

1999

The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry

Jeffery D. Schwarz

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Schwarz, Jeffery D. "The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry." American University Law Review 48, no.6 (August, 1999): 1449-1490.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry

Keywords

Antitrust, Electric utility industry, Antitrust State Action Doctrine

COMMENT

THE USE OF THE ANTITRUST STATE
ACTION DOCTRINE IN THE
DEREGULATED ELECTRIC UTILITY
INDUSTRY

JEFFERY D. SCHWARTZ*

TABLE OF CONTENTS

Introduction.....	1450
I. The Antitrust State Action Doctrine.....	1453
A. Antitrust—Generally.....	1453
B. Antitrust Exemptions.....	1455
C. The State Action Doctrine.....	1457
1. Origins of the state action doctrine	1457
2. Application of the state action doctrine to conduct of private parties.....	1460
3. The <i>Midcal</i> two-prong test for application of the state action doctrine to private party conduct.....	1463
II. The Electric Utility Industry and Deregulation	1466
A. Structure of the Industry	1466
B. Regulation of the Industry	1468
1. Federal regulation.....	1470
2. State regulation	1470
C. Deregulation of the Industry.....	1471
1. The federal deregulation actions	1471
2. The state deregulation actions.....	1473
III. Future Application of the State Action Doctrine in a Deregulated Market Place.....	1477

*Articles Editor, *American University Law Review*, Vol. 49; J.D. Candidate, May 2000, *American University, Washington College of Law*; M.B.A., December 1996, *University of Wisconsin—LaCrosse*; B.S., Mechanical Engineering, May 1992, *North Dakota State University*.

A. The State Action Doctrine in Past Cases Involving Claims of Anti-competitive Conduct by Utilities.....	1479
1. Cases finding utility conduct protected by the state action doctrine.....	1480
2. Cases finding utility conduct not protected by the state action doctrine.....	1484
B. Applying the State Action Doctrine in the Deregulated Environment.....	1486
Conclusion.....	1489

INTRODUCTION

The electric utility industry is perhaps one of the largest industries in the U.S. economy.¹ Nearly every individual, business, and government entity in the United States uses electric energy.² The industry has more than \$185 billion in assets and involves more than 3,000 companies.³ For decades, however, many parts of the industry have been non-competitive.⁴ Instead, the industry was subject to pervasive regulation by state and federal agencies.⁵ This preference for regulation as the method for market control—rather than competition—was the result of long-standing and widespread beliefs within the utility industry that the economic character of the industry left little room for competition.⁶

Recently, however, this once stable industry has begun to experience massive deregulation.⁷ This deregulation is intended to

1. See CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 623 (3d ed. 1993) (describing the general character of the electric utility industry).

2. See Scott B. Finlinson, *The Pains of Extinction: Stranded Costs in the Deregulation of the Utah Electric Industry*, 1998 UTAH L. REV. 173, 175 (1998) (arguing that electricity is the most common form of energy used in one's life); cf. PHILLIPS, *supra* note 1, at 623 (noting that the electric utility industry is one of the country's most important businesses, serving virtually every home and commercial enterprise in the United States). Additionally, as an indication of the importance of electricity to the U.S. economy, Phillips notes that although the U.S. comprises only about five percent of the world's population, it produces about twenty-six percent of the world's electric energy. See *id.*

3. See Elisabeth Pendley, *Deregulation of the Energy Industry*, 31 LAND & WATER L. REV. 27, 60 (1996) (profiling the electric utility industry and comparing it with other regulated industries).

4. See Richard J. Pierce, Jr., *Antitrust Policy in the New Electric Industry*, 17 ENERGY L.J. 29, 29 (1996) (discussing the absence of competition in the electric utility industry).

5. See *id.* (describing the traditional regulatory and operating environment of the electric industry).

6. See *id.* (stating that the beliefs of the utility industry were supported by the industry's use of cost-of-service regulation and the belief that large economies of scale existed in the industry, concepts that were both considered incompatible with competition); see also Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electricity Industry*, 16 ENERGY L.J. 347, 349 (1995) (stating that the preference for regulation was based on the industry belief that generation, transmission and distribution of electricity established a "natural monopoly" with economies of scale or scope and high barriers to entry).

7. See Navarro, *supra* note 6, at 347 (discussing various recent restructuring plans to

introduce competition into many aspects of the industry.⁸ The decision to introduce competition into this traditionally regulated industry stems from evolving views about the economic structure of the industry.⁹ Many analysts now believe that the regulated electric utility industry was not acting efficiently.¹⁰ Such inefficiency has resulted in a situation in which the cost of regulation has overwhelmed any expected benefits.¹¹

Deregulation of the industry is currently well under way.¹² Already, the industry's wholesale sector has experienced significant deregulation of the generation and sale of electrical energy, and there also has been significant re-regulation of the transmission sector.¹³ The retail portion of the industry is following suit.¹⁴ Many states have implemented or are seriously studying and designing deregulation plans to introduce competition into the retail sale of electricity.¹⁵ Thus, it is clear that deregulation and competition are approaching at a rapid rate.¹⁶

The projected benefits of deregulation of the electric industry are immense. The Federal Energy Regulatory Commission ("FERC") estimates that the annual savings from deregulation of the electric industry will range from \$3.8 billion to \$5.4 billion in the wholesale market alone. Additionally, given the impact that electricity has on the everyday lives of nearly all individuals, businesses, and government entities, deregulation is likely to have wide-ranging

drastically change the regulation of the industry).

8. *See id.* (noting that many restructuring plans included complete deregulation of the generation of electricity, open and fair access to the transmission grid, and replacement of traditional rate base rate-setting with a more market-oriented rate-setting technique).

9. *See* Pierce, *supra* note 4, at 29 (describing analysts' concerns with the absence of mergers and acquisitions and other characteristics of competition in the utility industry); *see also id.* at 29-30 (stating the belief common among investor-owned utilities that "they will soon experience the transition from the safe, quiet life of a regulated monopoly to the perilous, volatile life of a participant in a vigorously competitive market").

10. *See* John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 AM. U. L. REV. 775, 780 (1998) (noting that the decision to deregulate is based upon the belief that utilities have not been efficient); *see also* Pierce, *supra* note 4, at 29 (noting that many analysts believe that the industry is unduly fragmented and could increase efficiency significantly).

11. *See* McArthur, *supra* note 10, at 780 (arguing that collective regulatory imprudence has occurred making the regulatory scheme ineffective and that deregulation will bring great public welfare gains).

12. *See* Navarro, *supra* note 6, at 347 (describing deregulation as a "new chaos" in the electric industry).

13. *See infra* Part II.C.1 (discussing the progress and status of the federal deregulation of wholesale electric market).

14. *See infra* Part II.C.2 (discussing state deregulation efforts in the retail sector).

15. *See infra* Part II.C.2 (discussing the progress of deregulation of the electric industry's retail sector and the form of several state deregulation plans and statutes).

16. *See* Pendley, *supra* note 3, at 62 (stating that the "[Federal Energy Regulatory Commission's] vision for the energy industry rests on competition").

effects. With savings estimates of this magnitude and a deregulation impact that is widespread, it is apparent why many have jumped onto the deregulation bandwagon.¹⁷ As FERC Chairwoman Elizabeth Anne Moler stated at the time of the Commission's issuance of its deregulation order, "the future is here—and the future is competition."¹⁸

The drive toward competition will bring many new challenges to both those within the industry and to those that depend upon it.¹⁹ One change will be a narrowing of the protection that pervasive regulation has traditionally provided electric utilities against challenges to anti-competitive behavior under the federal antitrust laws.²⁰ Traditionally, utilities have been protected from such challenges because state and federal agencies were intimately involved in utility regulation.²¹ Utilities often operated in anti-competitive ways and received protection through various antitrust doctrines.²² As the industry deregulates, however, many of the traditional reasons for such antitrust immunity vanish.²³ One doctrine that provides such protection is the state action doctrine, which provides immunity from antitrust liability for state sanctioned anti-competitive behavior.²⁴ As deregulation of the electric industry moves forward, the states will, by definition, be sanctioning less anti-

17. See, e.g., CAL. PUB. UTIL. CODE § 330(b) (illustrating the attraction of lawmakers and consumers to infuse competition in the electric utility industry).

18. See McArthur, *supra* note 10, at 777 n.3 (quoting FEDERAL ENERGY COMM'N, NEWS RELEASE: COMMISSION ORDERS SWEEPING CHANGES FOR ELECTRIC UTILITY INDUSTRY (Apr. 24, 1996)).

19. See Paul L. Joskow, *Mixing Regulatory and Antitrust Politics in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in ANTITRUST AND REGULATION 173, 183 (Franklin M. Fisher ed., 1985) (stating that concurrent attempts to advance competition and regulations can cause difficulties).

20. See *id.* at 183 (recognizing that regulation is not perfect, that any residual regulation is likely to be beneficial, and that narrowing of protections recognizes this change). This narrowing of protections occurs appropriately when competition is introduced into the industry and regulation is eliminated. See *id.* at 183-84. As the level of competition continues to increase, it is necessary to continue narrowing these protections to support the present level of competition and encourage additional competition as desired. See *id.*

21. See *id.* at 173 (noting that the purpose of antitrust laws is to promote competition, whereas regulatory policies often restricted price competition and competitive entry, thus, as a legal matter, regulated utilities are generally considered immune from antitrust liability).

22. See Pendley, *supra* note 3, at 64 (stating that monopolies often were allowed to exist in the transmission and distribution functions of utility companies).

23. See *id.* at 76-77 (noting that electricity deregulation results in the "unbundling" of generation, transmission, and distribution functions from within each utility company as well as the introduction of competition). Traditionally, the reason for providing immunity from antitrust liability was based in the law's recognition that competition was not always the most desirable method for controlling a market, and that this was particularly true of regulated industries. See *infra* notes 40-46 and accompanying text (discussing the development of exemptions from antitrust immunity).

24. See *infra* Part I.B (discussing the origins of the state action doctrine and its application to the conduct of private parties).

competitive behavior. Thus, the introduction of deregulation will have a major impact on the state action doctrine.

This Comment explores the impact that deregulation of the electric utility industry will have on the scope of the state action doctrine and the protection that it gives monopoly electric utilities. First, this Comment reviews the state action doctrine by generally reviewing the basic reasons for antitrust law and exemptions. This Comment examines the origin and development of the state action doctrine, its application to private party conduct, and tests the courts have developed for its application. Second, this Comment discusses the electric utility industry and the deregulation currently taking place. This Comment looks at the structure of the industry, the traditional role of regulation in the industry, and the current trend toward deregulation of the industry at both the state and federal level. Finally, this Comment analyzes the role that the state action doctrine will play in the deregulated industry. In particular, this Comment examines the use of the state action doctrine in the utility industry in the past and then applies the historical reasoning of the courts to utility conduct in light of the deregulation currently taking place.

I. THE ANTITRUST STATE ACTION DOCTRINE

A. *Antitrust—Generally*

Antitrust policy is concerned with the extent to which private individuals and entities should be able to achieve and maintain economic control and market power, as well as the extent to which society should deal with such control and power through the courts.²⁵ The purpose of antitrust law is to promote competition and prevent undesirable monopoly power.²⁶ Congress designed antitrust laws to protect free competition and to prevent the excessive exercise of private monopoly power.²⁷

Most modern antitrust laws in the United States derive from important antitrust statutes passed during the late nineteenth and

25. See STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 1 (1993) (discussing the basic goals of antitrust laws and noting that fundamentally, antitrust is about economic power).

26. See LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977) (discussing the general plenary purpose of antitrust laws).

27. See *Standard Oil Co. v. FTC*, 340 U.S. 231, 248-49 (1951) (stating that competition is at the "heart of the national economic policy," and that even though the economic theory underlying the various antitrust laws may be somewhat different, the protection of competition is controlling).

early twentieth centuries.²⁸ The Sherman Antitrust Act of 1890²⁹ (“the Sherman Act”) is the most basic of antitrust legislation.³⁰ The wording of the Sherman Act’s two substantive sections—Sections 1 and 2—reflects Congress’s broad public policy against anti-competitive behavior.³¹ This law, which supports competition, developed as a result of fears aroused by the “vast accumulation of wealth in the hands of corporations and individuals . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.”³² Given the general nature of this concern, the language of the Sherman Act is purposely broad.³³ The statute does not specify conduct that is prohibited.³⁴ Rather, the Act only uses the general phrase “restraint[s] of trade.”³⁵ Much of U.S. antitrust law is based on this broad statute.³⁶

The broad nature of this antitrust statute has necessitated significant judicial interpretation.³⁷ Antitrust law, as it is understood today, evolved through the interpretation of many novel situations

28. See SULLIVAN, *supra* note 26, at 13 (stating that the basic U.S. antitrust legislation is found in the Sherman Act, 15 U.S.C. §§ 1-7 (1994), and that the Clayton Act, 15 U.S.C. §§ 12-27 (1994), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-44 (1994), are important supplementary statutes). Although the most important antitrust law is found in these basic statutes, general antitrust concepts are also found in common law. See ERNEST GELLHORN, *ANTITRUST LAW AND ECONOMICS* 1 (3d ed. 1986) (discussing the historical origins of antitrust laws).

29. 15 U.S.C. §§ 1-7 (1994).

30. See SULLIVAN, *supra* note 26, at 13.

31. See 15 U.S.C. §§ 1-2 (1994). Section 1 of the Sherman Act provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony

Id. § 1.

Section 2 of the Sherman Act provides in relevant part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” *Id.* § 2.

32. EARL W. KINTNER, *AN ANTITRUST PRIMER* 15 (2d ed. 1973).

33. See *id.*

34. See *id.*

35. See *id.* (expressing the broad nature of the Sherman Act and pointing out that the Act only indicates the end Congress sought by its passage, not any particular conduct with which Congress was concerned).

36. See *id.* Two other key antitrust statutes are the Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1994), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-44 (1994). These important supplementary statutes broadened enforcement tools and expanded concepts established under the Sherman Act. See SULLIVAN, *supra* note 26, at 13-14 (describing the importance of the additional antitrust statutes).

37. See KINTNER, *supra* note 32, at 16-18 (discussing some of the many cases the courts have used to interpret the Sherman Act).

parties presented to the courts.³⁸ One result of this interpretive process has been the development of a limited number of important exemptions to the general antitrust policy in support of competition.³⁹

B. Antitrust Exemptions

Facially, the antitrust statutes appear to apply equally to all anti-competitive conduct, irrespective of the industry or party.⁴⁰ Over time, however, the existence of other statutory provisions, the jurisdiction of administrative agencies, and various other policies have led to the creation of several exemptions from antitrust liability.⁴¹ The exemptions developed as the courts recognized that antitrust law relies only in part on competition to regulate markets, and that other mechanisms—some that limit competition—work in certain situations as well.⁴²

Antitrust liability exemptions are based on different sources and may be defined in various ways.⁴³ Some exemptions are based on an express grant of immunity from Congress, while others are the result of court-created doctrine involving concepts of federalism or regulatory specialty.⁴⁴ Occasionally, exemptions from antitrust

38. See SULLIVAN, *supra* note 26, at 14 (stating that “antitrust laws have not merely been open to doctrinal interpretation, they have required it; the process of adjudication, more than a means of enforcement, has been an indispensable element in the formation of the law”). In applying the Sherman Act, courts originally looked to common law. See *id.* As more elaborate and complex situations arose, however, courts abandoned common law in favor of their interpretations of the legislative history of the laws, the various situations that arose, and the current debate about the nature and function of competition in the marketplace. See *id.* (discussing the ongoing doctrinal elaboration required by antitrust laws).

