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## ***Alternative Energy Supplier Forbidden By Law And Contract From Being Electric Utility Company's Competitor***

by Sara E. Neff

To recover under antitrust laws for monopolization and attempted monopolization, a plaintiff must prove both that it is a competitor of a defendant and has suffered an injury which the antitrust laws were designed to protect. In *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir. 1997), the Third Circuit affirmed the district court's dismissal of plaintiff's complaint for failure to state a claim upon which relief could be granted. The court concluded that when the law and a contract both state that the plaintiff is forbidden from competing with defendant, plaintiff is unable to bring a viable antitrust claim.

### **Congress Tried to Reduce United States Dependence on Foreign Oil**

In 1978, the United States Congress passed the Public Utility Regulatory Policies Act ("PURPA") to facilitate the development of alternative energy sources and reduce the United States' dependence on oil, especially foreign oil. 16 U.S.C. § 824 (1997). PURPA mandates that electric utility companies purchase electric energy produced by independent power producers operating "qualifying cogeneration facilities." To effectively implement PURPA, Congress empowered the Federal Energy Regulatory Commission ("FERC") to promulgate the rules and regulations which govern the terms of

sales and purchases of electric energy. Concurrently, independent state administrative agencies such as the Pennsylvania Public Utility Commission ("PUC") regulate the facilities and validate the contractual arrangements covered by PURPA.

### **Energy Supplier Claimed to be Competitor of Electric Company**

Plaintiff, Schuylkill Energy Resources, Inc. ("SER"), is a "qualifying cogeneration facility" under PURPA and the PUC regulations. SER is an independent power producer that operates an anthracite coal refuse-fired cogeneration plant in Pennsylvania. Defendant, Pennsylvania Power & Light Company ("PP & L"), is an electric utility company regulated by the PUC which relies on nuclear power and coal-burning power sources. PP & L is a member of an unincorporated association, known as PJM, a power pool comprised of eight electric utility companies from five eastern seaboard states. As members of the PJM association, companies routinely sell their excess electric generation to the association which in turn sells it to other companies within the power pool or to other power pools.

Both the FERC regulations and the terms of PP & L's contract with SER mandate that PP & L purchase energy from SER. On October 17, 1986, PP & L and SER entered into a twenty-year contract. This contract

explicitly states that "SER is required to sell exclusively to PP & L, and PP & L is required to purchase SER's entire net power output up to 79.5 megawatts at a price per kilowatt hour which is either fixed within the agreement or calculated as a percentage of PP & L's Energy-Only Avoided Cost." According to the contract, PP & L is not required to purchase SER's total output of electric energy. In fact, PP & L can decrease the amount of its total electric energy purchase when the reduction is necessary for "PP & L to make repairs, changes, tests or inspections, or for reasons of an actual or potential System Emergenc[ies]." However, PP & L may not reduce its total electric energy purchases for purely economic reasons.

The Third Circuit disputed the validity of whether the contract required SER to sell energy exclusively to PP & L. Instead the panel opinion suggested that SER technically could have excess power available for sale if it first ensured the availability of 79.5 megawatts for PP & L's use. However, the Third Circuit was required, as was the district court, to consider the PP & L's motion to dismiss accepting all of SER's allegations as being true. Thus, when SER's amended complaint alleged an "exclusivity provision," it became the controlling fact under review.

In its amended complaint, SER alleged that PP & L improperly construed the term "system emer-

agency” in an effort to reduce its purchase of electric output produced by SER. According to SER, PP & L decreases its purchases of energy from independent power producers with high energy prices when the aggregate demand for power within the service areas of the PJM association is expected to fall below normal levels, and the association expects that it cannot sell the pool’s excess power to the member companies or other power pools. Consequently, SER claimed that it was not able to satisfy its own requirements, resulting in its own purchase of electricity and oil and the incursion of extra costs and lost revenues.

Based on the allegations of curtailment, SER brought suit for violation of the federal antitrust laws under section 2 of the Sherman Act. According to SER, PP & L violated the Sherman Act when PP & L monopolized and attempted to monopolize the local market by curtailing its energy purchases which in turn harmed competition and consumer welfare. Specifically, SER contended that PP & L’s reduction in purchases of energy from independent power producers enables PP & L to maintain an artificially high rate base and deprives consumers of energy sources other than those of PP & L. Implicit in SER’s allegations is the notion that SER is a competitor of PP & L. In addition, SER asserted related state-law claims for breach of contract, breach of good faith and fair dealing, intentional misrepresentation, and negligent misrepresentation.

### **Court Found No Viable Antitrust Claim**

The Third Circuit affirmed the district court’s dismissal of SER’s federal antitrust claims because the terms of the contract and PURPA’s regulations prohibited SER from competing with PP & L according to the terms of their contract and PURPA’s regulations. Additionally, the Third Circuit supported the district court’s refusal to exercise supplemental jurisdiction over SER’s state law claims.

In its analysis, the Third Circuit first addressed SER’s claim that PP & L created artificially high rates due to its reduction of purchases from independent power producers. The Third Circuit found that PP & L’s rate base is determined by Pennsylvania regulators and not the market. Therefore, SER’s claim that PP & L creates artificially high rates was not within the purview of the antitrust laws.

