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Competition, Consumer Protection and Energy Deregulation: A Conference Introduction

*Spencer Weber Waller**

I. INTRODUCTION

It is most fitting that the deregulation of the energy industry, and in particular the introduction of competition in electrical power, was the subject of the fall 2001 conference at Loyola University Chicago School of Law sponsored by the Institute for Consumer Antitrust Studies and the *Loyola University Chicago Law Journal*.¹ While there are many important and controversial issues pending in the antitrust area,² none has the direct and immediate impact on consumers as the deregulation of electrical power. Electricity is one of the few true necessities in life, and the deregulatory process is fraught with complicated scientific, economic, and legal issues. Important questions remain whether consumers truly will benefit from greater competition and still receive secure reliable service as needed.

Nearly half the states have begun the deregulatory process for electricity.³ The inefficiencies of traditional regulation and technological progress have changed the way we look at the energy industry and led to significant policy changes as to what segments of the industry should continue to be regulated as natural monopolies and what segments should be opened to competition. For example, in Illinois,

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1. The American Antitrust Institute and Commonwealth Edison/Exelon Corp. were co-sponsors of the conference as well. I owe a particular debt of gratitude to Bert Foer, the President of the American Antitrust Institute, and Rebecca Lauer, the former general counsel of Commonwealth Edison, for their help on this project.

2. The continuing saga of the Microsoft litigation and the controversy surrounding the European Union's blocking of the GE/Honeywell merger after its clearance by the Department of Justice are merely two such issues.

3. See FED. TRADE COMM'N STAFF, REPORT BY THE FTC STAFF, COMPETITION AND CONSUMER PROTECTION PERSPECTIVES ON ELECTRIC POWER REGULATORY REFORM: FOCUS ON RETAIL COMPETITION 7 (Sept. 2001), available at <http://www.ftc.gov/reports/elec/electricityreport.pdf> [hereinafter 2001 FTC STAFF REPORT].

competition for retail customers of electricity is scheduled to begin in May 2002 with competition for industrial users already in place.⁴

The challenge is to introduce competition for the benefit of consumers so that consumers will have a meaningful choice in the market for the distribution of electrical power and the ability to fully and fairly exercise that choice.⁵ Done correctly, deregulation holds great promise for the consumer. Done poorly, it leads only to the chaos that has occurred in California or the horrors of inefficient regulated monopolists being replaced by unregulated monopolists.

In this brief introduction, I will set forth the history and mission of the Institute for Consumer Antitrust Studies as a voice for a consumer-friendly competitive economy, the special challenges posed by the deregulation of the electrical power industry, and the conference that was convened on November 2, 2001 to explore competition, consumer protection, and energy deregulation.

II. THE INSTITUTE FOR CONSUMER ANTITRUST STUDIES

The Loyola University Chicago Institute for Consumer Antitrust Studies is a non-partisan, independent academic center designed to explore the impact of antitrust law enforcement on the individual consumer and to shape public policy. The Institute promotes a comprehensive, inclusive view of the benefits of competition law and policy that includes, but goes beyond, prevailing narrow notions of economic efficiency. The Institute fulfills its mission by sponsoring symposia, academic colloquia, and consumer education classes, publishing working papers, undertaking research projects, and funding a unique student fellowship.

The Institute for Consumer Antitrust Studies owes its existence to the perseverance of two extraordinary people, the late Judge Hubert Will,

4. For details of deregulation of electricity in Illinois, see <http://www.icc.state.il.us/icc> (web site of the Illinois Commerce Commission) and <http://www.citizensutilityboard.org> (web site of Citizens Utility Board). Each contains a variety of summaries and evaluations of the introduction of competition in electrical power under Illinois law.

5. The concept of consumer choice is central to competition law and unites both traditional antitrust and consumer protection policy. See generally Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001); Spencer Weber Waller, *Antitrust as Consumer Choice: Comments on the New Paradigm*, 62 U. PITT. L. REV. 535 (2001).

United States District Court for the Northern District of Illinois, and Dean Nina Appel of Loyola University Chicago School of Law.