39. See 9 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 34 (1989) (reviewing the judicial decisions that supported exemptions for public utilities).

40. See 15 U.S.C. §§ 1-2 (1994) (identifying only prohibited conduct, but not listing any particular conduct, industry, or economic sector to which the Sherman Act should apply); *cf.* 9 KINTNER & BAUER, *supra* note 39, at 1 (noting that antitrust statutes do not include exceptions or differentiation).

41. See 9 KINTNER & BAUER, *supra* note 39, at 1 (describing the process of interpretation leading to various exemptions from liability). For example, a court may find that antitrust laws are not applicable, or the court may find that a certain amount of deference must be given to administrative agencies regarding the applicability of competition in a particular factual situation. See *id.*

42. See *id.* at 34-51 (reviewing various legislative and doctrinal grounds for exemptions from antitrust liability).

43. See SULLIVAN, *supra* note 26, at 717 (discussing the formulation of antitrust exemptions). For example, in the past, electric utilities were considered natural monopolies. See 9 KINTNER & BAUER, *supra* note 39, at 32 (describing the application of antitrust laws to electric utilities). Therefore, competition was inappropriate. See *id.* Thus, it was generally considered that regulation, which actually sought to restrict price competition and competitive entry, was a more appropriate way to control the market. See Joskow, *supra* note 19, at 173 (discussing the conflict between antitrust law and state regulation and the resulting immunity from antitrust that has been generally granted to electric utilities in the past).

44. See SULLIVAN, *supra* note 26, at 717 (discussing categories of antitrust exemptions).

liability are found for certain types of conduct, whereas in other situations, exemptions from antitrust liability are granted to particular industries.⁴⁵ In any case, the effect is the same: when a party with immunity based on an exemption is challenged for anti-competitive behavior, the traditional antitrust remedies are not available to the challenging party.⁴⁶

Electric utilities enjoy no explicit exemption from antitrust liability. Rather, the industry had traditionally been granted immunity because of the view that the industry is comprised of natural monopolies for which competition is inappropriate.⁴⁷ Because the purpose of antitrust laws is to support competition and because competition was deemed to be inappropriate for the electric utility industry, antitrust immunity gradually developed.⁴⁸ The state action doctrine developed as the source of this antitrust immunity.⁴⁹

45. See 9 KINTNER & BAUER, *supra* note 39, at 4 (summarizing the sources of antitrust immunity and clarifying that immunity may be granted to certain types of *conduct* or to certain types of *industries*). *Conduct* that may be immune from antitrust liability includes activity by private competitors to petition the government to take certain steps—known as the *Noerr-Pennington* doctrine. See 10 KINTNER & BAUER, *supra* note 39, at 186-87 (explaining that, under the *Noerr-Pennington* doctrine, private requests for governmental action are immune from antitrust liability because such requests implicate important political and constitutional concerns); *cf.* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-70 (1965) (holding that the *Noerr-Pennington* doctrine applies even if the subjective intent of the parties in seeking government action is to restrain competition, and that motive and purpose are irrelevant); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 135-38 (1961) (establishing the doctrine and identifying various reasons why private requests for government action are generally immunized from antitrust law). Additionally, immunized *conduct* includes private activity that is sanctioned and monitored by a state agency or actor—the state action doctrine. See *infra* Part I.C (discussing the state action doctrine).

As opposed to particular conduct, antitrust immunity is also granted to particular *parties* or *industries*. See 9 KINTNER & BAUER, *supra* note 39, at 4 (noting that in some cases antitrust immunity is granted to certain types of industries). For example, the McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015 (1994), confers partial exemption from antitrust laws on certain activities of insurance companies. See *id.* at 179-80 (discussing elements of the insurance company exemption from antitrust liability under the McCarran-Ferguson Act). Additionally, exemptions are granted for more specific industries, such as in the Fishermen's Cooperative Marketing Act, 15 U.S.C. §§ 521-522 (1994), which allows fishermen to act together in associations in certain aspects of the industry. See *id.* at 282-83 (listing the scope of activities within the fishing industry that enjoy antitrust liability exemptions under the Fishermen's Cooperative Marketing Act).

Finally, courts interpret antitrust immunity in various ways. See *id.* at 4 (suggesting different approaches to questions of antitrust exemptions). Sometimes courts interpret immunity to be an exemption from the antitrust laws, and sometimes courts interpret immunity to cause a repeal of antitrust laws in a particular case. See *id.* at 4 n.6 (citing *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 301 (1973), and noting that repeal of antitrust laws can be implied "if necessary to make the [regulatory statute] work" but "only to the minimum extent necessary").

46. See *id.* at 4 (noting that when immunity applies, antitrust remedies are unavailable, and that often traditional antitrust concerns with competition are inapplicable).

47. See *supra* notes 4-6 and accompanying text (explaining the historical treatment of the electric industry as one of a natural monopoly based on economies of scale).

48. See 9 KINTNER & BAUER, *supra* note 39, at 32 (describing the basis for antitrust exemptions as the belief that competition would not work in the industry).

49. See *id.* at 48 (describing the state action doctrine as a defense to antitrust claims often

C. *The State Action Doctrine*

The state action doctrine provides immunity from antitrust liability when a state indicates that it has a substantial desire to limit competition in a particular situation.⁵⁰ It is true that, in interpreting the antitrust statutes, courts have expressed skepticism toward displacing or preventing competition in an industry.⁵¹ It has also been established, however, that a state's decision that competition should yield to some form of state regulation or other market control may result in immunity from antitrust scrutiny.⁵² The U.S. Supreme Court has stated consistently that, based on principles of federalism, considerable deference is due to the states because of the important role that they play in the area of economic regulation.⁵³ It is this deference to a state's authority to establish its own economic priorities that is the basis of the state action doctrine.⁵⁴

1. *Origins of the state action doctrine*

The U.S. Supreme Court first enumerated the state action doctrine in *Parker v. Brown*⁵⁵ in 1943.⁵⁶ In *Parker*, California enacted legislation

made by utilities).

50. *See id.* (maintaining that, after the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943), a state acting in its sovereign capacity does not violate the Sherman Act by restraining commerce).

51. *See* 10 KINTNER & BAUER, *supra* note 39, at 126 (noting the general reluctance of courts to attack competition); *cf.* *Standard Oil Co. v. FTC*, 340 U.S. 231, 248-49 (1951) (stating that competition is at the "heart of the national economic policy").

52. *See* 10 KINTNER & BAUER, *supra* note 39, at 126 (discussing the Supreme Court's support for the proposition that federal antitrust laws may yield to state regulatory efforts). In such a situation, state regulation of a particular economic sector may be the product of a decision that competition is unnecessary or inappropriate for a particular industry or market. *See id.* The decision to regulate may also be the result of a desire to advance other, more important, state interests. *See id.* (noting that some examples of state interests that may be more important include environmental interests, health concerns, or public safety).

53. *See id.* at 128-29 (stating that the principles involved are based on deference to the state's role and the limited intent of Congress to infringe upon that role).

54. It should be noted that a parallel but separate doctrine affords absolute immunity to the federal government and its employees against claims under the antitrust laws. *See* 10 KINTNER & BAUER, *supra* note 39, at 129 n.13 (noting similar doctrine applicable to the federal government); *see also, e.g.*, *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1384 (7th Cir. 1992) (noting immunity from federal antitrust laws applies to federal judges "serving as instrumentalities of the United States"); *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245-47 (D.C. Cir. 1981) (holding that federally owned railroad is immune from antitrust laws).

55. 317 U.S. 341, 362 (1943).

56. *See* 10 KINTNER & BAUER, *supra* note 39, at 126 (identifying *Parker* as the case establishing the state action doctrine). Before the *Parker* decision, the Court had not addressed the issue of whether anti-competitive conduct by a state government was subject to the antitrust laws. *See id.* (noting that, for the first half-century after the passage of the Sherman Act, the question of applicability of the Sherman Act to government action had not been directly addressed). A significant amount of jurisprudence followed the *Parker* decision. *See id.* The greatest outpouring of cases after the establishment of the state action doctrine began three decades later following the Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975), which applied the state action doctrine to the conduct of a state's bar association. *See*

authorizing the establishment of programs for marketing agricultural commodities in the state.⁵⁷ In doing so, the legislation restricted the manner in which producers could market their crops.⁵⁸ The purpose of the legislation was to “restrict competition among the growers and maintain prices in the distribution of their commodities.”⁵⁹ Thus, the state’s articulated purpose in establishing and running the marketing programs was anti-competitive. The plaintiff claimed that the anti-competitive legislation was therefore invalid as a violation of, *inter alia*, the Sherman Act.⁶⁰

The Court looked to the explicit language and the legislative history of the Sherman Act and determined that nothing in the Act suggested that its purposes included restraining or invalidating the activities or programs of a state.⁶¹ The Sherman Act’s language refers to activities involving individual agreement or combinations and conspiracies, not to actions of state legislatures.⁶² The Court held that

10 KINTNER & BAUER, *supra* note 39, at 126 n.3 (noting that the greatest amount of jurisprudence actually started with the *Goldfarb* decision). A number of important example cases followed the *Parker* decision. *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984) (holding that the state action doctrine can apply to actions of branches of government other than the legislature, and that the doctrine does not permit an examination of the wisdom of the state’s anti-competitive activity); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-10 (1978) (explaining that the state action doctrine would apply to state agency action if all requirements for immunity were met); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-97 (1978) (recognizing that the state action doctrine applies to actions of municipalities); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-98 (1976) (suggesting that the state action doctrine would apply to conduct of private parties under the proper circumstances, but refusing to apply it on the facts of the case).

57. *See Parker*, 317 U.S. at 346 (describing the legislation being challenged). The plaintiff was a producer and packer of raisins in California who objected to the manner in which the legislation restricted his ability to market his raisins. As a result he brought suit against the administrators of the California Agricultural Prorate Act to enjoin them from applying the marketing program to his 1940 raisin crop. *See id.* at 344 (explaining plaintiff’s injury and reason for bringing the antitrust complaint).

58. *See id.* at 346-47 (explaining the operation of the California Agricultural Prorate Act).

59. *Id.* The California Agricultural Prorate Act declared that such restrictive marketing programs were necessary to “conserve the agricultural wealth of the state and to prevent economic waste in the marketing of agricultural crops within the state.” *See id.* at 346.

60. *See id.* at 348-49 (describing the plaintiff’s complaint). The plaintiff also claimed that the legislation violated the Commerce Clause of the Federal Constitution. *See U.S. CONST.* art. I, § 8, cl. 3; *Parker*, 317 U.S. at 348-49. The plaintiff claimed that because of the restrictions that the marketing plan imposed he was unable to meet certain contracts for the sale of raisins and was unable to participate in the interstate sale and purchase of raisins, and that this impact on interstate commerce made the legislation violative of the Commerce Clause. *See Parker*, 317 U.S. at 348-49.

61. *See Parker*, 317 U.S. at 350-51 (noting that the drafters of the Sherman Act did not wish to interfere with activities that are not the result of individual agreement or combination, but rather derive their authority from state legislative command).

62. *See 15 U.S.C. § 1* (1994) (referring to individual contracts and combinations, not to actions mandated by state law); *cf. Parker*, 317 U.S. at 350-51 (stating that the agricultural marketing program was never intended to operate by force of individual agreement or combination, and that because it derived its authority from legislative mandate, the action would not be included in the Sherman Act’s prohibitions).

the state's sovereignty made it inappropriate to imply that Congress intended to invalidate acts of state legislatures, even when those acts restricted competition.⁶³ Thus, when a state imposes a restraint on competition, the Sherman Act does not apply.⁶⁴

The state action doctrine, as enumerated in *Parker*, has been interpreted in many subsequent cases.⁶⁵ Through development of the state action doctrine, courts have identified three general categories in which the state action doctrine might apply to immunize anti-competitive behavior:⁶⁶ (1) action by a state itself;⁶⁷ (2) action by a subdivision of a state—including a unit of local government or by a state agency;⁶⁸ and (3) conduct of private parties pursuant to the direction and supervision of the state or its subdivision.⁶⁹ This Comment is predominantly concerned with the third application of the state action doctrine—the conduct of private parties, namely electric utilities.

63. See *Parker*, 317 U.S. at 350-51 (noting that in a dual system of government the actions of the states are sovereign, unless within an area that Congress may constitutionally act; therefore if Congress does not expressly state an intention to act within such an area, and take power away from a state, such an intention to invalidate a state's acts is not to be implied lightly).

64. See *id.* at 352 (holding that since the state made no contract or agreement and entered into no conspiracy, but rather imposed the restraint as an act of a sovereign government, the Sherman Act did not intend to prohibit such restraint on competition) (citing *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904)). *Olsen* foreshadowed the result in *Parker*, in a non-antitrust context, by using similar state sovereignty logic and holding that a state could regulate whom it would allow to be a river pilot and that the Fourteenth Amendment would not infringe upon the state's right to regulate the riverboat industry in that regard if it found only certain persons acceptable for pilot jobs. See *Olsen*, 195 U.S. at 344-45.

65. See *supra* note 56 (listing a number of cases interpreting the state action doctrine).

66. See 10 KINTNER & BAUER, *supra* note 39, at 130-31 (defining the three situations in which state action immunity may be claimed and the different requirements under each situation for it to be successfully invoked). While the state action doctrine may be applicable to various categories of actors, there may be different requirements governing its application to the various categories. See *id.* at 131. Additionally, a finding that the state action doctrine does not apply as a defense to actions by one party does not address the merits of the antitrust claim, and therefore does not imply that the conduct is automatically unlawful under the antitrust laws. See *id.* at 131 & n.20. Indeed, even if the defense is not applicable to conduct by a private party, it may not be considered illegal anti-competitive behavior if also undertaken by a state itself. See *id.*

67. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (finding actions by branches of government other than the legislature covered by the state action doctrine); *Parker*, 317 U.S. at 368 (finding state legislature's creation of an anti-competitive agricultural program protected from antitrust challenge).

68. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (applying the doctrine to actions of a municipality); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (noting that the doctrine applies to actions of a state agency, but not to the facts of the case).

69. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 66 (1985) (applying the state action doctrine to state sanctioned collective ratemaking by private trucking companies); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976) (suggesting use of the state action doctrine in the case of a state regulated private utility company, although refusing to apply on the facts of the case).

2. *Application of the state action doctrine to conduct of private parties*

In *Cantor v. Detroit Edison Co.*,⁷⁰ the U.S. Supreme Court first suggested that the state action doctrine could apply to the conduct of private parties.⁷¹ Detroit Edison Company, an electric utility, distributed free light bulbs to its electricity customers.⁷² The cost of the light bulbs was incorporated into the company's electric rate.⁷³ The electric rate, including the cost of the light bulb program, was approved by the Michigan Public Service Commission,⁷⁴ which pervasively regulated the distribution of electricity within the state.⁷⁵ For this reason, Detroit Edison claimed that it was merely following the direction of the Commission.⁷⁶ The plaintiff claimed that the

70. 428 U.S. 579 (1976).

71. *See id.* at 592 (noting that the state action doctrine might apply to private conduct if a private party is doing nothing more than obeying its sovereign, or if the state is already pervasively regulating an area of the economy in which the private party acts); *see also* 10 KINTNER & BAUER, *supra* note 39, at 163 (noting *Cantor* was the first case suggesting such private party application of the state action doctrine). Before *Cantor*, the state action doctrine had been applied only to cases involving the conduct of states and state actors. *See, e.g., Parker*, 317 U.S. at 352 (applying the state action doctrine to cases involving only the conduct of states and state actors).

Cantor was also among the first cases to suggest that antitrust, in general, applies to traditionally regulated industries like the electric utilities and that the policies underlying antitrust and regulation are not necessarily repugnant and may even be complementary. *See* Joskow, *supra* note 19, at 173 (citing *Cantor*, 428 U.S. at 579 and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

72. *See Cantor*, 428 U.S. at 582 (explaining that the utility provided electricity and free light bulbs to approximately five million people in Southeastern Michigan).

73. *See id.* (describing the rate treatment of the utility's free light bulb program). This is basic cost of service regulation, where the utility's regulator approved rate is determined by summing the utility's cost of serving customers, including the cost of such a free light bulb program, adding an appropriate return on the shareholder investment, and dividing total cost by the amount of electricity sold, arriving at a per unit electric rate. *See generally* JAMES C. BONBRIGHT ET AL., *PRINCIPLES OF PUBLIC UTILITY RATES* 108-23 (2d ed. 1988) (discussing basic principles behind cost of service regulation). Thus, the cost of the light bulbs supplied to customers by Detroit Edison was being paid for by the customers as a portion of their electric rate. *See Cantor*, 428 U.S. at 582.

74. *See Cantor*, 428 U.S. at 582 (describing the Commission's review and approval of the utility's rates).

75. *See id.* at 584 (describing the legislature's grant of power to the Public Service Commission to regulate the rates, fares, fees, charges, services, rules, conditions of service, formation, operation, and direction of public utilities); *cf.* MICH. COMP. LAWS § 460.6 (1970) (vesting the Public Service Commission with complete power and jurisdiction to regulate all public utilities in the state).

Once the state regulators approved the utility's electric rate, the utility was obligated to follow the rate without modification, including the light bulb program, until a new rate was filed and approved by the Commission. *See Cantor*, 428 U.S. at 582-83 (describing the utility's inability to change rates without state commission approval). The utility had been providing free light bulbs to its customers to some degree since 1886. *See id.* at 583. In reality, the Commission had been approving the light bulb program as an element of the utility's costs since 1916. *See id.* In 1972, the utility provided its customers with 18,564,381 light bulbs at a cost of \$2,835,000. *See id.*

76. *See Cantor*, 428 U.S. at 581 (noting the lower court's acceptance of the utility's claim that state action exempted the practice from federal antitrust laws).

utility was using its state-granted monopoly power in the electricity market, combined with its state-sanctioned rate support of the light bulb program, to restrict competition in the unregulated light bulb market.⁷⁷ The plaintiff claimed this constituted a per se violation of the Sherman Act.⁷⁸

The Court identified two distinct reasons that justified using state action doctrine immunity to insulate a private party from antitrust liability when the private party was acting as required by state law.⁷⁹ First, the Court concluded that it would be unjust to find that a party violated federal law for doing nothing more than obeying its state sovereign.⁸⁰ Second, the Court concluded that Congress did not necessarily intend to superimpose the antitrust laws as an additional and possibly conflicting regulatory mechanism in areas of the economy already regulated by the state.⁸¹ The Court, therefore, indicated that conduct of private parties might be protected from antitrust liability in certain situations if they are acting under the requirements and regulations of a state.⁸²

77. *See id.* (describing the plaintiff's claim). Essentially, the plaintiff claimed that the utility's legitimate monopoly power in the electric market, making it the supplier of electricity for every electric consumer in the market, gave it an unfair advantage in the light bulb market. *See id.*

78. *See id.* (discussing plaintiff's claim that the use of legitimate monopoly power in one market to gain advantage in another market is a violation of the Sherman Act).

79. *See id.* at 592 (discussing the application of the *Parker* decision on state action doctrine immunity to private conduct required by state law).

80. *See id.* The Court also noted, however, that although it would be appropriate to assume it is unacceptable to assign antitrust liability to a party for doing nothing more than obeying a state command, such a purely state-ordered situation would hardly ever arise, as most situations involve a combination of public and private decision-making. *See id.* at 592-93. Moreover, at the time of *Cantor*, the Court had already noted in several cases involving a mixture of state/private action that state authorization, approval, encouragement or participation alone would not confer antitrust immunity, and that when the degree of freedom that a private party exercises is sufficient, it should be held responsible for anti-competitive conduct. *See id.* at 593. As the Court stated in *Parker*, the state does not give immunity to conduct by simply declaring that the action is lawful. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

81. *See Cantor*, 428 U.S. at 592 (describing the reasons for applying the state action doctrine to state required conduct of private parties). The Court in *Cantor* later noted that there were examples of state regulation where the purpose of government control was to prevent the consequences of market competition. *See id.* at 595. Yet, the Court also seemed to narrow this observation by stating that not all economic regulation was intended to suppress competition, and that there might be situations in which a private party could be expected to comply with antitrust standards in the parts of its business subject to competition, while still meeting regulatory criteria in the monopolistic parts of its business that are controlled by regulation. *See id.* at 595-96.

82. *See id.* at 598 (noting the Court's recognition that the state action doctrine might apply to some private conduct directed by state law, but rejecting the application of the state action doctrine to the utility's conduct in this case). The Court concluded that neither the state's approval of the rate structure, nor the fact that the light bulb replacement program could be stopped without state approval, was a sufficient basis for applying the state action immunity. *See id.*

In rejecting the application of the state action doctrine to the conduct of the utility, the

The Supreme Court later clarified that the state action doctrine did apply to the conduct of private parties in *Southern Motor Carriers Rate Conference, Inc. v. United States*⁸³ and applied additional rationale beyond that provided in *Cantor*.⁸⁴ In *Southern Motor Carriers*, the Court addressed the practice of common carriers—i.e., trucking companies—that were organizing rate bureaus for the purpose of jointly fixing prices before submittal to the states' public service commissions for approval.⁸⁵ The joint price-fixing practice was allowed, although not compelled, and monitored by the states' public service commissions, premised on the idea that it would lessen the regulatory burden of the states.⁸⁶

In *Southern Motor Carriers*, the Court clarified the principle that the state action doctrine would apply to private party conduct sanctioned by the state,⁸⁷ as it had indicated might be appropriate in *Cantor*.⁸⁸

Court reasoned that even though it would be unjust to hold the utility liable for conduct prescribed by the state, the utility actually had as much or more to do with the creation of the light bulb program than the Michigan Public Service Commission. *See id.* at 594. The Court noted the utility could conceivably stop the program at some point by getting a new rate approved by the commission, and therefore, the utility was not simply acting pursuant to the demands of the state. *See id.* (suggesting that it is not unjust to hold a party responsible for conduct that includes state involvement when the party has a significant part in the decision).

Additionally, the Court reasoned that although it would be inappropriate to apply the antitrust laws to an area of the economy that the state was already pervasively regulating, the state's actual regulatory interests were in regulating the sale and distribution of electricity and the distribution of light bulbs was not crucial to that regulatory purpose. *See id.* at 598 (stating that the state's electricity regulatory scheme will not be rendered ineffective if a light bulb program is to be outlawed as a violation of the federal antitrust laws).

83. 471 U.S. 48 (1985).

84. *See* 10 KINTNER & BAUER, *supra* note 39, at 164 (noting that the application of the state action doctrine to private party conduct was required to maintain the policies granting immunity to the state and its agencies' actions).

85. *See* *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50-51 (1985). In the four states involved in the case—North Carolina, Georgia, Mississippi and Tennessee—the State Public Service Commission was responsible for setting rates for motor common carriers. *See id.* The carriers would submit proposed rates to the relevant Commission and the Commission would either approve or deny the rate through established procedures, thereby giving the Commission the ultimate authority over the rates. *See id.* In these states, the carriers were allowed to combine and agree on rate proposals prior to a joint submission to the regulatory agency. *See id.* at 51.

86. *See id.* (noting the states' belief that voluntary collective ratemaking reduced the number of proposals and allowed the commissions to carefully review and consider each rate submission). Moreover, the Court noted that effective ratemaking would be very difficult if such collective action were not allowed. Additionally, the Court recognized that at least two of the states believed that, in addition to reducing the regulatory burden, collective ratemaking would produce a desirable stability and uniformity in pricing. *See id.* at 51 n.5 (citing N.C. GEN. STAT. § 62-152(b) (1982) and Miss. Pub. Serv. Comm'n Rule 39D(4)). Finally, the Court noted that in all four states, the collective submissions of rates were voluntary and each carrier remained free to submit separate rates for approval. *See id.* at 51.

87. *See id.* at 56 (explaining the reasoning of the doctrine developed in *Parker v. Brown*—that Congress did not intend the Sherman Act to compromise the state's ability to regulate domestic commerce—applied to private party conduct).

88. *See* *Cantor v. Detroit Edison*, 428 U.S. 579, 592 (1976) (noting that under the right facts the state action doctrine may be applicable to exempt private party conduct from the

The Court justified the application of the state action doctrine to private party conduct by looking to the original reasoning established in *Parker*.⁸⁹ According to the Court, *Parker* developed the state action doctrine premised on the assumption that Congress, in promulgating the Sherman Act, did not intend to compromise a state's ability to regulate its domestic commerce.⁹⁰ The Court noted that if the state action doctrine were found to apply only to actions by state officials, and not to private party conduct, the freedom of states to regulate their own domestic commerce, absent the interference of federal antitrust law, could easily be defeated.⁹¹ Any party could frustrate a state regulatory program intending to restrain competition between private parties by simply choosing to sue the private party being regulated, rather than the state official promulgating the regulation.⁹² The Court therefore established that the state action doctrine applied to private party conduct required by the State in order to prevent this contradictory result.⁹³

3. *The Midcal two-prong test for application of the state action doctrine to private party conduct*

In *Southern Motor Carriers*, the Court also clarified that the state action doctrine applied to private party conduct only if the two-prong

Sherman Act). Note however, the expansion of the logic in applying the state action doctrine to private party conduct in *Southern Motor Carriers* as compared to *Cantor*. In *Cantor*, while the court indicated that the state action doctrine would be applicable to private party conduct, it refused to apply it on the facts of the case largely because the private party—Detroit Edison—played a large role in the decision-making that led to the anti-competitive conduct. See *Cantor*, 428 U.S. at 594-95 (stating that the utility's involvement in the decision to continue the light bulb program made refusal to grant immunity just). However, in *Southern Motor Carriers* the Court expressly stated that the doctrine would apply even though the decision to jointly file rate applications with the Commission was a voluntary decision for each carrier, thus placing greater responsibility for such anti-competitive action on the private party. See *Southern Motor Carriers*, 471 U.S. at 51 (noting the voluntary nature of joint rate submissions).

89. 317 U.S. 341 (1943).

90. See *Southern Motor Carriers*, 471 U.S. at 56 n.19 (recognizing that the *Parker* court relied on congressional silence when holding that states were free to regulate domestic commerce). The Court emphasized that although the holding in *Parker* was based on the Sherman Act's lack of an express intent within the statute to include state legislative actions in the prohibitions of the Act, there was also evidence in the Sherman Act's legislative history that affirmatively expressed a desire not to invade states' legislative authority. See *id.* at 56 n.19 (citing H.R. REP. NO. 51-1707, at 1 (1890)).

91. See *id.* at 56 (stating that if *Parker* immunity was limited to the conduct of public officials, then a state would not be able to implement programs prohibiting competition among private parties).

92. See *id.* at 56-57 (explaining that if the state action doctrine did not apply to private conduct, a challenging party could simply sue the private carriers, rather than the state commission, and defeat the state's policy of allowing joint rate applications).

93. See *id.* (holding that if the state action doctrine did not apply to private party conduct, the doctrine would stand for nothing more than a formal requirement that the challenger needs to be sure to sue the right party to defeat state sanctioned anti-competitive policies).

test previously developed for conduct by state actors and agencies was met.⁹⁴ Specifically, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,⁹⁵ the Court declared that a two-prong test existed for determining whether or not the state action doctrine applied to conduct by a state actor, such as a state agency.⁹⁶ First, "the challenged restraint must be one 'clearly articulated and affirmatively expressed as state policy,'" and second, "the policy must be 'actively supervised' by the state itself."⁹⁷ This two-prong test is now referred to as the *Midcal* test.⁹⁸

In *Midcal Aluminum*, the state implemented a regulatory scheme required all wine producers, wholesalers, and rectifiers to file price schedules and contracts with the state.⁹⁹ The state then restricted the ability of wine merchants to sell to retailers at prices other than the prices stated in the schedules or contracts, thus stifling the competitive nature of the market.¹⁰⁰ Although the state limited the prices that could be charged to those prices filed with the agency, the state actually had little control over the submitted prices, and did not review the reasonableness of the prices.¹⁰¹ The passive nature of this

94. See *id.* at 57 (acknowledging that the circumstances in which *Parker* immunity would apply to private conduct were most clearly articulated by the two-prong test).

95. 445 U.S. 97 (1980).

96. See *id.* at 105 (noting that a two prong test had been established in the previous cases as a standard for antitrust immunity under *Parker v. Brown*).

97. *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). Several previous cases interpreting *Parker* were evaluated and combined by the Court to arrive at the declaration of the *Midcal* two-prong test. See *id.* at 104-05; see also, e.g., *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (holding a state program was not subject to the Sherman Act because the "clearly articulated and affirmatively expressed goal of the State's policy was to displace unfettered business freedom"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977) (noting that the State Bar's rules were immune to antitrust challenges because the rules "reflect[ed] a clear articulation of the State's policy . . . and were subject to pointed examination by the policymaker"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (stating "[i]t is not enough that . . . anti-competitive conduct is prompted by state action; rather, [these] activities must be compelled by direction of the State acting as a sovereign").

