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My remarks are directed to the implications for the electric power industry of recent antitrust decisions. I first consider the implications of those decisions in cases involving allegations that FERC-imposed open access obligations have not been complied with satisfactorily. I then consider the implications of those decisions for cases involving allegations of collusive bidding. With respect to both types of cases, these recent court decisions suggest that antitrust may play a more limited role than may have been supposed just a year ago.

Antitrust and Access

A useful point of departure in discussing the application of the antitrust laws to the electric power industry is the Supreme Court's decision thirty years ago in *Otter Tail Power Co. v. United States.*[1] The threshold issue in the case was whether the antitrust laws applied at all, given the comprehensive regulation of the electric power industry. By a slim majority, the Court held that the antitrust laws do apply. The Court also affirmed a district court's determination that Otter Tail had violated the antitrust laws by refusing to transmit power to several municipalities in its service area and by refusing to supply the municipalities with backup power.

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[1] 410 U.S. 366 (1973).

Otter Tail remains one of a very few cases in which the Supreme Court has found a unilateral business decision to deny access in violation of the antitrust laws. The *Otter Tail* decision is sometime cited as support for what came to be known as the "essential facilities doctrine," which holds that firms controlling access to bottleneck facilities necessary for successful competition must share those facilities with competitors. It should be noted, however, that the Supreme Court did not endorse the essential facilities doctrine in *Otter Tail*, and to this day, the Court has avoided both endorsing and rejecting the doctrine.

A bit more than a decade after the *Otter Tail* decision, the Supreme Court again affirmed antitrust liability based on the failure of one competitor to cooperate with another. The case was *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*,[2] and the cooperative activity was selling a joint lift ticket. For almost two decades, the *Aspen* decision provided the most authoritative guidance as to when one competitor has a duty to assist another, although the decision did not actually articulate any clear standards.

Almost exactly a year ago, things changed abruptly when the Supreme Court handed down its decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko.*[3] Mr. Trinko's law firm got its local telephone service from AT&T, but AT&T could not serve Trinko with its own facilities. Rather, AT&T and others provided local service using facilities owned by the local Bell operating company in New York City. Trinko alleged that service was poor because the Bell operating company, which is now part of Verizon, failed to provide AT&T with access to its facilities that was equivalent in quality to its own access to them.

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[2] 472 U.S. 585 (1985).

[3] 540 U.S. 398 (2004).

In a way, the allegation was uncontested, since the local Bell operating company had just entered into a consent decree with the FCC to resolve complaints about its failure to meet access obligations. The issue in the antitrust case, however, was whether the failure to meet regulatory access obligations constituted a violation of the antitrust laws. In short, the Court held that it did not.

The Supreme Court began its analysis by considering the implications of the extensive regulatory scheme created by the 1996 Telecommunication Act, which imposed extraordinary access obligations going far beyond anything in the electric power industry. Initially, the Court indicated that "a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether."

The Court explained that the "enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by the courts exercising jurisdiction under the antitrust laws.'" But the Court found that it was precluded from holding that antitrust laws did not apply to the challenged conduct by a proviso in the 1996 Act stating that "nothing in this Act . . . shall be construed to modify, impair, or supercede the applicability of . . . the antitrust laws."

The most basic message of the *Trinko* decision is that the antitrust laws rarely impose a "duty to aid competitors." The Court discussed at length why it is generally unwise to impose such a duty. The Court noted that "[c]ompelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." In addition, the Court stressed that

"[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."

Despite these and other reasons for not imposing a "duty to aid competitors," the Court did not overrule its *Aspen* decision by holding that there is never a "duty to aid competitors." Instead, the Court made clear that the *Aspen* case is "at or near the outer boundary" of circumstances in which "a refusal to cooperate with rivals can constitute" an antitrust violation. In explaining why it made sense to impose antitrust liability in the *Aspen* case, even if not in most other cases, the Court stressed that the *Aspen* case involved the "termination of a voluntary (and thus presumably profitable) course of dealing," which "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." But the Court made no attempt either to enumerate the circumstances in which there is a "duty to aid competitors" or to articulate a standard for identifying such cases.

The Court found no need to decide when there is an antitrust "duty to aid competitors" because it concluded that imposing such a duty "serves no purpose" when "access exists" under a regulatory scheme such as that of the 1996 Act. The Court also found significance in the fact that the defendant in the *Aspen* case had refused to sell its lift tickets to the plaintiff even on the terms they were sold to skiers at retail. In contrast, the services at issue in the *Trinko* case would not have been provided to anyone but for the 1996 Act.

