 737 (1962).

agency would prejudice the government's antitrust suit. But neither the necessity for administrative expertise nor the requirement of uniformity of ruling basic to fixing primary jurisdiction in an administrative agency was present in *California*. As a consequence, primary jurisdiction was found to be that of the courts.

The Court noted that the application of the doctrine of primary jurisdiction did not always result in allocation of the controversy to the administrative agency. Criteria had been established: those cases meeting the criteria were to be handled by the administrative tribunal. The corollary inference from this proposition is that cases not meeting this criteria are to be handled by the courts. This view is a consistent application of the doctrine of primary jurisdiction and not an inversion of it.

IV. CLARIFICATION OF THE DOCTRINE: 1973 CASES

That *California* is the correct interpretation of the doctrine of primary jurisdiction is supported by the Supreme Court's reaffirming references to it in subsequent decisions. Four recent cases that touch on the doctrine of primary jurisdiction cite *California* as valid law: *Ricci v. Chicago Mercantile Exchange*,[23] *Otter Tail Power Co. v. United States*,[24] *FMC v. Seatrain Lines, Inc.*,[25] and *Gulf State Utilities Co. v. FPC*.[26]

In *Ricci*, plaintiff-petitioner had filed an antitrust complaint charging the Chicago Mercantile Exchange with conspiring to restrain his business by transferring his exchange membership to another person in violation of both the Commodity Exchange Act and the Sherman Act. The Supreme Court decided that the antitrust proceedings should be stayed until the Commodity Exchange Commission had acted. In effect, the Commission was held to have primary jurisdiction because of the expertise of the administrative tribunal:[27]

> We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, a matter

23. 409 U.S. 289 (1973).
24. 410 U.S. 366 (1973).
25. 411 U.S. 726 (1973).
26. 411 U.S. 747 (1973).
27. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305 (1973).

> that seems to depend in the first instance on whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules. That issue in turn appears to pose issues of fact and questions about the scope, meaning and significance of Exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case.

California v. FPC was cited as an example of the conflict between court and agency adjudication of antitrust issues.[28] *California* was also cited in support of the rule that when Congress does not expressly give an agency jurisdiction to decide antitrust issues, the jurisdiction is left in the courts.[29] Application of the doctrine of primary jurisdiction had a different result in *Ricci* than in *California* because a need for the expertise of the administrative agency was found.

The dissenting opinion by Justice Marshall in *Ricci* also cited *California*. The dissent stressed that staying the court action pending the agency decision would result in a delaying of petitioner's remedy with little likelihood of a fair hearing on his complaint:[30]

> It has been argued that the doctrine of primary jurisdiction involves a mere postponement, rather than relinquishment of judicial jurisdiction . . . . However, that observation should not be taken to mean that invocation of the doctrine therefore imposes no costs. On the contrary, in these days of crowded dockets and long court delays, the doctrine frequently prolongs and complicates litigation. More fundamentally, invocation of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindiction of his legal claims of right. As we have said in a somewhat different context "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard". *Boddie v. Connecticut* 401 U.S. 371, 377 (1971). And surely the right to a "meaningful opportunity to be heard" comprehends within it the right to be heard without unreasonable delay. This principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given the courts, rather than the agencies, the primary duty to act. Cf. *California v. FPC* 369 U.S. 482, 487-490 (1962).

Thus, in both the majority and minority opinions in *Ricci, California v. FPC* represents the law applicable to antitrust issues before certain administrative agencies. The difference between the majority opinion and the dissent is perhaps explained by the comment

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28. *Id.* at 300.
29. *Id.* at 302.
30. *Id.* at 320.

in the dissenting opinion to the effect that "the majority's scale is apparently differently calibrated."[31]

In *Otter Tail*, the Federal Power Act was again involved in an antitrust case in *California*. The Department of Justice sued under the Sherman Act to enjoin certain monopolistic and anticompetitive practices of the Otter Tail Power Co. Defendant claimed that by reason of the Federal Power Act it was not subject to antitrust regulation for refusing to sell power at wholesale prices to municipal power systems. The Supreme Court held that Otter Tail was not insulated from antitrust regulation by reason of the Federal Power Act and could be compelled by injunction to participate in interconnections with municipal systems. *California* was cited to support the argument that being subject to regulation by the FPC was not a bar to an antitrust suit.[32]

Justice Stewart's partial dissent in *Otter Tail* questioned the court's giving administrative agency preference in *Ricci* but not in *Otter Tail*:[33]

> It seems to me that the principles of *Ricci*, related to but not identical with the traditional doctrine of "primary jurisdiction", should require a District Court in a case like this one to defer to the Commission proceeding then in progress. Surely the regulatory authority of the Commission with respect to interconnection is at least as substantial as the responsibility of the Commodity Exchange Commission, in *Ricci*, for the implementation of reasonable membership practices by its regulated contract markets.

In short, Justice Stewart would follow *Ricci* and give primary jurisdiction to the agency. But the above statement by Justice Stewart is confusing in several respects. First, as this Comment has pointed out, *Ricci* can be read as being consistent with the traditional doctrine of primary jurisdiction, contrary to the opinion of Justice Stewart. Second, Justice Stewart joined in the dissent in *Ricci*,[34] which argued that the court action should *not* be stayed pending the outcome of the administrative proceeding. In doing so, he accused the majority of being inconsistent between *Ricci* and *Otter Tail*.

There were other dissenting voices in *Otter Tail*. The majority

31. *Id.* at 321.
32. Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973).
33. *Id.* at 392-93.
34. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 309 (1973).