98. See, e.g., *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1436 (9th Cir. 1997) (referring to the "Midcal Clear Articulation Requirement"); *Municipal Utilities Bd. v. Alabama Power Co.*, 21 F.3d 384, 386 (11th Cir. 1994) (referring to the *Midcal* two-prong test).

99. See *Midcal*, 445 U.S. at 99 (describing the State's pricing program and citing to CAL. BUS. & PROF. CODE § 24866 (West 1964)). Although at the time of the appeal both parties in the case were private actors, *Midcal Aluminum* was actually challenging the action of a state agency. The agency and original defendant—the Department of Alcoholic Beverage Control—did not appeal the lower court's ruling. The California Retail Liquor Dealers Association, however, intervened in the lower court proceeding and appealed the ruling. See *id.* at 101-02 (discussing the procedural posture of the case).

100. See *id.* at 99-100 (noting that no state-licensed wine seller could sell wine at prices other than the set price, that the prices set were binding, and that selling below the price could result in fines or license revocation).

101. See *id.* at 100 (indicating the state agency's minimal participation in the regulatory program's details).

regulatory scheme was dispositive.¹⁰²

The Court found that the first prong of the *Midcal* test—a clearly articulated and affirmatively expressed state policy in favor of anti-competitive conduct—was satisfied.¹⁰³ The legislative policy of the program was “forthrightly stated and clear in its purpose to permit resale price maintenance.”¹⁰⁴ The Court, however, found that the second prong—the anti-competitive policy must be actively supervised by the state—was not satisfied.¹⁰⁵ The state merely authorized the price setting, but neither established nor reviewed the reasonableness of the prices and was therefore not sufficiently supervising the state policy.¹⁰⁶ The Court emphasized the importance of the second prong by stating that “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”¹⁰⁷

The *Midcal* test was intended to ensure that anti-competitive behavior would be protected only if it was truly the product of state action.¹⁰⁸ The *Midcal* test is widely accepted, because it provides a clear guideline for determining whether conduct should be immune from antitrust liability.¹⁰⁹ Although the Court originally developed the *Midcal* test in the context of anti-competitive behavior by a state agency, it later stated that the two-prong test was applicable to anti-

102. See *id.* (noting the states’ passive role decisive in finding no real state support for anti-competitive conduct).

103. See *id.* at 105 (stating that California’s system for wine pricing satisfied the first prong of *Midcal* test).

104. *Id.* (noting that the legislature’s statement of the purpose of a California statute requiring all wine producers and wholesalers to file fair trade contract or price schedules was sufficient to meet the first requirement for application of the state action doctrine). This holding shows how a clear statement of the legislature’s anti-competitive policy within a legislative enactment is strong evidence that could be used in support of the first prong of the *Midcal* test for finding applicability of the state action doctrine.

105. See *id.* at 105-06 (noting the second requirement for immunity under *Parker* was not met).

106. See *id.* at 106 (noting the passive role of the state in setting prices and further noting that the court did not regulate contracts, evaluate prices, monitor the conditions of the market, or undertake any periodic re-examination of the program).

107. *Id.* The Court also stated that “as *Parker* teaches, ‘a state does not give immunity to those who violate the Sherman Act by authorizing them to violate or by declaring that their action is lawful’” *Id.* at 106 (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

108. See *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) (holding that determination of whether state action doctrine applies rests on satisfaction of *Midcal* test).

109. See, e.g., *FTC v. Ticor Title Ins.*, 504 U.S. 621, 622 (1992) (insisting on compliance with both parts of the *Midcal* test to determine applicability of the state action doctrine); *Zimora v. Alamo Rent-a-Car, Inc.*, 111 F.3d 1495, 1499 (10th Cir. 1997) (finding state action immunity when both prongs of the *Midcal* test were satisfied); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997) (using the *Midcal* test to determine that the state action doctrine was inapplicable as the second prong of the test was not satisfied).

competitive conduct by private parties acting under the direction of the state,¹¹⁰ and therefore it applies to the conduct of electric utilities under such circumstances.¹¹¹

II. THE ELECTRIC UTILITY INDUSTRY AND DEREGULATION

A. *Structure of the Industry*

From morning to night, one is constantly surrounded by electricity and its uses.¹¹² Yet the importance and accessibility of electricity is often taken for granted. Like many other important industries that operate in the background, few persons understand how the electric industry operates.¹¹³ Therefore, before analyzing the impact of deregulation on the antitrust state action doctrine, a basic understanding of the operation of the electric industry is necessary.

Most people purchase electricity as a single “bundled service”—i.e., they pay a single price for all the requirements that go into producing and delivering electricity—however, the industry is more complex and must be examined in light of its key components and players.¹¹⁴ The industry’s functional characteristics can be divided into four components. The first functional component is generation.¹¹⁵ Generation involves the basic conversion of one energy source—e.g., coal, uranium, solar radiation, etc.—into electrical energy.¹¹⁶ The second functional component is transmission.¹¹⁷

110. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (noting that the *Midcal* test most accurately describes the circumstances in which the state action doctrine applies to private conduct).

111. See, e.g., *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1567-68 (11th Cir. 1996) (noting that the *Midcal* test was established to determine if the state action doctrine applies, and applying the test to the conduct of the utility in the case); *Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1501-02 (11th Cir. 1991) (noting that the *Midcal* test determines if the state action doctrine applies to the electric utilities in the case), *aff’d after remand*, 21 F.3d 384 (1994).

112. See Finlinson, *supra* note 2, at 175 (noting the pervasiveness of electricity in all aspects of life for individuals, businesses, and government entities).

113. See *id.* (noting that most people consider the electric industry to be a simple provider of a single service for a single price).

114. See *id.* at 175 (noting the contrast between the simple perception and the complex reality of the electric industry).

115. See *id.* at 176.

116. See George Sawyer Springsteen, Note, *Government Regulation and Monopoly Power in the Electric Industry*, 33 CASE W. RES. L. REV. 240, 243 (1983) (describing the most common generation technologies). Technically, the generation of electricity can be accomplished in a number of highly complex ways including: burning of fossil fuels such as coal, oil and natural gas; fission of nuclear fuel; gathering of solar radiation; conversion of the potential energy of water in a river; and gathering kinetic energy from wind. See generally KAM W. LEE & A. PAUL PRIDDY, *POWER PLANT SYSTEM DESIGN* 1-15 (1985) (describing various power generation systems); MARK’S STANDARD HANDBOOK FOR MECHANICAL ENGINEERS § 9 (Eugene A. Avallone & Theodore Baumeister, III eds., 9th ed. 1987) (discussing technical specifics of various modes of

Transmission involves the process of moving electrical energy from the point of generation to a wholesale purchaser located near the ultimate consumer.¹¹⁸ Transmission is analogous to a “wholesale” delivery.¹¹⁹ The third functional component is distribution.¹²⁰ Distribution is the retail delivery of electricity and involves the transportation of electrical energy from the transmission system to the consumer.¹²¹ Finally, the fourth functional component, sometimes referred to as ancillary services, includes the additional activities that must be performed to coordinate and facilitate the first three components.¹²² When analyzing deregulation of the industry and the impact of deregulation on the antitrust doctrine, it is important to consider these functional divisions, because they are often the divisions used by states to determine what will and will not be deregulated and subject to competition in the future.¹²³

power generation). For the purposes of this antitrust analysis, however, the method of generation is unimportant, rather, it is only important to see generation as the manufacturing component of the industry.

117. See Finlinson, *supra* note 2, at 176.

118. See *id.* (noting transmission involves delivery of large amounts of electrical energy over relatively few transmission lines to delivery points in the consumer’s area).

119. See Springsteen, *supra* note 116, at 244 (noting that in the production chain, transmission links generation with ultimate delivery to the consumers).

120. See Finlinson, *supra* note 2, at 176 (describing transmission as the third component of service).

121. See *id.* (describing the process and function of the distribution component as moving the electricity through the low voltage system to the point of consumption); see also Springsteen, *supra* note 116, at 244 (describing distribution as the link in the manufacturing process that carries electricity to the consumer). Distribution is often seen as part of the retail side of the electric industry, whereas generation and transmission are often seen as part of the wholesale side of the business. See Finlinson, *supra* note 2, at 176 (characterizing distribution as retail in nature).

122. See Finlinson, *supra* note 2, at 176 (noting the group of additional services used to coordinate the generation, transmission, and distribution of electricity). The importance of these activities is amplified by the fact that electric utilities, unlike almost any other manufacturing industry, must produce electric supply instantaneously upon demand by consumers; storage or inventory is not economically feasible. See Springsteen, *supra* note 116, at 242-43 (noting how manufacturers of electricity must be able to provide electricity to consumers over a wide demand range with no notice of constant, future fluctuations).

Additionally, note that the term ancillary services also refers to a *specific* set of functions designated by FERC in the open-access order that are performed to support the generation and transmission of electricity and are necessary for open competition in the industry. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,579-80 (1996) (listing the six FERC ancillary services as follows: scheduling and system control, voltage control, frequency response service, energy imbalance service, spinning operating reserve service, and supplemental operating reserve service).

123. See *infra* Part II.C.2 (discussing the particular details of deregulation at the state level).

It is also useful to understand the basic role of the parties involved in the industry. Traditionally, there have been three main groups involved in the electric industry: (1) the electric companies, (2) the consumers, and (3) the regulators. See Finlinson, *supra* note 2, at 176. Furthermore, there were traditionally four types of electric companies. These companies are the investor owned utilities (“IOUs”), the state and municipal owned utilities, the cooperative utilities, and the federal power systems. See PHILLIPS, *supra* note 1, at 635-37

B. Regulation of the Industry

The need to regulate the electric industry developed early in the its history and continued with the technological growth that followed.¹²⁴ As the industry grew, it developed into one that consisted of relatively few companies and large economies of scale.¹²⁵ These factors led to a continual diminution of competition in the industry.¹²⁶ This decrease in competition was one of the major factors leading to the government's regulation of the electric utility industry.¹²⁷ The decision to regulate was consistent with then-current theories that regulation was "a device that would allow a single firm [or a few firms] to secure all the advantages of larger scale production but which would protect consumers from the abuse of monopoly power."¹²⁸ Since the 1930s, nearly all electric utilities in the United States have operated under both state and federal regulation.¹²⁹

Today, the electric industry is a highly complex agglomeration of individual electric systems, most of which possess some degree of

(describing the major ownership segments of the industry). Generating capacity and production is broken down between the company groups as follows: there are approximately 250 privately owned IOU systems possessing about 77% of the industry's electric generating capacity; there are approximately 2,200 state, municipal, and local publicly owned systems with about 10.2% of the industry's generating capability; there are approximately 1,000 cooperatively owned systems with approximately 3.6% of the industry's generating capacity; and the federal agencies—e.g., large federal power districts—own approximately 9.2% of the industry's generating capacity. *See id.* (delineating production capabilities by ownership class).

124. *See* PHILLIPS, *supra* note 1, at 624-25 (describing the history of the industry). Although the electric utility is vastly important to modern society, it is a relatively young industry. *See id.* at 624. Although an electric current was demonstrated as useful to make light in 1802, it was not until 1879 that the first central station power plant was built in San Francisco to run the city's electric arc lighting system. Additionally, in 1882 the first central station power plant was built in New York City to power about 400 incandescent lamps. *See id.*

125. *See id.* at 625 (discussing consolidation of the industry). Very early in the development of the industry, direct current technology, insufficient transmission assets, and limited demand encouraged the creation of an industry comprised of many small localized companies. *See id.* at 624-25. "Frequently two, three, or more non-interconnected power plants . . . were built in the same city." *Id.* Consequently, while competition between these companies served the public interest, it also led to a highly splintered industry. *See id.* at 625. For example: in 1887, six electric companies served New York City; in 1895, five electric companies served Duluth, MN; in 1906, four firms served Scranton, PA; and in 1907, 45 firms had the legal right to operate in Chicago. *See id.* The result was a very inefficient market by modern standards. Technological changes in the late 1800s—including the introduction of the transformer, the use of alternating current electricity, the use of higher transmission voltages, and the resulting increasing economies of scale—led to consolidation of these small companies, creating what some felt were natural monopolies and a diminution of competition. *See id.* (citation omitted).

126. *See id.* (describing how technological and resulting economic changes led to consolidation and a diminution of competition) (citation omitted).

127. *See id.* (describing the early reasons for regulation) (citation omitted).

128. WILLIAM W. SHARKEY, *THE THEORY OF NATURAL MONOPOLY* 16 (1982) (discussing the views of Henry Carter Adams, who in 1887 was one of the first to suggest direct regulation of natural monopolies as a means toward social welfare).

129. *See* Finlinson, *supra* note 2, at 182 (describing the history of regulation at both the state and federal levels and its relation to the perceived monopoly power of utilities).

local monopoly power.¹³⁰ As of the early 1990s, there were approximately 3,500 separate electric utility systems in the United States.¹³¹ The largest 200 companies, however, control over ninety percent of the industry's generating capacity and directly serve eighty percent of its ultimate retail consumers.¹³² This concentration of monopoly power has continued to support the perceived need for regulation into the modern era, and resulted in the preemption of most competition within the industry.¹³³

Regulation of the electric industry developed into a dual jurisdiction system.¹³⁴ Responsibility for regulating the industry is divided between the federal and state governments.¹³⁵ The Commerce Clause of the U.S. Constitution¹³⁶ necessitates this dual jurisdiction scheme.¹³⁷ Application of the state action doctrine, however, applies only to conduct by the state or sanctioned by state regulation.¹³⁸ As a result, for this Comment, the state regulatory scheme and the state deregulation plans are more important than federal regulatory issues. The movement in state deregulation has been preceded and heavily influenced by deregulation at the federal level.¹³⁹ Thus, it is necessary to have a basic understanding of both federal and state regulation and deregulation.

130. See PHILLIPS, *supra* note 1, at 635 (describing the current complex nature of the electric industry today) (citation omitted).

131. See *id.* (providing electric industry composition statistics).

132. See *id.* (noting the degree of market power concentration in a relatively small percentage of the industry's firms).

133. See Finlinson, *supra* note 2, at 182 (describing the inherently monopolistic nature of the industry and the resulting need for regulation).

134. See *id.* at 183 (noting how since the 1930s, utilities have been regulated by both the state and federal governments).

135. See *id.* at 182 (discussing the jurisdictional split for regulation of the industry between the state and federal governments) (citing the Federal Power Act, 16 U.S.C. §§ 791-828 (1994)).

136. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

137. See Finlinson, *supra* note 2, at 183 (stating that dual jurisdiction between the federal and state governments is necessary because utility transactions often cross state lines and have an impact on interstate commerce, thus invoking the Commerce Clause).

138. See *supra* notes 66-69 and accompanying text (explaining that the state action immunity doctrine applies to conduct required by the states and is based on the sovereign ability of states to regulate their own economic environment exclusive of federal regulation).