Beginning in the 1980s, Judge Will increasingly believed that the centrist tradition in American antitrust law was threatened by the influence of the so-called Chicago school of antitrust analysis⁶ and the associated well-funded group of think tanks, academic literature, and judicial education programs that relentlessly sought to inculcate what he considered a false belief that a narrow definition of allocative efficiency was the only value at stake in antitrust. More importantly, Judge Will decided to do something about it. In supervising the settlement of a major private treble damage antitrust class action case, Judge Will announced that he would entertain proposals under the doctrine of *cy pres*,⁷ so that the funds remaining after all claims, fees and costs had been paid could be used to promote the interests of consumers in the ongoing antitrust debate.

Dean Nina Appel became aware of this opportunity and prepared, with the help of the Loyola faculty and friends in the antitrust community, the proposal that ultimately became the Institute for Consumer Antitrust Studies. Judge Will selected the Loyola proposal over the competing proposals he received and directed the funds to Loyola.⁸ This proved to be the beginning, rather than the end, of the process. On appeal, the Seventh Circuit reversed Judge Will's decision with respect to the left over funds,⁹ and all monies were returned to the court. It was only in a subsequent settlement of a different antitrust case that Judge Will followed the road map laid out for him by the Seventh Circuit and ultimately awarded similar funding to the Institute and the proposal again championed by Dean Appel.¹⁰ The Institute has received additional funding and support from Loyola University Chicago, subsequent *cy pres* court decisions, foundations, law firms, corporations, and individuals.¹¹

The Institute began under the leadership of Professor Jane Locke of the Loyola University Chicago law faculty and carved out for itself a unique niche as the only academic public interest center focusing on

6. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

7. For a discussion of the origins of the *cy pres* doctrine, see Matthew Perkins, Note, *The Cy Pres Doctrine in the 1980s: The Case for Charitable Favoritism*, 10 PROB. L.J. 163, 163 (1990).

8. *In re Folding Carton Antitrust Litig.*, 687 F. Supp. 1223 (N.D. Ill. 1988).

9. *In re Folding Carton Antitrust Litig.*, 881 F.2d 494 (7th Cir. 1989).

10. *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477 (N.D. Ill. 1993).

11. Recent donations and grants are set forth on the Institute web site at <http://www.luc.edu/antitrust>.

both antitrust and consumer protection law. Living up to its mandate from Judge Will, the Institute began examining issues of competition from the perspective of the consumer and insisting that such benefits must be tangible, and not merely theoretical in the sense of wealth maximization for producers. The Institute sponsored consumer education classes as well as conferences on antitrust and health care,¹² antitrust and the millennium,¹³ and consumer protection issues for the elderly.

In the past two years, the Institute has implemented a number of new programs. The Institute created a unique fellowship for students at the law school to both study and shape competition and consumer protection policy. Student Fellows are selected from incoming students and after completion of the first year of study. Fellows must maintain standing in the top third of the class and pursue a structured curriculum to provide the proper background to practice in the field which culminates in research and field work in their third year. Students receive a financial stipend, attend all Institute events, attend local and national antitrust conferences, and enjoy special informal programs designed to inform them of key topics and introduce them to policymakers in the public and private sector. Fellows receive individualized assistance in obtaining appropriate summer and permanent positions in the field. There are currently nine student fellows of the Institute, and its first fellow graduated in January 2002.

For the academy, the Institute sponsors the annual Midwest Antitrust Colloquium to support the work of professors in law and related disciplines who share the Institute's centrist pro-consumer orientation. The first colloquium was convened in April 2001 and featured over thirty attendees for a day of papers, commentary, and discussion. A number of the papers from the colloquium have been published,¹⁴ and an expanded second annual Midwest Antitrust Colloquium was held in April 2002, this time underwritten by a generous grant from the Coleman Foundation.

12. Symposium, *Can Antitrust Law Cure Health Care?*, 8 LOY. CONSUMER L. REV. 76-166 (1995-1996). This conference was co-sponsored by the Institute for Health Law of Loyola University Chicago School of Law. See <http://www.luc.edu/schools/law/hlthlaw/index.htm>.

13. Colloquy, *Antitrust Law for the New Millennium: An Examination of Leading Issues in Antitrust Enforcement Policy for the Approaching Age*, 9 LOY. CONSUMER L. REV. 111-92 (1997).

