



National Energy Marketers Association

BEFORE THE ANTITRUST MODERNIZATION COMMISSION

COMMENTS REGARDING ISSUES FOR STUDY OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)¹ hereby submits comments regarding antitrust issues for study pursuant to the Commission's Request for Public Comment published in the July 23, 2004, Federal Register. NEM submits that an appropriate issue for this Commission to study is the propriety of repealing the state action doctrine as a defense for gas and electric utilities engaged in anti-competitive conduct in deregulated markets.²

The U.S. Supreme Court recognized that conduct of private parties (such as utilities) could be afforded with State immunity to antitrust laws.³ However, a State's immunity does not extend to anti-competitive conduct by a private party "unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by [the] private actor[]."⁴ The Supreme Court also found that even a regulated utility must, "comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy."⁵

Given the nascent state of the competitive gas and electric markets, an examination of the repeal of the state action doctrine as a defense to anti-competitive utility conduct is necessary. The state and federal regulatory and legislative landscape is evolving to permit and encourage a greater array of competitive energy products, services, information and technologies. As such, there is a greater attendant risk that gas and electric utilities may engage in anti-competitive conduct to protect their monopoly

¹ NEM is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, electronic trading exchanges and price reporting services, advanced metering, demand side management and load management firms, billing, back office, customer service and related information technology providers. NEM members are global leaders in the development of enterprise solution software for energy, advanced metering, telecom, information services, finance, risk management and the trading of commodities and financial instruments. NEM members also include Multiple Service Organizations (MSOs), inventors, patent holders, systems integrators, and developers of advanced Broadband over Power Line (BPL), Power Line Communications (PLC) technologies, and Hybrid-PLC as well. NEM and its members are committed to helping federal and state lawmakers and regulators to implement a consumer-focused, value-driven transition to a reliable, price and technology competitive retail marketplace for energy, telecom and financial related products, services, information and technologies.

² See "When Utilities Compete – Antitrust Laws are Broken" by Craig Goodman, President of NEM, Power & Gas Marketing, November/December 2001 (a copy is attached hereto).

³ *Parker v. Brown*, 317 U.S. 341 (1943).

⁴ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992).

⁵ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976).

status.⁶ It is difficult for regulators to achieve active, comprehensive supervision over all aspects of utility businesses in the context of the fast-paced and complex competitive energy markets.

The New York Public Service Commission recently repealed the state action doctrine defense with respect to New York's gas and electric utilities.⁷ It would be beneficial to duplicate the action of the NYPSC on a national level through federal legislation or otherwise, applicable to all gas and electric utilities, as it would provide all market participants with a greater degree of certainty as to the legal framework within which business must be conducted in the era of competitive energy markets.

In light of the foregoing, NEM submits that an appropriate issue for this Commission to study is the propriety of repealing the state action doctrine as a defense for gas and electric utilities engaged in anti-competitive conduct in deregulated markets.

Sincerely,

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⁶ See, e.g., Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Elec. Corp., 244 F.3d 1220 (10th Cir. 2001), cert.denied 534 U.S. 993 (2001). Copies of the Petition for Writ of Certiorari of Trigen-Oklahoma City Energy Corp and the Brief Amici Curiae of the National Energy Marketers Association, the Electricity Consumers Resource Council and the Independent Petroleum Association of America in Support of Petitioner are attached hereto.

⁷ The NYPSC found that, “[u]tilities that act in the competitive arena and in a manner that would otherwise run afoul of the antitrust laws should not escape accountability for their actions on the basis of the state action exemption from those laws.” Accordingly, the NYPSC held, “that any utility activities that impede the development of the competitive market, or the development of competition in potentially competitive markets (and are not otherwise actively supervised), would not be consistent with our policies and, therefore, are not eligible for the exemption.” New York Public Service Commission, Case 00-M-0504- Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, STATEMENT OF POLICY ON FURTHER STEPS TOWARD COMPETITION IN RETAIL ENERGY MARKETS, issued and effective August 25, 2004, at page 43.