139. See, e.g., 1996 Cal. Stat. 854, § 1(a) (finding that the restructuring of the California electric utility industry has been driven in large part by changes in federal law intended to introduce increased competition); 220 ILL. COMP. STAT. ANN. 5/16-101A(b) (West 1993 & Supp. 1999) (finding that competitive forces are affecting markets for electricity partially as a result of recent federal statutory and regulatory changes); 66 PA. CONS. STAT. ANN. § 2802(1), (3) (1979 & Supp. 1999) (finding that the federal government has introduced competition into several industries that have been regulated traditionally as natural monopolies, and that federal initiatives to encourage greater competition in the wholesale electric market are in the public interest to extend competition to the retail electric market).

1. Federal regulation

In 1935, Congress passed the Federal Power Act,¹⁴⁰ which gave the Federal Power Commission ("FPC") jurisdiction to regulate interstate transmission of electric energy and sales at wholesale intended for resale.¹⁴¹ With the creation of the Department of Energy in 1977, FERC replaced the FPC.¹⁴² Today, FERC regulates virtually all transactions between utilities for the sale of electricity across state lines and all wholesale sales and transmission transactions that occur in the continental United States, regardless of whether the transaction crosses state lines.¹⁴³ Approximately twenty-eight percent of the industry's total sales volume is thereby subject to federal regulatory jurisdiction.¹⁴⁴

2. State regulation

Individual state public utility commissions regulate most aspects of the industry not covered by federal regulation.¹⁴⁵ Most state commissions possess a general statutory authority to regulate electric

140. 16 U.S.C. §§ 791-828 (1994).

141. *See id.* § 824 (declaring that the transmission and sale of electric energy, which affects the public, is subject to federal regulation); *see also* PHILLIPS, *supra* note 1, at 648 (describing the broad regulatory authority granted to the FPC in Title II of the Federal Power Act). The federal regulatory jurisdiction also includes regulation of hydroelectric power plants on the federal water ways. *See* PHILLIPS, *supra* note 1, at 644-45. This function was actually created by the Federal Water Power Act in 1920. *See id.*

142. *See* Finlinson, *supra* note 2, at 181 (describing FERC's creation and general regulatory responsibility).

143. *See id.* at 183 (discussing the extensive reach of FERC's jurisdiction). Note that because of the physical interconnection of the high voltage wholesale transmission grid and the physics of electrical transmission, virtually any wholesale transaction within the continental United States has an impact on interstate commerce even if the two parties to the transaction are located within the same state. *See* Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 461-63 (1972) (noting that studies indicate that transfers of electricity between electric utilities located in different states commingle in an electrical bus). This decision is the basis for federal jurisdiction over *all* wholesale transactions, even when the parties are within the same state. *See id.* at 463 (holding that the physical explanation is sufficient to sustain FPC jurisdiction).

Additionally, FERC jurisdiction includes sales by *all utilities*. The term utilities, however, includes more than just the common IOU electric company and is defined to include "any person who owns or operates facilities subject to the jurisdiction of the Commission." *See* 16 U.S.C. § 824(e) (1994).

144. *See* PHILLIPS, *supra* note 1, at 648. Although this percentage is a relatively small amount when compared with that controlled by the states, the regulatory influence of the FERC is significant. For example, under the "filed rate doctrine," rates set by FERC must be given binding effect by state commissions. *See, e.g.,* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962-65 (1986) (describing the history and development of the "filed rate doctrine"); Narragansett Elec. Co. v. Burke, 381 A.2d 1358, 1362-63 (R.I. 1979) (holding that the state commission must treat the FPC's price as binding).

145. *See* Finlinson, *supra* note 2, at 183 (citing as an example Utah's Code which authorizes states to regulate all public utility operations and transactions not regulated by the federal government).

utilities, as well as other public utilities.¹⁴⁶ For most states, this includes regulatory authority to assign licenses, service territory franchises, and also permits for the construction or abandonment of generation and transmission facilities.¹⁴⁷ Typically, state regulators also regulate the rates that utilities can charge for retail sales.¹⁴⁸ Generally, this authority includes the power to require approval of initial rates and rate changes, the power to suspend rates, the power to prescribe interim rates, and the power to initiate rate investigations.¹⁴⁹

C. Deregulation of the Industry

1. The federal deregulation actions

The most pervasive regulation of the industry continued until the 1970s.¹⁵⁰ Until such time, traditional rate based regulation had arguably been very successful with utilities constructing increasingly larger plants to take advantage of economies of scale, shareholders consistently earning stable and acceptable returns, and customers receiving reliable electricity at rates that continued to fall in inflation adjusted terms.¹⁵¹ During the 1970s, however, a number of factors, including the oil embargoes, overbuilding by utilities, increased costs of nuclear generation, virulent inflation, and reduced demand for electricity, led to rapidly rising electric rates.¹⁵² Many analysts and regulators perceived increasing rates as a failure of the regulatory scheme, and claimed that utilities were not acting prudently and the cost of regulation was too high.¹⁵³ As a result, it was believed that

146. See generally CAL. PUB. UTIL. CODE § 701 (Deering 1990) (granting the commission the authority to supervise and regulate every public utility in the state and to do all things necessary and convenient in the exercise of such power and jurisdiction); MINN. STAT. ANN. § 216B.08 (West 1992) (vesting the public utility commission with the powers, rights, functions, and jurisdiction to regulate every public utility in the state).

147. See PHILLIPS, *supra* note 1, at 136 (describing the powers of state commissions).

148. See Springsteen, *supra* note 116, at 251 (noting that states have regulatory ratemaking authority over retail sales). At the same time, states are prohibited from asserting any regulatory authority over wholesale sales. See *Public Utilities Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927).

149. See PHILLIPS, *supra* note 1, at 136 (describing the authority of state commissions over utility rates).

150. See Navarro, *supra* note 6, at 349-50 (describing utility regulation during the electric industry's growth period in the early middle 20th century).

151. See *id.* (noting the success of utility regulation before the 1970s).

152. See Finlison, *supra* note 2, at 184 (discussing the reasons for changing attitudes about the regulation of the energy industry); see also Navarro, *supra* note 6, at 350 (describing the rise in the cost of generating electricity).

153. See McArthur, *supra* note 10, at 780 (describing concern over the large utilities' operation of the industry).

introducing competition would solve these problems.¹⁵⁴

In 1978, the federal government took the first step toward deregulation of the electric industry with the passage of the Public Utility Regulatory Policy Act of 1978¹⁵⁵ ("PURPA").¹⁵⁶ PURPA permitted new, non-regulated parties to enter the electric generation market.¹⁵⁷ These new parties were called Qualifying Facilities ("QF").¹⁵⁸ If an electricity generating entity qualified for QF status, the local regulated electric utility could be forced to purchase generation from that entity at the utility's avoided costs.¹⁵⁹ This change was a seemingly small opening in the non-competitive nature of the industry,¹⁶⁰ yet it was important because third party competitors were finally introduced into the market for the generation of electrical energy.¹⁶¹

PURPA was followed by the Energy Policy Act of 1992 ("EPAct").¹⁶² As part of EPAct, Congress encouraged further competition in the electric industry by allowing FERC to force regulated electric utilities to grant other parties access to their transmission systems.¹⁶³

154. *See id.* (noting the belief that industry's imprudence "is the reason that the lash of competition needs to be applied" and that "deregulation will produce large public welfare gains").

155. Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at scattered sections of 16 U.S.C.).

156. *See* Finlinson, *supra* note 2, at 184 (describing PURPA as the "first taste of competition" in the electric industry).

157. *See id.* at 185 (discussing the impact of PURPA on competition).

158. *See id.* (describing QFs as a "new form of nonutility generating entity") (citation omitted); Navarro, *supra* note 6, at 351 (noting that as a "new generation" of generators, QFs rapidly proliferated).

159. *See* Finlinson, *supra* note 2, at 185 (discussing the impact of PURPA on electric utilities and describing how PURPA essentially required electric utilities to allow an outside company to use its transmission lines); Navarro, *supra* note 6, at 351 (noting PURPA provided a "must take" provision which would require local utilities to take "any and all power offered by QFs," and noting that utilities were required to pay QFs for such energy at the "avoided cost"). The "avoided cost" is the "incremental cost of alternative electric energy" and refers to the amount the utility would save by not having to purchase or generate that quantity of electricity provided by the QF—i.e., the incremental or marginal costs, presumably including both variable costs of production—i.e., fuel, purchased power, and other variable costs—as well as fixed costs—i.e., the capital costs avoided by not having to construct the capacity replaced by the purchases from the QF. *See* 16 U.S.C. § 824a-3(b)&(d) (providing rules for the purchase of electricity from QFs by electric utilities).

160. *See* Finlinson, *supra* note 2, at 185 (describing the impact of the PURPA legislation on the industry).

161. *See* Navarro, *supra* note 6, at 351 (describing the impact of PURPA as creating a new industry of generators).

162. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (relevant portions to be codified in scattered sections of 15 U.S.C. and 16 U.S.C.); *see also* Finlinson, *supra* note 2, at 185 (describing passage of the EPAct several years after PURPA and after deregulation of several other industries had occurred, including the transportation, telecommunications, airline, and natural gas industries).

163. *See* Navarro, *supra* note 6, at 352 (describing the opening of the nation's transmission grid due to the EPAct).

Independent generators could utilize a regulated utility's transmission systems to reach a distant customer without having to construct its own transmission facilities.¹⁶⁴ Passage of the EPAct was critical to the implementation of competition because it further opened the industry to independent parties, particularly in the market for generation.¹⁶⁵

In 1996, FERC acted upon EPAct's transmission open access mandate by promulgating its open access order,¹⁶⁶ Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities ("Order 888").¹⁶⁷ FERC realized that unimpeded competition would be impossible without requiring utilities to grant access to their transmission systems on a non-discriminatory basis and requiring utilities to unbundle electric service components.¹⁶⁸ In Order 888, FERC required utilities to file tariffs with federal regulators, setting the terms and conditions for the use of their transmission systems, and to allow non-discriminatory access to their transmission systems based on this tariff.¹⁶⁹ Thus, FERC finally set the stage for competition at the wholesale level.¹⁷⁰

2. *The state deregulation actions*

Nearly every state has taken some action to develop plans to deregulate the retail portion of the electric industry.¹⁷¹ Because the

164. See Finlinson, *supra* note 2, at 186 (describing the impact of the EPAct on the industry). The third party generator would, however, have to pay for the use of the utility's transmission system. See *id.*

165. See Navarro, *supra* note 6, at 352 (discussing the increasing competition in the industry starting in the 1970s).

166. See Finlinson, *supra* note 2, at 186-87 (describing how FERC acted to promote competition by ordering utilities to open their electrical systems and provide access on a non-discriminatory basis).

167. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996).

168. See Finlinson, *supra* note 2, at 186 (discussing the reasons for Order 888 and noting comparable access and unbundled service were necessary).

169. See *id.* at 187 (describing FERC's open access requirement). Non-discriminatory access means that the utility owning the transmission system must not discriminate when providing access to outside requestors of transmission service, and must charge the same "price" for such access that they would charge to themselves. See *id.*; see also Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. at 21,552 (stating that a utility's purchase of energy must be made under the same tariff as the purchases of other utilities).

170. See Finlinson, *supra* note 2, at 187 (claiming that with Order 888 and its open access requirement, wholesale competition is "nearly complete").

171. See Energy Information Administration, *Status of State Electric Utility Deregulation Activity*

industry's retail sales are regulated by state commissions, it is necessary for each individual state to take steps to remove the traditional regulatory paradigm and introduce competition in the retail sector.¹⁷² States have indicated that deregulation at the federal level has precipitated and encouraged their introductions of competition into the retail sector of the electric industry.¹⁷³ States have also indicated that deregulation of portions of the retail sector will result in increased innovation, improved efficiency, better service from all market participants, and a reduction in the cost of regulatory agency oversight.¹⁷⁴ In addressing state efforts to deregulate the retail sector of the industry, this Comment focuses on those states that have already enacted restructuring legislation.¹⁷⁵

(visited Feb. 14, 1999) <http://www.eia.doe.gov/cneaf/electricity/chg_str/tab5rev.html> (listing the current status of retail deregulation on a state-by-state basis). According to the United States Energy Information Administration, the following is a breakdown of state deregulation activity as of February 1, 1999:

- (1) States with restructuring/deregulation legislation enacted: Arizona, California, Connecticut, Illinois, Maine, Massachusetts, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, and Virginia.
- (2) States with a comprehensive regulatory order on competition issued: Maryland, Michigan, New Jersey, New York, and Vermont.
- (3) States with restructuring orders or legislation pending: Delaware and Texas.
- (4) States with regulatory commission or legislative investigation ongoing: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.
- (5) States with no significant deregulation activity: Florida and South Dakota.

See id.

172. *See supra* notes 134-40, 145-51 and accompanying text (discussing the reasons for the split between federal and state jurisdiction for wholesale and retail sales and the general regulatory responsibilities of the states and noting the exclusive regulatory jurisdiction of states over the retail sector).

173. *See supra* note 139 and accompanying text (noting that state deregulation was influenced by federal deregulation and citing examples of state statutes which point to federal deregulation as the impetus for their own deregulation).

174. *See* CAL. PUB. UTIL. CODE § 330(e) (West Supp. 1999) (indicating a belief that competition in the generation market will bring economic benefits); 1997 Mass. Acts 164, § 1(f)-(g) (finding that the introduction of competition into the generation market will provide incentives to act efficiently, improve markets for new technologies, improve public confidence, and provide market participants with better price signals); 66 PA. CONS. STAT. ANN. § 2802(5) (West Supp. 1999) (declaring that competitive forces are more efficient than state regulation for controlling the cost of electricity generation).

Additionally, several states have indicated through enacted restructuring legislation that they expect general reductions in the overall cost of electricity to result from the introduction of competition into areas of the retail sector. *See, e.g.*, ARIZ. REV. STAT. ANN. § 30-805(G) (West 1996 & Supp. 1998) (requiring a 10% reduction over a maximum of 10 years in the rate for bundled service for retail customers unable to choose competitive electric service); CAL. PUB. UTIL. CODE § 330(a)-(b) (West 1975 & Supp. 1999) (expecting a reduction of at least 20% in the state's \$23 billion annual cost of electricity); 1997 Mass. Acts 164, § 1(w) (expecting an initial rate reduction of 10% due to the introduction of competition).