14. See, e.g., Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283 (2001).

The Institute web site features a number of free publications designed both for the public and antitrust professionals.¹⁵ The working paper series includes scholarly and shorter works from faculty members at Loyola University Chicago and other law schools embodying the Institute's philosophy. A *Consumer's Guide to Antitrust*, prepared by Institute Advisory Board Member William Gotfryd, outlines the basic tenets of the antitrust laws and the commitment to free markets for the benefit of consumers that has animated United States antitrust policy since the passage of the Sherman Act in 1890.¹⁶ Finally, the newsletter of the Institute is available on-line as well.¹⁷

The Advisory Board is another key component of the Institute. Building toward an eventual membership of twenty-five, the Board assists the Institute director and staff as a source of ideas for programs, speakers, research projects, competition advocacy before state and federal agencies and legislatures, job placement, funding opportunities, and provides valuable direction to the evolving nature of the Institute. The Board reflects the basic philosophy of the Institute as to the importance of the antitrust and consumer protection laws and their vigorous enforcement, but includes representatives from all segments of the bar, corporations, government, and academia.¹⁸ Because of the international nature of antitrust in the new millennium, plans are underway to constitute a similar International Advisory Board.

Although the Institute for Consumer Antitrust Studies remains a work in progress, it remains defined best by its public programs over nearly a decade since its initial creation and funding. To fulfill its mission of examining antitrust from the consumer perspective, the Institute focused in the fall of 2001 on the potential benefits and risks posed by the rapidly, but unevenly, developing deregulation of the electrical power industry.¹⁹

III. THE CHALLENGE OF ELECTRICAL DEREGULATION

The deregulation of the electrical power industry takes place in the long shadow of the deregulatory movement both in the United States and abroad. Over the past thirty years, industries such as airlines,

15. Institute for Consumer Antitrust Studies, at <http://www.luc.edu/antitrust>.

16. *Id.*

17. *Id.*

18. The full membership of the Advisory Board can be found on the Institute web site. <http://www.luc.edu/antitrust>.

19. See 2001 FTC STAFF REPORT, *supra* note 3, at app. A (describing differing deregulation initiatives in twelve key states).

trucking, telecommunications, and various segments of the energy industry have undergone deregulation with varying degrees of success.²⁰ Outside of the United States, similar experiments with deregulation²¹ have proceeded, often at a pace that would astonish United States observers.

Electricity is, however, fundamentally different from the prior industries subject to deregulation. Electricity is necessary for modern life. It has few reasonably effective substitutes, and it has a substantially inelastic demand curve making consumers vulnerable to price increases in times of shortage or when faced with exercise of market power. Compounding the situation is the current state of engineering in the electrical power field where electricity cannot be effectively stored, and the path of generated electricity cannot be strictly controlled. Power must thus be added or taken from a series of regional and state transmission grids which must be balanced in real time in order to avoid brownouts, blackouts, and other system failures.

For largely historical reasons, the generation and retail distribution of electricity has been regulated by the public utility commissions of the fifty states, while wholesale transactions and the interstate transmission of power has been regulated at the federal level by the agency now known as the Federal Energy Regulatory Commission. The Antitrust Division of the Justice Department, the Federal Trade Commission, the Nuclear Regulatory Commission, the Department of the Interior, the Environmental Protection Agency, the Defense Department, and other federal agencies also have participated in different aspects of national energy policy. At the state level, the state public service commissions are joined by the state attorney generals, local governments, and other agencies in regulating aspects of the industry. Deregulation thus is not a single process controlled by a single player but a multi-dimensional game with multiple players at both the federal and state levels.