The Court also addressed whether the particular facts of the case weighed in favor of, or against, "adding . . . to the few existing exceptions from the proposition that there is no duty to aid competitors." The Court found three facts that weighed against adding an exception. The regulatory structure of the industry greatly diminished potential harms from

anticompetitive conduct. The danger false positive findings of anticompetitive conduct threatened to "distort investment" decisions. And an "antitrust court is unlikely to be an effective day-to-day enforcer" of detailed open access requirements.

In the wake of the *Trinko* decision, several comparable cases were disposed of entirely, or to a considerable extent, on similar grounds.[4] In addition, one district court rejected a claim involving access to information on the grounds that the Commodity Futures Trading Commission already had provided access to the information.[5]

There are contrasts between the facts of the *Trinko* case and those of any similar case likely to arise in the electric power industry, but the parallels are most striking.

- The *Trinko* decision held that the provision of access under a regulatory mandate was itself a sufficient basis for not imposing any access obligation under the antitrust laws. And just like local telephone companies, electric utilities provide access under a regulatory mandate.

- The *Trinko* decision found three particular industry features the telecommunications industry counseled against creating an exception to the general rule against imposing an antitrust "duty to aid competitors." And the electric power industry is similar in these respects.

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[4] MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004); Covad Communications Co. v. BellSouth Corp., 374 F.3d 1044 (11th Cir. 2004); Levine v. Bellsouth Corp., 302 F. Supp. 2d 1358 (S.D. Fla. 2004).

[5] New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc., 323 F. Supp. 2d 559, 568–70 (S.D.N.Y. 2004).

- The *Trinko* decision stressed that antitrust courts should not place themselves in the position of having to police disputes over the terms and quality of the access being provided, yet that most likely would be precisely what the court would be asked to do any antitrust case involving allegations that FERC-imposed open access requirements had not been complied with satisfactorily.

- Finally, it may be noted that the proviso in the 1996 Telecommunications Act that prevented the Court from finding antitrust immunity is almost identical to a proviso in the Energy Policy Act of 1992.[6] Thus, a court would be unlikely to hold that access regulation in the electric power industry completely ousts the application of the antitrust laws.

In the wake of *Trinko*, a court could be expected to hold that a failure to satisfy open access obligations, even if blatant, would not violate the antitrust laws. I doubt that any court would have so held a year ago, or at any time over the preceding thirty years, so *Trinko* plainly changed the law in a significant way. But I don't think *Trinko* was nearly as revolutionary as some have suggested. Very few courts had ever imposed antitrust liability for no more than the unilateral business decision not to grant a competitor access to bottleneck facilities. After *Otter Tail*, plaintiffs had little success after in gaining transmission access through antitrust suits.

I am also not disturbed by the fact that the antitrust laws may have nothing to say about access issues in the electric power industry. I have long believed that access policies should be based on a careful assessment of the costs and benefits of access in each particular industry, and that legislatures or industry regulators, rather than courts, should weigh these

[6] 16 U.S.C. § 824k(e)(2).

costs and benefits. That was done in the electric power industry, just as it was done in the telecommunications industry. In addition, there has long been a broad consensus among antitrust commentators that setting the terms of access and policing compliance with access obligations is a job that only well-staffed regulatory agency could adequately perform. Finally, there could be no better example than the electric power industry to illustrate the fact that opening up an industry to competition is likely be very complicated and time consuming. Courts are ill-suited to hold the reins of an industry in the throes of creating new market institutions.

The Filed Rate Doctrine and Market-Based Rates

Over eighty years ago, the Supreme Court articulated what is termed the “filed rate doctrine” in a case involving railroads that charged rates filed with, and approved by, the Interstate Commerce Commission.[7] The plaintiff sought to recover the damages suffered by paying a rate influenced by a conspiracy in violation of the antitrust laws. For a variety of reasons, the Court rejected the claim. The key principle of law established by the case is that no claim for damages can be maintained by a plaintiff who paid the rates resulting from a regulatory process. This principles applies to every possible claim for damages, and not just to antitrust claims, but I concentrate on its application to antitrust cases, which the Supreme Court revisited and reaffirmed in 1986.[8]

The filed rate doctrine was developed at a time of strict cost-based rate regulation. Utilities were permitted to do business only at rates that were filed with regulatory agency, made public, and subjected to both challenges by ratepayers and detailed agency review. In the restructured electric

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[7] Keogh v. Chicago Northwestern Ry. Co., 260 U.S. 156 (1922).

[8] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

power industry, rates continue to be regulated, but FERC has authorized generators to charge market-based rates, and a few years ago, the courts of appeals began to address the application of the filed rate doctrine to market-based rates.