175. *See supra* note 171 (listing the states and their basic position in the movement toward deregulation). A total review of the status of each state's progress in deregulating the industry

State deregulation plans allow competition in the retail supply of the generation component¹⁷⁶ of the industry.¹⁷⁷ As a result, states have declared that they will no longer regulate the provision of generation services.¹⁷⁸ Under state deregulation plans, any qualified entity can provide generation services to retail customers, defined retail service territories for generation services will no longer apply, and the marketplace—not state regulators—will control prices for generation services.¹⁷⁹ Additionally, states have explicitly stated in their deregulation plans that retail consumers will be free to choose from alternative suppliers of competitive generation service.¹⁸⁰

A number of states have also declared that other components of the industry will be subject to competition.¹⁸¹ Some restructuring plans will allow for billing and collection services to be provided on a competitive basis.¹⁸² Electric metering and meter reading services also

is beyond the scope of this Comment and is not necessary for the analysis of deregulation on antitrust doctrine.

176. See *supra* notes 115-18 and accompanying text (explaining the generation function of the electric industry).

177. See ARIZ. REV. STAT. ANN. § 30-802(A) (West 1996 & Supp. 1998) (requiring public power entities and the state commission to facilitate the transition to a competitive market in electric generation services); CAL. PUB. UTIL. CODE § 330(d) (West 1975 & Supp. 1998) (finding competition in the supply of electric power to be in the interest of ratepayers and the state as a whole); 66 PA. CONS. STAT. ANN. § 2802(13) (West Supp. 1998) (declaring the purpose of the Electricity Generation Customer Choice and Competition Act to be, *inter alia*, establishment of a structure under which retail customers will have direct access to a competitive market for the generation of electricity).

178. See CAL. PUB. UTIL. CODE § 330(l)(2) (West 1975 & Supp. 1998) (concluding that generation should be transitioned from regulated status to unregulated status); MASS. GEN. LAWS ANN. ch. 164, § 1A(e) (West 1996 & Supp. 1999) (stating that a generation company will not be subject to regulation as a public utility); ME. REV. STAT. ANN. tit. 35-A, § 3202(2) (West 1988 & Supp. 1998) (declaring that under the Public Utility Act generation services are not subject to regulation after March 1, 2000); 66 PA. CONS. STAT. ANN. § 2806(a) (West 1979 & Supp. 1999) (declaring that generation of electricity will no longer be regulated as a public utility).

179. See ARIZ. REV. STAT. ANN. § 30-803(A) (West 1996 & Supp. 1998) (establishing that any public power entity may participate in retail electric competition, and that all service territories currently served must be opened to competition, 20% by 1999 and 100% by 2001); 220 ILL. COMP. STAT. 5/16-103(c) (West 1993 & Supp. 1999) (stating that prices for competitive components of service must be market based prices); 66 PA. CONS. STAT. ANN. § 2806(a) (West 1979 & Supp. 1998) (declaring that generation of electricity will no longer be regulated as a public utility and that consumers will have the ability to choose their own supplier of generation).

180. See CAL. PUB. UTIL. CODE § 330(k)(2) (West 1975 & Supp. 1998) (announcing that customers must have the ability to choose from competing suppliers of electricity in order to achieve meaningful levels of competition in the industry); ME. REV. STAT. ANN. tit. 35-A, § 3202(1) (West 1988 & Supp. 1998) (declaring that all consumers of electricity have the right to purchase generation services directly from the competitive provider of their choice); 66 PA. CONS. STAT. ANN. § 2806(a) (West 1979 & Supp. 1999) (declaring that consumers will have the ability to choose their own supplier of generation).

181. See *supra* note 122 and accompanying text (explaining the ancillary services sector of the industry). Many of these other components would fall into the ancillary services functional component of the industry.

182. See, e.g., ARIZ. REV. STAT. ANN. § 30-803(C)(1) (West 1996 & Supp. 1998) (stating that

will be open to competition in some restructuring plans.¹⁸³ As a result, different, independent providers could supply these services, which previously had been provided by the integrated, regulated utility as part of the bundled electric service.¹⁸⁴

While state deregulation plans intend to introduce competition for the generation market and for some other services, other areas of the industry will remain regulated. Generally, state restructuring plans require that transmission and distribution services remain regulated.¹⁸⁵ Much like the federal model, some states require that utilities maintain their transmission systems and allow open access to alternative suppliers of generation services.¹⁸⁶ Some states view regulation of the transmission and distribution functions as critical to maintaining high levels of reliability in electric service.¹⁸⁷ Additionally, several state plans also require utilities to provide default electrical

billing and collection services will be provided on a competitive basis for retail loads greater than one megawatt after December 31, 1998 and for all retail customers after December 31, 2000); ME. REV. STAT. ANN. tit. 35-A, § 3202(4) (West 1988 & Supp. 1998) (directing that the provision of electric billing will be subject to competition beginning March 1, 2002). Billing, collection, and metering refer to the functions of determining the retail consumer's electric bill, collecting payment, and transferring the appropriate payment to the providers of the other services such as generation and transmission. *See id.* at § 3201(8)(A).

183. *See, e.g.*, ARIZ. REV. STAT. ANN. § 30-803(C)(2)-(3) (West 1996 & Supp. 1998) (ordering that metering and meter reading services will be provided on a competitive basis for retail loads greater than one megawatt after December 31, 1998 and for all retail customers after December 31, 2000); ME. REV. STAT. ANN. tit. 35-A, § 3202(4) (West 1988 & Supp. 1998) (directing that the provision of metering services will be subject to competition beginning March 1, 2002). Metering and meter reading refer to the process of measuring the amount of electrical energy and capacity consumed by the consumer as well as provision and maintenance of metering equipment. *See id.* at § 3201(8)(B)-(D).

184. *See, e.g.*, ARIZ. REV. STAT. ANN. § 30-803 (West 1996 & Supp. 1998) (indicating in the title that an "open market" will be created with the deregulation of these services).

185. *See id.* § 30-804 (West 1996 & Supp. 1998) (stating that the existing regulatory system for distribution services is not impacted by the deregulation statutes); CAL. PUB. UTIL. CODE § 330(k)(2) (West 1975 & Supp. 1998) (declaring that the delivery of electricity over transmission and distribution systems is and will continue to be regulated); MASS. GEN. LAWS ANN. ch. 164, § 1B(a) (West 1996 & Supp. 1999) (stating that state regulators will define service territories for distribution companies and that the state regulators have the power to make service territories exclusive for the distribution company).

186. *See, e.g.*, ARIZ. REV. STAT. ANN. § 30-803(D) (West 1996 & Supp. 1998) (holding that public power entities must provide buy-through service on request at charges no greater than the cost required for the transmission, distribution, and ancillary services necessary to wheel the generation to the customer); 66 PA. CONS. STAT. ANN. § 2804(6) (West 1979 & Supp. 1999) (stating that transmission and distribution owning public utilities must provide service to all customers and generation service providers that desire it, on terms that are equivalent to the utility's own use of its system). Such open transmission access will be necessary to ensure that competitive suppliers of generation services are able to deliver the electricity to the retail consumers. *See supra* notes 163-68 (noting FERC's realization that similar open access is required to support a competitive market in an analogous way at the federal level).

187. *See, e.g.*, CAL. PUB. UTIL. CODE § 330(i) (West 1975 & Supp. 1998) (noting the importance of the transmission and distribution system to the reliability of electricity supply, and requiring that the Commission take responsibility for regulating the inspection, maintenance, repair, and replacement standards for the state transmission system).

service to those retail consumers that do not or cannot choose from competitive suppliers of generation and for those customers whose alternative supplier is unable to deliver.¹⁸⁸ Finally, states have placed licensing restrictions on potential competitive suppliers of generation and other services.¹⁸⁹

The state deregulation plans discussed above are being implemented to introduce competition in those areas of the industry where it is believed that allowing competition can lower costs for consumers.¹⁹⁰ At the same time, the restructuring plans maintain certain elements of regulation in those areas necessary to ensure that competition in the generation market works while still maintaining reliable service.¹⁹¹ In any case, the preference of states for some increased level of competition is clear.¹⁹²

III. FUTURE APPLICATION OF THE STATE ACTION DOCTRINE IN A DEREGULATED MARKET PLACE

In *Cantor*,¹⁹³ the U.S. Supreme Court listed two reasons for applying the state action doctrine to private party conduct: (1) it is unfair to find liability for merely obeying state law; and (2) Congress did not intend to superimpose federal law on a sector of the economy already sufficiently regulated by the state.¹⁹⁴ Later, the Court added a third reason for applying the doctrine to private party conduct in *Southern*

188. See MASS. GEN. LAWS ANN. ch. 164, § 1B(d) (West 1996 & Supp. 1999) (requiring distribution companies to provide default service to customers who require electric service because of a failure of the alternative supplier to provide for contracted service or who have for any reason stopped receiving electrical service); 66 PA. CONS. STAT. ANN. § 2807(e)(3) (West 1979 & Supp. 1999) (obligating electric distribution companies to provide market priced electric service to customers whose power is not delivered by alternative suppliers or who do not choose to select an alternative supplier of generation service).

189. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 3203(1) (West 1988 & Supp. 1998) (declaring that the Commission must license all competitive electricity suppliers).

190. See *supra* notes 174-84 and accompanying text (citing examples of how certain states are encouraging competition through deregulation).

191. See *supra* notes 183-89 and accompanying text (providing evidence of continued state regulation in certain areas).

192. Some of the restructuring statutes go so far as to explicitly declare a preference for competition and against anti-competitive monopolistic behavior. See, e.g., ARIZ. REV. STAT. ANN. § 30-813 (West 1996 & Supp. 1998) (stating explicitly that the state's antitrust laws will apply to the provision of competitive electric generation service and other public power services declared to be competitive); 1997 Mass. Acts 164 § 1(j) (stating that the state must guard against the exercise of market power in the electric supply industry); 66 PA. CONS. STAT. ANN. § 2807(e)(3) (West 1979 & Supp. 1999) (obligating the Commission to monitor the electric market and to act to prevent anti-competitive conduct and the unlawful exercise of market power).

193. 428 U.S. 579 (1976).

194. See *id.* at 592 (expressing two possible reasons why private party conduct may be found exempt from the Sherman Act); see also *supra* Part I.C.2 (discussing the Court's application of the state action doctrine to private party conduct).

Motor Carriers Rate Conference v. United States,¹⁹⁵ and ruled that private party conduct could be immunized from antitrust liability.¹⁹⁶ Finally, with its holding in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,¹⁹⁷ the Court established the two-prong test which required: (1) a clearly articulated and affirmatively expressed state policy in favor of restricting competition; and (2) that the state itself actively supervised such policy.¹⁹⁸ In the context of the utility industry, the purposes of the state action doctrine and the requirements of the two-prong test frequently have been satisfied based on the pervasive state regulation of the industry.¹⁹⁹

With deregulation of the utility industry, however, this pervasive regulation is disappearing.²⁰⁰ Therefore, given this shift in state policy, it may be difficult in the future for courts to find the two-prong test enumerated in *Midcal* to be satisfied. Utilities may face an environment in which conduct traditionally shielded from antitrust liability by the state action doctrine will now be subject to antitrust liability.²⁰¹

States are still in the process of implementing deregulation, and are moving away from the old regulatory paradigm.²⁰² Utilities, however, have been challenged for anti-competitive behavior in the past. A review of the logic that courts used in evaluating past cases is helpful in determining how courts will evaluate such challenges and the application of the state action doctrine in the deregulated future.²⁰³

195. 471 U.S. 48 (1985).

196. *See id.* at 56-57 (confirming that the state action doctrine applies to the conduct of private parties); *see also supra* Part I.C.2.

197. 445 U.S. 97 (1980).

198. *See id.* at 105 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978), and noting the two requirements for finding application of the state action doctrine); *see also supra* Part I.C.3 (explaining the development of the *Midcal* two-prong test for the application of the state action doctrine).

199. *See, e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1272 (3d Cir. 1994) (holding the utility immune from antitrust liability under the state action doctrine for programs supervised by the state); *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1335 (10th Cir. 1988) (holding that the utility's actions are immune from antitrust attack under the state action doctrine).

200. *See supra* Part II.C.2 (describing the deregulation of the electric industry and the introduction of competition at the state level).

201. *See supra* note 199 and accompanying text (explaining that immunity was granted to utilities by the courts because of close regulation by the state).

202. *See supra* note 171 (listing state-by-state progress in the deregulation of the retail portion of the electric industry).

203. *See infra* Part III.A (reviewing past cases involving application of the state action doctrine to utility conduct).

In order to examine the application of the state action doctrine in the deregulated environment, this Comment first looks at the application of the state action doctrine to several past cases. This Comment then applies the reasoning of the courts from these past cases and examines potential results in a deregulated industry. Finally, this Comment draws some conclusions as to how the application of the state action doctrine will transpire in the future.

A. The State Action Doctrine in Past Cases Involving Claims of Anti-competitive Conduct by Utilities

Since the early 1970s, competitors and consumers have challenged utilities for anti-competitive conduct, even though utilities were considered highly regulated, natural monopolies for which competition did not apply.²⁰⁴ In the past, utilities were in some cases found liable for anti-competitive conduct for refusing to sell electricity to potential competitors, for refusing to transmit power to potential competitors, and for engaging in costly litigation for the purpose of stifling potential competition.²⁰⁵ Utilities were also found to have violated antitrust laws for illegally tying²⁰⁶ the sale of unregulated products to the sale of regulated electricity.²⁰⁷

In other cases in the past, however, courts have also frequently found that the state action doctrine applied to immunize some anti-competitive conduct by utilities. Utilities were found not to be liable

204. See Joskow, *supra* note 19, at 173 (noting that the Supreme Court has found that antitrust policy can apply to regulated industries, that regulation and antitrust are not necessarily repugnant, and that regulation and antitrust may actually be complementary).

205. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In *Otter Tail Power*, the utility had engaged in anti-competitive practices, including refusing to deal, refusing to transmit, and attempting to stop competition through costly litigation. See *id.* at 368. The U.S. government claimed that such conduct was a violation of the Sherman Act. See *id.* The utility claimed that it was immune from antitrust liability because, *inter alia*, it was regulated by the federal government under the Federal Power Act. See *id.* at 372. The Court, however, disagreed and held that the Federal Power Act did not repeal the antitrust laws and that the antitrust laws and regulatory scheme can exist concurrently. See *id.* at 372-74. Finally, the Court noted that the prospect of decreasing efficiency or losing customers did not excuse a utility from illegal, anti-competitive conduct and that regulated utilities must rely on lower costs and superior service to protect their business rather than illegally suppressing competition. See *id.* at 380-81.

206. "Tying" refers to the practice of forcing customers to purchase one product or service as a condition to receiving the product or service that the customer actually desires. See SULLIVAN, *supra* note 26, at 431 (describing the basics of tying arrangements). Forced bundling or tying, if done for anti-competitive reasons—e.g., to leverage a company's dominance in one product into dominance in another product—is considered a per se violation of antitrust laws. See *id.* (describing the consistent judicial interpretation of tying arrangements as anti-competitive devices existing solely to extend market power in one product to another and thus as per se illegal under the antitrust laws).

207. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976) (finding that the utility violated antitrust laws when it used its monopoly power in the electric market to dominate the light bulb market by distributing "free" light bulbs which were actually paid for by customers through the electric rate).

for anti-competitive conduct for refusing to transmit power for competitors,²⁰⁸ for establishing exclusive service territory agreements with competitors,²⁰⁹ for tying the sale of electricity to other products or services,²¹⁰ and for other claimed abuses of monopoly power.²¹¹ In these instances the decisions are very fact specific, and although one court might find certain conduct protected under certain circumstances, another court may find similar conduct not protected by the state action doctrine under other circumstances.

1. *Cases finding utility conduct protected by the state action doctrine*

In *Lease Lights, Inc. v. Public Service Co. of Oklahoma*,²¹² the court examined the state's constitution and statutes to determine that the state action doctrine protected a utility program providing low rates for the leasing of outdoor lighting.²¹³ The court noted that Oklahoma law gave the Commission "general supervision over all public utilities that supply 'the production, transmission, delivery, or furnishing of heat *or light* . . .'"²¹⁴ The court also noted that the state constitution provides the Commission with the power to "establish[] and enforce rates 'as may be reasonable and just.'"²¹⁵ The court used these provisions as evidence that the state had a clear intent "to supplant the market for leased outdoor lighting with active regulation by the Commission."²¹⁶ Finally, the court noted that the

208. See *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1570 (11th Cir. 1996) (finding the utility's refusal to wheel electric power—transfer electric power from one utility to another through an intermediate utility by direct transmission or displacement—to be protected by the state action doctrine).

209. See *Municipal Util. Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1505 (11th Cir. 1991) (noting that utilities' private service territory agreements would be protected by the state action doctrine if proper state supervision was found by the lower court on remand), *aff'd after remand*, 21 F.3d 384 (1994).

210. See *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1335 (10th Cir. 1988) (holding that the state action doctrine applied to protect from antitrust challenge the utility's special rate for leasing outdoor lights to electric customers because the Commission supervised the rate implementation).

211. See *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 435 (9th Cir. 1992) (holding that the state action doctrine protected from antitrust liability the utility's refusal to grant a contractor's force majeure claims).

212. 849 F.2d 1330 (10th Cir. 1988).

213. See *id.* at 1334-35 (holding that the utility's plan was protected from antitrust challenge under the state action doctrine). In *Lease Lights*, the utility, in addition to providing electric service under a state granted franchise, sold and leased large outdoor lighting systems. See *id.* at 1332 (describing the utility's lighting program). A group of electrical contractors claimed that the utility's low rate for leasing outdoor lights was an illegal attempt by the utility to use its monopoly power to drive the contractors out of business. See *id.* (discussing the plaintiff's claim).

214. *Id.* at 1333 (quoting OKLA. STAT. tit. 17, § 151 (1981)).

215. *Id.* at 1334 (quoting OKLA. CONST. art. IX, § 18).

216. *Id.* (finding that the first prong of the *Midcal* two-prong test, a clearly articulated intent by the state to supplant competition, was met).

Commission had regulated the outdoor lighting business for twenty years, had established sets of guidelines for the utilities' outdoor lighting services, and had closely regulated utilities' rates—including the rate charged for the outdoor lighting service.²¹⁷ Based on the evidence characterizing the state's regulatory scheme, the court found the utility's actions to be protected by the state action doctrine.²¹⁸

In a similar manner, the court in *TEC Cogeneration Inc. v. Florida Power & Light Co.*²¹⁹ found that the state action doctrine protected the utility's refusal to transmit power from a competitor over its transmission system.²²⁰ The court found an obvious and clear policy to displace competition and rely on regulation in the areas of power generation and transmission.²²¹ The court noted that the Florida statute "gave the [Public Service Commission] broad authority to regulate [the utility]."²²² This policy met the requirement of the first prong of the *Midcal* two-prong test.²²³ Additionally, the court found that the Commission had the power to actively supervise the utility in the areas of transmission, rates, and interconnection—the issues involved in the case—and if a complaint were to have been filed, the Commission could have acted.²²⁴ This ability to regulate the utility in the relevant area met the requirement of the second prong of the *Midcal* two-prong test.²²⁵ Based on this view of the extent and purposes of the state's regulatory scheme, the court found that the state action doctrine protected the utility's actions.²²⁶

217. *See id.* (finding that the second prong of the *Midcal* two-prong test, active supervision by the state, was met).

218. *See id.* at 1335 (holding that the utility program was protected by antitrust immunity under the state action doctrine).

219. 76 F.3d 1560 (11th Cir. 1996).

220. *See id.* at 1570 (holding that the utility's conduct was immune from antitrust liability under the state action doctrine because the conduct satisfied both prongs of the *Midcal* test).

221. *See id.* at 1568 (noting that the state has a clearly articulated policy against competition, and that the utility's conduct was performed in light of that policy).

222. *Id.* (citing to FLA. STAT. ch. 366.05 (1994)). Additionally, the court noted that Florida utilities have been subject to pervasive regulation through state statutes and that the Florida Supreme Court had been active in judicial review of regulatory cases. *See id.* (citing several Florida statutes and court cases relating to the regulation of Florida utilities).

223. *See id.* at 1569-70 (holding that the first prong of the state action defense was satisfied).

224. *See id.* at 1570 (noting the commission was available to intervene in the issue and that this fact supported the idea that the utility conduct was sufficiently supervised by the state).

225. *See id.* (declaring that the State Commission's actions were sufficient to satisfy the supervision requirement of the *Midcal* two-prong test).

226. *See id.* (concluding both prongs of the two-prong test were met, and therefore, the utility's conduct was immune from antitrust liability).

Finally, in *Municipal Utilities Board of Albertville v. Alabama Power Co.*,²²⁷ the court affirmed the lower court's decision that the state action doctrine protected agreements between competing utilities to divide exclusive service territories.²²⁸ In a previous decision in the same dispute, the court looked to various Alabama general legislative acts to determine that the requirements of the *Midcal* test were met for those general provisions.²²⁹ The court noted that the Alabama legislature had a clearly stated policy of reducing the cost of transmission lines by preventing duplication of power lines, and that the exclusive service territory agreements developed by the electric utilities supported this policy.²³⁰ Accordingly, the court found that the legislative acts met the first prong of the *Midcal* test.²³¹ The court then noted that the Alabama legislature had set forth in the general acts precise procedures for the division of service territories, effectively limiting any discretion that the utilities may have had in the development of the service territory agreements.²³² This constituted evidence that the state was actively supervising the policy to displace competition.²³³ Thus, the court found that the legislature's general acts met the second prong of the *Midcal* test.²³⁴ Therefore, the conduct described by the legislative provisions could qualify for immunity under the state action doctrine.²³⁵

These cases provide valuable insight into the type of evidence the courts look for to determine if the state action doctrine is

227. 21 F.3d 384 (11th Cir. 1994).

228. *See id.* at 387-88 (holding the private agreements met the requirements for state action doctrine immunity).

229. *See Municipal Utils. Bd. v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991) (consulting the Alabama statutes for guidance). While the court in this decision held that the general Alabama Acts allowing the private agreements were immunized by the state action doctrine, the court did not have enough information to determine whether the private agreement acts, incorporated into the general acts, were covered by the state action doctrine. *See id.* at 1504-05. The court remanded to the lower court to decide whether the private agreements were also immunized. *See id.* The lower court found the private agreements immunized based upon the logic of the court of appeals, and this lower court decision was subsequently affirmed by the court of appeals. *See Alabama Power*, 21 F.3d at 387-88.

230. *See Alabama Power*, 934 F.2d at 1502 (citing ALA. CODE §§ 37-14-1 & 37-14-30 (1987)). Additionally, the court noted that sections of the same legislation incorporated private agreements to divide service territories and that this was consistent and in support of the general policy of eliminating line duplication. *See id.* (citing ALA. CODE §§ 37-14-8 & 37-14-36 (1987 & Supp. 1989)).

231. *See id.* (noting that the court's analysis of the first prong focused solely on the existence of state policy regarding competition).

232. *See id.*

233. *See id.* at 1503-04 (noting that the private parties could not exercise any private regulatory power).

234. *See id.*

235. *See id.* at 1504 (finding that the provisions of the statute were therefore exempt from the Sherman Act).

applicable.²³⁶ In a deregulated environment, the courts will need to look for similar evidence in evaluating future claims of utility anti-competitive misconduct.

236. There have been other cases that utilized similar logic in finding utility conduct immunized. In *City of College Station v. City of Bryan*, 932 F. Supp. 877 (S.D. Tex. 1996), the City of College Station claimed that the utility and several municipals were illegally refusing to transmit electricity from outside suppliers of generation. The court looked to state statutes to find that the legislature had defined public utilities to be natural monopolies to which the traditional forces of competition do not apply, and thus the utilities are regulated by the state. *See id.* at 886 (citing TEX. REV. CIV. STAT. ANN. art. 1446c-0, § 1.002 (West Supp. 1996) (later repealed by Acts 1997, 75th Leg., ch. 166, § 9 (effective Sept. 1, 1997))). Based on this general policy, the court stated that some anti-competitive behavior was a foreseeable result of the state's electric power policy. *See id.* at 887 (noting that some competition suppressing activity, such as "hard bargaining," was foreseeable). Thus, the conduct may be protected by the state action doctrine. *See id.* (finding that defendant's arguments in favor of the state action doctrine were sufficient to defeat the plaintiff's summary judgment motion).

Additionally, in *Transphase Systems, Inc. v. Southern California Edison Co.*, 839 F. Supp. 711 (C.D. Cal. 1993), the plaintiff claimed that the utility's program of offering rebates for customers who purchase certain demand side management ("DSM") systems was an illegal attempt to use its monopoly power to damage the plaintiff's business. *See id.* at 714 (describing the plaintiff's complaint of attempted monopolization by the defendant). The court looked to the state utility commission's active involvement in the design and approval of the utility's DSM programs and determined that the utility's conduct fell within the state's policies, thereby satisfying both prongs of the *Midcal* test. *See id.* at 715-16 (noting that the state statute clearly articulated a displacement of competition in the area of DSM programs and that the commission's involvement in those programs met the supervision requirement). Thus, the court held that the state action doctrine immunized the utility's anti-competitive actions from federal antitrust liability. *See id.*

Finally, a state's interesting proactive use of the state action doctrine is found in *Municipality of Anchorage v. Chugach Electric Association, Inc.*, Docket No. U-97-201, Order No.3 (Alaska Pub. Util. Comm'n May 20, 1998). In this decision, the Alaska Public Utilities Commission specifically noted that its decision to confirm the Anchorage municipal utility's exclusive service territory, and to approve of the utility's refusal to allow a competitor access to consumers within that service territory, was being made to bring the utility's conduct under the protection of the state action doctrine. *See id.* at 16 (stating that the Commission's decision will satisfy the requirements of the state action doctrine should it be challenged as being in violation of the federal antitrust laws). In doing so, the Commission specifically stated that Anchorage's conduct, which prevented Chugach from entering into the market as a competitor, was supported by state statute, thus providing the clearly articulated state policy needed for protection under the state action doctrine. *See id.* at 8 (citing ALASKA STAT. § 42.05.221(a) (Michie 1998), which provides that utilities gain a certificate of need from the Commission before being allowed to provide service to the public, as evidence of the state's interest in restricting competition). The Commission also stated that with the decision, it was making clear that Anchorage Municipal Light and Power's exclusive operation in its territory was and will remain protected by the state action doctrine as the result of the Commission's policy. *See id.* at 23 (stating so to prevent any ambiguity about the state's policy toward exclusive service territories in future litigation). Finally, the Commission specifically noted that it actively supervises and monitors the conduct of utilities in the state, thus fulfilling the second requirement of the state action doctrine. *See id.* at 24 (noting that the Commission regularly supervises the operations of utilities to prevent any ambiguity about the state's involvement in actively supervising the policy in favor of reducing competition). It is clear that the Alaska Commission was intentionally emphasizing the state's policy and active supervision to protect its decision. This case indicates how a state may go about ensuring that its policies in favor of reducing competition will be recognized and protected from challenge under federal antitrust laws. Additionally, this is the type of clear statement of policy that a utility may be interested in utilizing to ensure that any of its anti-competitive conduct is immunized. These are the types of state actions that the state action doctrine, as enumerated in *Parker v. Brown*, 317 U.S. 341 (1943), was meant to protect.

2. *Cases finding utility conduct not protected by the state action doctrine*

Although the state action doctrine often can be applied to find anti-competitive utility conduct protected from antitrust liability, there are several cases where courts have found that the doctrine does not apply.²³⁷ These cases provide useful insight into the way that courts analyze state action doctrine questions.

In *Cantor v. Detroit Edison Co.*,²³⁸ the U.S. Supreme Court found that a utility could be subject to antitrust liability for illegally tying the "sale" of free light bulbs to the sale of electricity.²³⁹ The Court found that Detroit Edison Co. was not immune from antitrust liability under the state action doctrine.²⁴⁰ The Court found the state action doctrine inapplicable for two reasons: (1) the decision to engage in the program and to recover the costs through the company's electric rates was more the decision of the company than the state public service commission;²⁴¹ and (2) the bundling of light bulbs to electric sales, although approved and supervised by the state agency, was not integral to the state's interest and policy in the regulation of electric utilities.²⁴² Thus, because of the extent of discretion the utility possessed in developing the program and the small degree of importance to the state's regulatory scheme, the Court declined to apply the state action doctrine.²⁴³

Similarly, in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*,²⁴⁴ the Ninth Circuit Court of Appeals found that the state

237. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997).

238. 428 U.S. 579 (1976).

239. See *id.* at 598 (holding that Michigan's approval of the challenged program was insufficient for state action protection). Although the light bulbs were given away free of charge, they were actually sold to the utility customers in that the cost of the light bulbs was placed in the utility rate base. Thus the customers paid for the light bulbs through higher electric rates. See *id.* at 582-84 (describing the free light bulb program and the utility's rate base). The *Cantor* decision went only to the applicability of the claim of immunity based on the state action doctrine, and the case was remanded for evaluation on the merits of the antitrust claim, but the parties settled before a decision was reached. See *Cantor v. Detroit Edison Co.*, 86 F.R.D. 752, 756 (1980).

240. See *Cantor*, 428 U.S. at 598 (holding that there was not a sufficient basis for finding an exemption from federal antitrust laws).

241. See *id.* at 594 (holding that there was nothing unfair in requiring the utility to conform with antitrust law when it had sufficiently significant participation in the decision to adopt and maintain the program). The Court, however, did note that there may be situations in which the State's participation in a decision would make it unfair to hold a private party liable for violations of federal antitrust law. See *id.* at 594-95 (indicating this was possible but that the record in the current case did not support such a finding).

242. See *id.* at 598 (noting that Michigan's interest in electricity regulation will be almost entirely unimpaired if the utility is no longer allowed to continue with the program).