A broad consensus nonetheless emerged that traditional cost-plus price regulation of vertically integrated monopolists has failed. The natural monopolist rationale for traditional regulation was challenged in favor of a model of competitive generation and distribution with natural monopoly utilities limited to the transmission of electrical power as

20. See generally RICHARD J. PIERCE, *ECONOMIC REGULATION* (1994).

21. Frequently this process outside the United States has been linked or preceded by a process of privatization because of the greater degree of public ownership of such industries. One of the ironies of the recent experiences in California has been the unintended interjection of de facto public ownership and control of previously private California electrical utilities because of the failure of the deregulatory process used in that state. See Richard D. Cudahy, *Full Circle in the Formerly Regulated Industries?*, 33 LOY. U. CHI. L.J. 767 (2002).

non-discriminatory common carriers. As of November 2001, the FERC and approximately half of the states had implemented different versions and visions of deregulation each on their own timetable. In Illinois, the basic legislative initiative was created in 1997 with deregulated wholesale prices, substantial mandated consumer rate reductions in 1998 and 2000, rapid introduction of competition in distribution of power for industrial users, and the introduction of choice for retail customers beginning in May of 2002.²²

Assessing the successes and failures of these various deregulatory regimes has been clouded by the spectacular failure of the process in California which, in hindsight, was flawed from the inception. More recently, the unrelated, but equally spectacular, failure of Enron Corporation has caused others to further question deregulation. Regardless of these high profile disasters, deregulation has brought consumers in certain states lower prices, greater choice, greater efficiency in generation, transmission, and distribution, preservation of reliable service, and environmental preservation.²³ For most states, it is simply too early to tell.

IV. THE CONFERENCE

These were the issues explored when the Institute and *Law Journal* conference convened on November 2, 2001. The conference was co-sponsored by the American Antitrust Institute and Commonwealth Edison/Exelon Corp.²⁴ which each provided generous financial and other assistance, and was well attended by a national audience of students, academics, practitioners, government officials, and consumer advocates.

The conference began with a keynote address by Commissioner Thomas Leary of the United States Federal Trade Commission. In his thoughtful discussion, Commissioner Leary set the stage for the panels that followed by questioning the continued utility of the overlapping state and federal regulation of different aspects of the electrical power industry.²⁵

22. See *supra* note 4 (providing websites discussing the deregulation of electricity in Illinois).

23. Pennsylvania, New Jersey, Maryland, and Delaware are frequently praised in this regard although a number of commentators question whether these results can be duplicated on a more general basis.

24. See *supra* note 1.

25. Thomas B. Leary, *A Comment on Regulation and Deregulation in a Nation With Multiple Sovereigns*, 33 LOY. U. CHI. L.J. 759 (2002). The FTC generally has taken a leading role in competition advocacy before state and federal regulatory agencies to assure the preservation of competition and consumer protection principles in the deregulatory process. The Institute

The first panel on the antitrust/deregulation dilemma followed Commissioner Leary's keynote address. Milton Marquis of Jenner & Block began the discussion by returning to the theme of multiple enforcers, this time at the federal level. In his presentation on overlapping jurisdiction in merger enforcement between the FERC, the Antitrust Division, and the FTC he concluded with his preference for real antitrust review for the antitrust agencies, but acknowledged the importance of the role of the FERC during the long transition period until full market competition.²⁶ James Serota of Vinson & Elkins followed with a look at the critical issue of what constitutes monopoly pricing in times of shortage, distinguishing between those prices which are the result of market conditions and those which derive from the individual or collective exercise of market power.²⁷ John Hilke, the head economist for the Federal Trade Commission's electricity project, followed with an insightful discussion of the ways that markets can be structured and consumers can be empowered to defeat exercises of market power and deceptive practices.²⁸ The principal papers were followed by commentary represented in this conference issue by the written comments of Albert Foer, the President of the American Antitrust Institute, who focused on the role of antitrust during the critical transition period between regulation and true market competition.²⁹

Professor Robert Fellmeth of the University of San Diego School of Law, one of the country's leading public interest lawyers, was the featured speaker for the panel on the consumer protection/deregulation dilemma. Professor Fellmeth gave an impassioned fiery populist response to the events in California and discussed how to prevent their

benefited greatly from the participation at the conference of John Hilke and Michael Wroblewski of the FTC who have played important roles in the FTC's ongoing work in this area including co-authorship of the FTC's outstanding recent reports on electrical power regulatory reform. See 2001 FTC STAFF REPORT, *supra* note 3; FED. TRADE COMM'N STAFF, COMPETITION AND CONSUMER PROTECTION PERSPECTIVES ON ELECTRIC POWER REGULATORY REFORM (July 2000).

