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In the

Supreme Court of the United States

OTTER TAIL POWER COMPANY,

Appellant,

vs.

UNITED STATES,

Appellee.

No. 71-991

Washington, D. C.
December 5, 1972

Pages 1 thru 41

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OTTER TAIL POWER COMPANY	:	
Appellant,	:	
v.	:	No. 71-991
UNITED STATES	:	

Washington, D. C.

Tuesday, December 5, 1972

The above-entitled matter came on for argument at 10:09 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAN J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MILTON HANDLER, ESQ., 425 Park Avenue, New York City, New York 10022 for the Appellant

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530 for the Appellee

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-991, Otter Tail Power Company against the United States.

Mr. Handler, you may proceed whenever you are ready.

ORAL ARGUMENT OF MILTON HANDLER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. HANDLER: Mr. Chief Justice and may it please the Court:

The key issues in this case are whether Otter Tail violated section 2 of the Sherman Act by refusing to sell power at wholesale or to wheel governmental power to two small towns in its area which had decided to terminate Otter Tail's franchise and to take over themselves the retail distribution of electricity to their inhabitants.

One of the towns, Elbow Lake, Wisconsin -- Elbow La,e, Minnesota applied to the Federal Power Commission and obtained from that body two orders requiring Otter Tail to provide it with wholesale power. The other, Hankinson, North Dakota abandoned a similar FTC proceedings following the defeat of the public power faction in a municipal election.

Finding that Otter Tail's refusal to wholesale or wheel power constituted unlawful monopolization, the district court issued a voiding junction which I should like to invite your Honors to examine with me. It appears at 208 of the

Appendix.

You will note, your Honors, that it imposes an unqualified and absolute obligation on Otter Tail to wholesale power to any municipality in its service area. The judgment likewise requires Otter Tail, again without qualification, to wheel power generated by others to any municipality that requests such service.

The district court also found that Otter Tail had monopolized in two additional towns, Colman and Aurora, South Dakota by bringing or aiding the pliantiffs in certain law suits. On this basis, paragraph (C) of the judgment at page 208 restrains Otter Tail from exercising its constitutional right to appeal to the courts in the protection of its own interest if, by so doing, it will delay, prevent or interfere with the establishment of a municipal power system.

Finally, the judgment in paragraphs (D) and (E) abrogates willing arrangements between Otter Tail and other electric power suppliers limiting the use of Otter Tail's facilities for transmission of their own power to their own customers.

I propose, with the court's permission, to discuss each of these erroneous decreeal provisions separately and in the order indicated, starting with wholesaling.

Contrary to the impression created by the plethora of briefs filed in this matter, we have not raised -- and this

court need not consider, the abstract question as to whether the anti-trust laws can ever be applied to any of the acts and practices of electric utilities. The narrow question presented for decision is whether there is plain repugnance between section 202(B) of the Federal Power Act, which is set forth at page 3 of our brief, and section 2 of the Sherman Act as applied to the present facts.

There is no disagreement among the parties that where such repugnancy exists, the regulating agency has explicit jurisdiction. I address myself therefore not to the questions of law which are in agreement, but to the question of whether in fact the pertinent provisions of the two enactments are mutually inconsistent.

I start with Justice Brennan's summary of section 202(B) in the Gainesville case, which your Honors will find at page 26 of our brief. You might well recall that Justice Brennan there pointed out that section 202(B) -- that under section 202(B) any municipality wanting to be served at wholesale may apply to the Federal Power Commission for an appropriate order which may be granted if the Commission finds that it would be in the public interest, would not impose an undue burden, would not require the enlargement of generating facility or impair service to the utility's existing customers.

The judgment below is repugnant to each and every

aspect of regulatory scheme. First, mandatory interconnection has been granted here on a blanket basis by a district court which has thereby usurped the authority of the agency to make such decisions as Congress contemplated on a case by case basis in light of the facts of each application.

Second, neither the court's decision nor the prospective operation of its decree is based upon a finding that such mandatory interconnections are in the public interest within the meaning of the Federal Power Act.