Furthermore, the Third Circuit addressed SER’s assertion that PP & L’s curtailment of energy purchases deprived consumers of energy sources. Concluding that energy sources were products, not competitors, the Supreme Court noted that SER’s assertion did not constitute an antitrust claim. The Supreme Court stated that the issue was “whether PP & L unlawfully excluded independent power brokers like SER from the relevant market, not whether consumers receive electricity generated by nuclear, coal, culm, solar or other sources for energy.” The Supreme Court stated that even if it were to find that PP & L’s curtailment practices curbed or destroyed competition, it would still

have to find a violation of the antitrust laws. To do this, SER must allege that PP & L in some way acted to exclude SER as a competitor in the delivery of electricity to customers in PP & L’s service area.” Thus, SER would have to have proven that it was PP & L’s competitor.

The Supreme Court refused to find SER a competitor of PP & L because both PURPA’s regulations and their contract prohibited SER from competing with PP & L. Specifically, the Court accepted the contention that the contract requires SER “to sell [its electric energy] exclusively to PP & L” for twenty years. In addition, both state and federal law prohibit SER from competing with PP & L in the wholesale market. Finally, the lack of a transportation infrastructure constitutes a “physical limitation” that prevents SER from selling its power directly to consumers in the retail market. Because SER is forbidden from being PP & L’s competitor, SER could not prove an antitrust injury which is required for any antitrust claim. The Supreme Court noted that the antitrust laws are intended to protect competition for consumer welfare and that unless a competitor or consumer can prove injury which the antitrust laws are designed to correct, there can be no viable antitrust claim

### **Court Would Not Predict the Future**

SER claimed that it had a cause of action under the Pennsylvania Electricity Generation Customer Choice and Competition Act, 66 PA. CONS. STAT. ANN. § 2801 (West

1996). This Act restructures how electricity is supplied within Pennsylvania and will introduce competitive retail access within PP & L's service area. The Act's provisions will be implemented over time, preventing full direct access to competition until the year 2001. SER responded by stating that PP & L's current curtailment of electric energy purchases injures SER's ability to compete with PP & L in the future. The court refused to predict the future for the sake of finding an antitrust violation. Specifically, the court stated that "[w]e cannot permit SER to pursue such a speculative path to recovery under the Sherman Act."

This case demonstrates that the antitrust laws are meticulously technical in their application. Unless a plaintiff can demonstrate that it is a competitor and has suffered an injury in which the antitrust laws are designed to protect, it does not have standing to bring an antitrust action. The Third Circuit was admittedly not clairvoyant nor willing to design case law based upon the speculation of "unsubstantiated conclusions and bald assertions."

### Concurring Judge Said SER Had No Duty to Sell Exclusively to PP & L

While agreeing with the majority opinion that SER's antitrust claim should be dismissed, the concurring judge reached his decision with one clarification. Judge Stapleton did not accept the panel's conclusion that SER had a duty to sell exclusively to PP & L. Although the majority opinion stated in a footnote that SER, under the terms of the contract only, may sell to third parties, the majority declared that SER can sell to third parties only after it "provides 79.5 megawatts to PP & L." Judge Stapleton, on the other hand, interpreted the contract to simply require SER to have the capacity to satisfy PP & L's requirements — up to 79.5 megawatts if necessary — in excess of SER's potential sales to third parties.

Moreover, Judge Stapleton addressed SER's claim that it is a competitor in the retail market. He stated that while the Pennsylvania Electricity Generation Customer Choice and Competition Act will

gradually initiate competition in the retail market, there was no competition prior to its passage. He concluded that since the market was not competitive, SER could not establish that it was PP & L's competitor, a condition SER needed to satisfy to prove an antitrust injury.

Finally, Judge Stapleton focused on SER's assertion that it was a competitor in the wholesale market. He stated that while the terms of the contract could be construed to mean that SER's obligation to sell exclusively to PP & L is limited to its capacity to satisfy its contractual obligations, SER did not allege that it sold, attempted to sell, or intended to sell any excess capacity. He further noted that, even if SER were allowed to amend its complaint, it would be able to allege only that it has the capacity to sell more than 79.5 megawatts, not that it has competed with PP & L in the wholesale market. Therefore, Judge Stapleton agreed with the majority's decision to affirm the district court's dismissal of SER's antitrust claim.

## National Magazine Sweepstakes Are Not Illegal Lotteries Under California Law

by Rana Abbasi

In *Haskell v. Time, Inc.*, 965 F. Supp. 1398 (E.D. Cal. 1997), a federal district court granted partial summary judgment in favor of mail-order retailers who used sweepstakes offers in their magazine and

book marketing campaigns, holding that Defendants' national magazine sweepstakes were legal lotteries, that Defendants' promotional mailings were not false advertising, and that Defendants' did not run their sweepstakes in a misleading manner.

However, the court refused to grant summary judgment on the issue of whether Plaintiff had proved that a "prompt-pay" sweepstakes was an illegal lottery because there was insufficient evidence to decide the issue.