(Justices Douglas, Brennan, White and Marshall) were supported by Chief Justice Burger and Justices Stewart and Rehnquist only on the point that the case should be remanded to decide whether certain litigation instituted by Otter Tail Power Co. was in itself a violation of the antitrust laws.[35] In addition to the reference to the difference in *result* between *Ricci* and *Otter Tail*, Justice Stewart's dissent-in-part also argues that the administrative agency had primary jurisdiction by intent of Congress:[36]

> With respect to decisions by regulated electric utilitites as to whether or not to provide nonretail services, I think that in the absence of horizontal conspiracy, the teaching of the "primary jurisdiction" cases argues for leaving governmental regulation to the Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation. I believe this is what Congress intended by declining to impose common carrier obligations on companies like Otter Tail, and by entrusting the Commission with the burden of "assuring an abundant supply of electrical energy throughout the United States" and with the power to order interconnections when necessary in the public interest. This is an area where "sporadic action by federal courts" *can* "work mischief."

What weight should be given to the view of Justice Stewart? It appears that the majority of the court would retain primary jurisdiction over antitrust issues within the province of the courts except where Congress has explicitly given such jurisdiction to administrative agencies or in certain areas where the court has given preference to the "expertise" of the agencies. It has not done so on the larger antitrust issues such as mergers and interconnections. In *California* and *Ricci*, Justice Stewart concurred with the dissenting view; in *Otter Tail*, he was the author of the dissent. The current view of the court seems to follow *California*, not as an *inversion* of the doctrine of primary jurisdiction, however, but as a corollary consistent with it.

In *FMC v. Seatrain Lines, Inc.*,[37] the issue was whether Congress had granted the Federal Maritime Commission (FMC) the power to approve merger agreements between shipping lines even where such agreements were violative of the antitrust laws and even though the Commission had taken antitrust principles into account in reaching its decision. The FMC argued that a one-time merger or acquisition-of-assets agreement was within Commission jurisdiction as an agreement "controlling, regulating, preventing or de-

35. Otter Tail Power Co. v. United States, 410 U.S. 366, 382 (1973); *rehearing denied*, 411 U.S. 910 (1973).

36. *Id.* at 391-92.

37. 411 U.S. 726 (1973).

stroying competition."[38] The Supreme Court, in a unanimous opinion by Justice Marshall, refused to allow a broad reading of the statute to include the merger in question as within the sole authority of the Commission to grant approval, holding that it would conflict with the Court's frequently expressed view that exemptions from antitrust laws are strictly construed. Quoting from *Otter Tail* and citing *California* and other cases, the Court stated:[39]

> When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policy embodied in the antitrust laws.

In a footnote,[40] the court interpreted the 1950 amendment to section 7 of the Clayton Act[41] as it had in *California*[42] to the effect that no new or stronger power to adjudicate antitrust issues had been granted any administrative agency by that amendment.

In *Gulf States Utilities Co. v. FPC*[43] another instance of conflict between an agency and the courts over antitrust law enforcement was decided against the agency. In *Gulf*, the conflict was not as direct as in the previous cases. In this instance, the court did not take the decision away from the agency but made it mandatory that the agency take antitrust policy into consideration. Gulf States Utilities Co. had applied to the Federal Power Commission for authorization of a bond issue to refinance its short term debt. The application was required by section 204 of the Federal Power Act.[44] The cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene in the proceedings, contending that the bond issue should not be approved because the proceeds would be used to finance activities in violation of the antitrust laws. The FPC granted the cities' petition to intervene but denied their request for a hearing. The Court of Appeals remanded the case for the consideration of the cities' claim. The Supreme Court

38. *Id.* at 732.
39. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).
40. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 743-44 n.11 (1973).
41. 15 U.S.C. § 18 (1950), *formerly* ch. 25, § 7, 38 Stat. 631 (1914).
42. 369 U.S. 482 (1962).
43. 411 U.S. 747 (1973), *rehearing denied*, 412 U.S. 944.
44. 16 U.S.C. § 824(c).

affirmed 6-3, holding that the FPC must consider the anticompetitive consequences of a security issue since consideration of such consequences provides a first line of defense against anticompetitive practices which might later become the subject of an antitrust proceeding. The Court cited both *Otter Tail* and *California* to support the application of antitrust policy to FPC activities:[45]

> The Federal Power Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. Indeed, within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated.

There was a dissenting opinion in the case by Justice Powell, in which Justices Stewart and Rehnquist joined. The dissent emphasized two views. The first was that the Commission's position was consistent with the statute, namely: that antitrust policy need not be considered. However, as the previous cases have disclosed, the courts have insisted on application of antitrust law to the power industry. The dissenting view is an expression of the contrary position and not the view which has consistently commanded a majority of the court. The second view is that the court's position is incompatible with the public interest as represented by the factual situation: Public interest—in the form of lower rates—is served by allowing utilities access to capital funds on favorable terms. However, the mere selling of bonds is really not the antitrust issue. The point litigated as an antitrust issue should be how the funds so obtained are to be used.

It is clear from the majority opinion that the Supreme Court is interested in maintaining a strong judicial role in antitrust policy enforcement. It effectively exercises this role when it asserts primary jurisdiction upon request of the plaintiff and also when it undertakes judicial review of administrative acts where the administrative agency is required to consider antitrust policy.

V. Conclusion

That *California v. FPC* represents the current law is clear from the 1973 decisions. That the case represents the majority view of the Supreme Court in regard to the role of the court in antitrust cases in those areas not specifically allocated to the agencies by Congress is also evident. The *California* rule is not an inversion of the classic doctrine of primary jurisdiction but a logical and consistent corollary to it. It is only where the requirements for

45. Gulf States Util. Co. v. F.P.C., 411 U.S. 747, 759 (1973).

administrative expertise of uniformity of ruling in the rate-making sense are absent that primary jurisdiction in an antitrust case rests with the courts.

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