26. Milton A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 LOY. U. CHI. L.J. 783 (2002).

27. James I. Serota, *Monopoly Pricing in a Time of Shortage*, 33 LOY. U. CHI. L.J. 791 (2002).

28. John C. Hilke, *A Consumer Self-Defense Perspective on Electricity Markets*, 33 LOY. U. CHI. L.J. 805 (2002).

29. Albert A. Foer, *Electricity: Notes on the Transition Phase*, 33 LOY. U. CHI. L.J. 813 (2002). Mr. Foer is also a member of the advisory board of the Institute for Consumer Antitrust Studies. The morning panel also included comments by David Gustman of Freeborn & Peters and JoAnne Bloom, the former Vice President of Regulatory Strategies for Commonwealth Edison.

reoccurrence elsewhere in the United States.³⁰ Professor Fellmeth's rousing talk was followed by commentary from both Robert Kelter,³¹ the litigation director of the Citizens Utility Board and Paul Bonney, the Deputy General Counsel of Exelon Corp. on the ongoing issues for consumers in the deregulatory process both in Illinois and throughout the country.

The afternoon was reserved for a discussion of lessons to be learned from the deregulatory process outside the United States, from other industries, and from the pioneer states which have gone the furthest down the road toward introducing competition and choice in the generation and distribution of electrical power. We are pleased to include in this conference issue the papers of Professor John Kwoka, the Neil Finnegan Professor of Economics at Northeastern University, on learning from the deregulation of other industries,³² and Professor Harry First of New York University School of Law on the benefits and costs of electrical deregulation in New York.³³

We are honored to include one additional written comment from a distinguished individual who was unable to attend the conference itself. Judge Richard Cudahy of the United States Court of Appeals for the Seventh Circuit has devoted much of his career to the study of competition in regulated industries as a practitioner, member of the Wisconsin Public Service Commission, leader in the American Bar Association, teacher, scholar, and judge. He is the author of the Seventh Circuit's seminal *MCI* decision which explored the application of antitrust law to the telecommunications industry at the very inception of its deregulation³⁴ and other leading cases dealing with antitrust and

30. Robert C. Fellmeth, *Plunging Into Darkness: Energy Deregulation Collides with Scarcity*, 33 LOY. U. CHI. L.J. 823 (2002).

31. Robert Kelter, *Peace, Love, Competition. An Initial Look at the Restructuring of Illinois Residential Energy Markets*, 33 LOY. U. CHI. L.J. 875 (2002).

32. John E. Kwoka, Jr., *Twenty-Five Years of Deregulation: Lessons for Electric Power*, 33 LOY. U. CHI. L.J. 885 (2002).

33. Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911 (2002). The afternoon also included a presentation by Jade Eaton of the Antitrust Division on the important, but limited, lessons to be learned from the foreign experience in electrical deregulation and commentary from Caroline Shoenberger, Commissioner of the Department of Consumer Services for the City of Chicago, Howard Learner, the President of the Environmental Law and Policy Center, and Peter Esposito, Regulatory Counsel of Dynegy, Inc.

34. *MCI Communications, Corp. v. Am. Tel. & Tel., Co.*, 708 F.2d 1081 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983). See generally Spencer Weber Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DEPAUL L. REV. 595 (1983), reprinted in 26 CORP. PRAC. COMM. 280 (1984).

regulation.³⁵ Judge Cudahy was unable to participate in the November 2001 conference because of his prior obligation to sit by designation on the Third Circuit. We are honored that he was willing to contribute his thoughts on some of the unanticipated effects of the developments in California that have shaped so many perceptions of the value and risks of deregulation.³⁶

This conference issue represents a snapshot as of the end of 2001 of one of the most vexing, complicated, and important issues in competition and consumer protection policy. On behalf of everyone at the Loyola University Chicago School of Law, the *Law Journal* and the Institute for Consumer Antitrust Studies, we hope the perspectives offered in these papers and comments help guide wise decisions so that the deregulatory process provides tangible benefits for consumers and that consumers will have the tools to choose wisely in the newly emerging competitive markets for energy.

35. See, e.g., *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988); *U.S. Trotting Ass'n v. Chi. Downs Ass'n.*, 665 F.2d 781 (7th Cir. 1981).

36. See Cudahy, *supra* note 21.