243. See *id.* (holding that no sufficient basis existed for finding an exemption to antitrust liability).

244. 111 F.3d 1427 (9th Cir. 1997).

action doctrine did not protect an agreement between two utilities to divide the city of Portland into separate service territories.²⁴⁵ The court first noted that technology and deregulation have recently been exerting competitive pressures into markets where utility monopolies once reigned.²⁴⁶ With this general preference toward competition in mind, the court evaluated the particular Commission orders upon which the utility was basing its anti-competitive conduct, and declared that the orders were not specific enough to meet the clearly articulated policy requirement of the *Midcal* test.²⁴⁷ In addition, the court looked to a city ordinance that disapproved of exclusive territories and instead favored competition—much like the deregulation statutes that states are creating today.²⁴⁸ Due to a lack of evidence in support of a state policy to displace competition, and indeed the presence of evidence in the form of a city ordinance expressly in favor of competition, the court found the state action doctrine inapplicable.²⁴⁹

These cases illustrate the manner in which a court will examine a state's policies, and will refuse to apply the state action doctrine if the policies do not adequately support the anti-competitive conduct.²⁵⁰

245. *See id.* at 1441 (holding that eliminating competition between two utilities was not protected by the state action doctrine because the utility commission did not specifically and clearly authorize the division of the city into exclusive service territories).

246. *See id.* at 1439 (noting that any competitive advantage that the utility once had because of the formerly non-competitive nature of the industry was now transitory, given the movement in the industry toward deregulation).

247. *See id.* at 1440 (noting that none of the commission's orders established a clear expression of state policy to displace competition with regulation). The court noted that the particular orders established nothing more than a description of the status quo, and that the utilities had stopped competing with each other at the time of the orders, not that there was any intention that competition would be eliminated permanently. *See id.* The court expressed that this was nothing more than "state authorization, approval, encouragement, or participation in restrictive private conduct" and that the mere authorization or approval by the state confers no antitrust immunity. *See id.* at 1440-41 (citing *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1981)).

248. *See id.* at 1438 (citing to Portland, Or. Ordinance 134416 (1972)).

249. *See id.* at 1441 (holding that the state action doctrine was inapplicable to the conduct of the utility and the state commission).

250. A number of other cases also show courts using similar logic to deny use of the state action doctrine because the conduct is not adequately supported by state policies in favor of restricting competition. For example, in another recent case, *Snake River Valley Electric Association v. PacifiCorp*, No. CV 96-0308-E-0308, 1997 WL 241086 (D. Idaho April 25, 1997), the Federal District Court for the District of Idaho found that the state action doctrine did not apply when PacifiCorp refused to sell electricity or to transmit electricity for Snake River Valley to serve potential new customers. *See id.* at *7 (holding that the state action doctrine does not apply to allegations that PacifiCorp has restrained competition in the market for provision of services to new and existing customers). The court looked explicitly to the Idaho statute that provides that new customers have the ability to choose providers of electric service. *See id.* (citing to IDAHO CODE § 61-332C(1) (1994) which provides for customer choice if no existing transmission line is located within 1,320 feet of the customer). The court found this to be clear evidence that there was not a clearly articulated policy to displace competition for new customers and, therefore, the state action doctrine did not apply. *See id.* at *7.

Such logic will be important in the future because deregulation will create policies that support competition in certain areas of the industry.²⁵¹

B. Applying the State Action Doctrine in the Deregulated Environment

In applying the state action doctrine in the future, courts will need to continue looking to the conduct being challenged, and determine if the state's policy supports the anti-competitive behavior.²⁵² While the analysis should not change, the state action doctrine should be applicable in fewer circumstances, as with the implementation of deregulation it will likely be more difficult to identify state policies in favor of anti-competitive conduct.²⁵³

A common theme among state deregulation plans is the introduction of competition into the market for generation services.²⁵⁴ For example, Pennsylvania has provided that "retail customers will have direct access to a competitive market for the generation and sale or purchase of electricity."²⁵⁵ Clearly, this

Similarly in *United States v. Rochester Gas & Electric Corp.*, 4 F. Supp. 2d 172 (W.D.N.Y. 1998), the court held that contract provisions, required by the utility, that prohibited a customer from entering the electricity market as a competitor in the future in exchange for a discounted electric rate, were not protected by the state action doctrine. *See id.* at 176 (denying the utility's motion for summary judgment on the ground that the state action doctrine did not give it immunity from the claim). The utility relied on the state statute that allowed the Public Service Commission to "authorize reduced 'incentive' rates that utilities may offer to customers in order to prevent loss of such customers . . ." *Id.* at 175-76 (discussing the utility's contentions that the statute immunized its actions from antitrust liability and citing N.Y. PUB. SERV. LAW § 66(12-b)(a) (McKinney 1989)). The court, however, found that while the statute does expressly allow the utility to offer such discounted rates it did not "expressly authorize utility companies to offer discounted rates to consumers who are also potential competitors for the purpose of inducing them not to compete against the utility". *Id.* at 176 (emphasis added). Thus, the court found that the utility's conduct was not supported by state policy in favor of restricting competition and that the state action doctrine did not apply. *See id.* (holding that the state's policy of allowing discounted rates does not implicitly authorize anti-competitive behavior on the part of the utility).

251. *See supra* Part II.B.2 (discussing the development of state electric deregulation plans and noting ways in which they will encourage and require competition in certain segments of the electric industry).

252. These are and will continue to be the basic requirements of the state action doctrine. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (stating the requirements for state action immunity as a clearly articulated state policy in favor of limiting competition and active supervision by the state itself); *see also Parker v. Brown*, 317 U.S. 341, 350-51 (1943) (noting that the purpose of the state action doctrine is to support the state's sovereign right to support an anti-competitive policy in the regulation of commerce within its own borders).

253. *See supra* Part II.B.2 (noting ways in which state deregulation plans will support competition as well as discourage anti-competitive conduct).

254. *See supra* notes 173-80 and accompanying text (discussing the state movement toward allowing competition into the generation marketplace and citing several statutes providing for competition).

255. 66 PA. CONS. STAT. ANN. § 2802(13) (West 1979 & Supp. 1998) (declaring the purpose of the Electricity Generation Customer Choice and Competition Act to be, *inter alia*, to make a

indicates a legislative purpose in favor of competition in the market for generation services.²⁵⁶ If the state legislature has stated that there will be competition through deregulation, a court will be unable to find the “clearly articulated and affirmatively expressed state policy” in favor of displacing competition necessary for invocation of state action doctrine protection.²⁵⁷ For example, if a utility refuses to allow a competitor access to its current customers in an attempt to maintain a monopoly in its current service territory, a court would be forced to find this conduct unprotected by the state action doctrine.²⁵⁸ After deregulation, state policies clearly will state a preference for competition in the generation market, and such utility conduct would be contrary to that purpose.²⁵⁹ Therefore, in the future, the state action doctrine will not protect utility conduct that constrains competition in the market for generation.²⁶⁰

transition from a regulated to a competitive market); accord ARIZ. REV. STAT. ANN. § 30-802(A) (West 1996 & Supp. 1998) (requiring utilities and the public service commission to act to transition to a competitive market in electric generation services); CAL. PUB. UTIL. CODE § 330(d) (West 1975 & Supp. 1998) (finding competition in the supply of electric power to be in the interest of rate payers and the state as a whole).

256. See 66 PA. CONS. STAT. ANN. § 2802(13) (West 1979 & Supp. 1998) (favoring a transition to competitive market).

257. See *Midcal*, 445 U.S. at 105. This is the first prong of the *Midcal* two-prong test for finding the state action doctrine applicable to protect anti-competitive behavior from federal antitrust liability. See *supra* Part I.C.3 (discussing the *Midcal* requirements for immunity).

258. See generally *TEC Cogeneration, Inc., RRD v. Florida Power and Light Co.*, 76 F.3d 1560, 1566 (11th Cir. 1996) (describing the utility’s refusal to wheel power for the competing cogenerators).

259. If, for example, legislation such as the Pennsylvania legislation exists, the state policy is clearly to encourage competition, not prevent it. See 66 PA. CONS. STAT. ANN. § 2802(13) (West 1979 & Supp. 1998) (indicating a preference for competition in the generation market). This is contrary to the facts in *TEC Cogeneration*, where the court based its application of the state action doctrine on evidence showing “[i]t was clear that [the state] intended to displace competition in the utility industry” See *TEC Cogeneration*, 76 F.3d at 1568 (indicating that the first prong of the *Midcal* test is met by state policy opposed to competition).

260. Another example of the manner in which the state action doctrine would be applied in a deregulated environment is seen in the facts of *United States v. Rochester Gas & Electric Co.*, 4 F. Supp. 2d 172 (W.D.N.Y. 1998). In *Rochester Gas*, the utility forced a customer, and potential future competitor, to accept a contract clause which forbade the customer from becoming a competitor in the future—i.e., a no-compete clause—in exchange for a reduced electric rate. See *id.* at 174 (describing the particular details of the contract provisions). This was arguably an illegal use of the utility’s state-granted monopoly power for the purpose of restraining competition in the generation market. See *id.* at 173 (describing the government’s claim). In a future deregulated environment, such conduct would clearly not be protected by the state action doctrine. First, state deregulation plans generally specify that there will be competition in the market for generation services. See, e.g., CAL. PUB. UTIL. CODE § 330(d) (West 1975 & Supp. 1998) (finding competition in the supply of electric power to be in the interest of rate payers and the state as a whole). As a result, conduct clearly intended to restrict competition, such as a similar no-compete clause, would be contrary to the state policy in favor of competition. Second, several states also specify in their state deregulation plans that anti-competitive exercises of monopoly power should be controlled. See, e.g., 1997 Mass. Acts 164, § 1(j) (stating that the state must guard against the exercise of market power in the electric supply industry). As a result, conduct such as a no-compete clause, forced through the exercise of the utility’s monopoly power would be contrary to that policy and such conduct would not be

Deregulation plans also call for the introduction of competition into other areas of the industry, such as the provision of various electric metering and billing functions.²⁶¹ For example, the Arizona deregulation statutes provide for the competitive provision of billing, collection, metering, and meter reading services.²⁶² These statutes will make anti-competitive conduct by utilities in these particular areas illegal and unprotected by the state action doctrine because they express a state policy in favor of competition rather than anti-competitive behavior.²⁶³ Potentially more significant, however, is the impact that such deregulation statutes will have on tangential parts of the industry that involve provision of services beyond basic electric service. For example, if a utility provides outdoor lighting services,²⁶⁴ discounts to contractors using electric heat pumps in new houses,²⁶⁵ or other services related but separate from the core service of providing electricity, it may be more difficult for a court to find the state action doctrine applicable in the future.²⁶⁶ In the past, anti-competitive conduct by utilities in such related areas was protected under the state action doctrine as the conduct was viewed as a reasonably foreseeable result of the state's general regulatory program.²⁶⁷ Statutory deregulation provisions requiring competition in areas closely related to the core provision of electricity, such as billing or meter reading, however, could be interpreted to mean that more distantly related services, such as outdoor lighting or heating

protected by the state action doctrine.

261. See *supra* notes 179-84 and accompanying text (describing state plans for deregulating various ancillary services in the industry).

262. See ARIZ. REV. STAT. ANN. § 30-803(C)(1-2) (West 1996 & Supp. 1998) (declaring that billing, collection, metering, and meter reading services will be provided on a competitive basis for retail loads greater than one megawatt after December 31, 1998 and for all retail customers after December 31, 2000); see also ME. REV. STAT. ANN. tit. 35-A, § 3202(4) (West 1964 & Supp. 1998) (declaring that the provision of electric billing and metering will be subject to competition beginning March 1, 2002).

263. Statutes such as these express a clearly articulated state policy in favor of competition, not in favor of restraining competition, and as such, the first prong of the *Midcal* test would not be met. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (requiring a "clearly articulated and affirmatively expressed state policy" in support of restraining competition as the first prong in the test for applying the state action doctrine to private party conduct).

264. See *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1332 (10th Cir. 1988) (describing the utility's program providing outdoor high power lighting).

265. See *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1263 (3d Cir. 1994) (describing the utility's program offering discount for housing contractors using electric heat pumps).

266. See *id.* at 1273 (holding that utility's claim of state action immunity to be valid); *Lease Lights*, 849 F.2d at 1336 (holding that state action doctrine protected actions by utility).

267. See *Yeager's Fuel*, 22 F.3d at 1268 (indicating that it is foreseeable that anti-competitive effects could result from the state's policy in favor of load management programs); *Lease Lights*, 849 F.2d at 1334 (finding that the state's legislative control over the electric utilities entails regulation of the outdoor lighting business).

systems, also must be subject to competition.²⁶⁸ Therefore, the movement toward state deregulation will reduce the scope of activities protected by the state action doctrine to those specifically and clearly stated as regulated, and will not include services merely related to the provision of electricity.

Although the scope and application of the state action doctrine will certainly be reduced with the implementation of state deregulation, there will still be areas where state action immunity will remain. State deregulation plans generally provide for the continued regulation—and accompanying preclusion of competition—in certain sectors of the industry.²⁶⁹ For example, state deregulation plans explicitly provide that the transmission and distribution components of the industry will remain regulated.²⁷⁰ Such explicit declarations of state intention to maintain regulation in the areas of transmission and distribution will therefore provide the clearly articulated state policy in favor of suppressing competition needed for the application of the state action doctrine.²⁷¹ Therefore, even though deregulation of the electric industry will make application of the state action doctrine less frequent, the doctrine will still have some applicability.

CONCLUSION

The state action doctrine has been an important source of immunity from liability under federal antitrust statutes for electric utilities in the past. The doctrine has provided immunity to utilities for anti-competitive conduct, including refusal to deal, tying arrangements, and use of monopoly power to reduce competition. This immunity is based on state policies in favor of regulation of the industry and in favor of the suppression of competition. States, however, are rapidly introducing competition into the retail sector. As a result, the applicability of the state action doctrine to utility conduct is significantly being reduced. Thus, utilities must be more

268. See *supra* notes 264-70 (discussing the nature of such programs and their ties to the state's regulatory interests).

269. See *supra* notes 183-89 and accompanying text (describing areas to remain regulated in state deregulation plans).

270. See ARIZ. REV. STAT. ANN. § 30-804 (West 1996 & Supp. 1998) (stating that the existing regulatory system for distribution services is not impacted by the deregulation statutes); CAL. PUB. UTIL. CODE § 330(k)(2) (West 1975 & Supp. 1998) (declaring that the delivery of electricity over transmission and distribution systems is, and will continue to be, regulated); MASS. GEN. LAWS ANN. ch. 164, § 1B(a) (West 1997 & Supp. 1998) (stating that the state regulators will define service territories for distribution companies and that the state regulators have the power to make service territories exclusive for the distribution company).

271. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (holding the first prong of the test for applying the state action doctrine is met only if the state has clearly articulated a state policy against competition).

cognizant of the remaining state policies in favor of suppressing competition, and limit anti-competitive conduct to that which can be part of that policy.