The first major decision came four years ago in the *Town of Norwood v. New England Power Co.*, which involved price squeeze allegations. In an opinion written by an excellent judge with whom I once worked at the Department of Justice, the court concluded that the filed rate doctrine would "no longer operate" if "rates were truly left to the market, with no filing requirement or FERC supervision at all." But the court noted that "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review."[9]

Over the past year, two other courts of appeals have invoked the filed rate doctrine in rejecting antitrust claims against electric utilities charging market-based rates.[10] Both decisions describe the current federal regulatory scheme in general terms and conclude that the filed rate doctrine applies, without clearly indicating which features of the scheme are critical.

Of particular interest may be a district court decision from last June in a case involving allegations that generators and others conspired to manipulate prices in a bid market within ERCOT.[11] Because the traditional requirements of reasonable rates continue in force and the Texas

[9] 202 F.3d 408, 419 (1st Cir. 2000).

[10] Public Utility Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc., 384 F.3d 756, 760–61 (9th Cir. 2004); Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303 (3d Cir. 2004).

[11] Texas Commercial Energy v. TXU Energy, Inc., 2004-2 Trade Cas. (CCH) ¶ 74,497 (S.D. Tex. 2004)

Commission investigates, and can remedy, market power abuses, the court concluded that "the filed rate doctrine applied to market based rates in the ERCOT-administered electricity market." The court's rationale for invoking the filed rate doctrine is not entirely clear and may relate to the existence of after-the-fact rate review pursuant to the market monitoring program operating in ERCOT.

The basic thrust of these decisions seems to be that the filed rate doctrine applies as long as there remains a legal obligation to charge reasonable rates, and as long as the rates are reported after the fact to the appropriate regulatory agency. While the Texas case suggests that some form of after-the-fact reasonableness review might play a role in invoking the filed rate doctrine, it does not actually so hold, and none of the other cases make a similar suggestion.

These decisions extend the application of the filed rate doctrine outside its traditional factual setting and beyond its traditional rationale. As explained by one court of appeals a decade ago, the filed rate doctrine states that a rate "*approved by* the governing regulatory agency . . . is per se reasonable and unassailable in judicial proceedings brought by ratepayers."[12] It is not obvious that the doctrine, stated this way, continues to apply in a world of market-based rates. The use of market-based rates is approved by a regulatory after a reasonableness determination, but there is no advance approval of specific rates, which may be found unreasonable after the fact.

As stated in the *Town of Norwood* decision, "[i]n part, the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to

[12] Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) (emphasis added).

accept or challenge" specific rates,[13] and this rationale applies even with market-based rates. As explained in several Supreme Court decisions, the reasons for "protect[ing] the exclusive authority of the agency" are to prevent inconsistent rate determinations in different proceedings[14] and to avoid enmeshing the courts in a rate-making process that vests reasonableness determinations to broad agency discretion.[15] There is, however, little prospect that imposing damages for bid rigging would inject any inconsistency into rate determinations or intrude on agency discretion.

Courts and scholars have explained the filed rates doctrine as a necessary to prevent rate discrimination, which the relevant regulatory statutes made a major point of prohibiting. The Supreme Court reasoned that allowing a collateral attack on rates in antitrust or other cases would inevitably lead to different customers paying different rates.[16] Perhaps more tellingly, the Court reasoned that regulated firms would be able to discriminate largely at will without the filed rate doctrine.[17] But it is certainly possible today that similarly situated customers pay different wholesale electric power rates, even though the anti-discrimination provisions of the Federal Power Act remain on the books.[18]

What would be required to eliminate the application of the filed rate doctrine to wholesale electric power sales is not merely the massive restructuring we have witnessed over the last decade, but true

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[13] 202 F.3d at 420.

[14] *See* Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579 (1981).

[15] *See* Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951).

[16] *See* Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126–27 (1990); *Keogh*, 260 U.S. at 163.

[17] *See Maislin Industries*, 497 U.S. at 127–28.

[18] See 16 U.S.C. § 824d(b).

deregulation. The word "deregulation" is often used to describe the evolution in the electric power industry, but that word is inappropriate in a technical, legal sense, and for many purposes, the technical legal sense is all that matters.

In closing, I must stress that the filed rate doctrine does not create a broad antitrust immunity for generators and traders in the electric power industry. The Supreme Court has made this clear in several of the leading cases on the filed rate doctrine.[19] Bid rigging in the electric power industry is subject to attack under the antitrust laws, although the filed rate doctrine precludes damage claims. The filed rate doctrine does not preclude injunctions against bid rigging, nor does it limit enforcement by the Department of Justice, which can criminally prosecute both corporations and individuals that engage in bid rigging.

[19] *Square D*, 476 U.S. at 421–22 & n.22; Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 455 (1945).