Finally, the decree requires Otter Tail to wholesale regardless of whether such action would impose an undue burden, require the enlargement of generating facility or impair Otter Tail's ability to render adequate service to its customers. Indeed, the district court states in its opinion that the erosion of Otter Tail's business and its very survival are irrelevant.

Any municipality that henceforth wishes to compel Otter Tail to wholesale will simply apply to the court under the injunction rather than to the Federal Power Commission.

If it is an anti-trust violation to refuse wholesaling in advance of a Federal Power Commission determination, and this is precisely what happened here, we refused, Elbow Lake went to the Federal Power Commission which issued two orders compelling wholesaling and yet we are held now to have violated the anti-trust laws.

It is perfectly apparent that anytime you refuse in putting a municipality or any applicant to the task of appealing to the agency, you open up a panoply of anti-trust sanctions against yourself. In essence --

Q Mr. Handler, if Otter Tail had wanted to voluntarily sell to Elbow Lake, would it have had to go to the Federal Power Commission to get permission?

MR. HANDLER: This is -- the statute contemplates voluntary interconnection and Commission in 202(A) as contrasted with 202(B) is charged with the responsibility of encouraging such voluntary interconnections under 202(B) it has the power which I have enumerated and described to order the compulsory interconnections.

I have to check with those that are more versed in the intricacies of the Federal Power Commission law as to whether the voluntary arrangements are subject to approval. I am told that they are not, Mr. Justice Rehnquist.

Despite the fact that the government persuaded the trial court to hold that the erosion of Otter Tail's business was without legal significance, now in this appeal the government seeks to reconcile the conflict between the two enactments by suggesting that if Otter Tail had refused wholesaling because it constituted a threat to its ability to serve other communities, its conduct probably would not have violated the anti-trust laws.

The government, however, nowheres explains how this contention can possibly be squared with its simultaneous assertion -- and I am quoting, "That the right of a utility to survive has never justified conduct which otherwise would violate the Sherman Act."

The government further proposes that the statutes can be reconciled on an ad hoc basis by having Otter Tail request a modification of the broad decree that I have asked you to read when other compliance would violate the provisos of section 202(B). Both concessions, it seems to me, are tantamount to a confession of error since the judgment by its terms imposes an unqualified duty to wholesale without any conditions whatsoever.

It is small comfort to Otter Tail to be told on this appeal that the effect of the judgment on its ability to render adequate service to its customers can be taken into account on a motion to modify judgment when the court has already held that Otter Tail's very survival, much less its ability to serve, is legally immaterial.

Furthermore, under the proposed regime, the Commission's function of applying the criteria in section 202(B) would be transferred to a court having none of the specialized expertise necessary for such a task, thus devitalizing the regulatory scheme established by the Congress.

Now, if your Honors will turn to paragraph (B) of

the judgment on page 208, you will find that it requires Otter Tail to wheel subsidized government power to any town which wishes to take over its retail business.

In our main brief, we discussed at some length the legislative history of part two of the Federal Power Act. That history shows, and it is not contradicted by the government, that Congress specifically rejected the imposition of any such duty to wheel in order to protect utilities from the very kind of competition that the government now seeks to promote. The bill's draftsmen repeatedly sought to reassure Congress that under no circumstances would a utility have to wheel power to its existing retail customers.

Far from recognizing that such competition might be a possible benefit, Solicitor and later Judge De Vane of the FPC, the draftsman, underscored, and I quote, "THere is nothing in this bill that permits one utility to enter another utility's field and in so doing to require the other utility to transport its power for that purpose."

Again, he says, "The bill is not drawn upon the theory that competition should be established in this industry."

When De Vane proposed an amendment to the bill which would have prevented the FPC from ordering wheeling, his revision was rejected as inadequate because of the danger that a court might take such action on its own accord. Thus,

in order to eliminate any possible basis for compulsory wheeling, Congress eliminated entirely all of the wheeling provisions of the 1935 measure and in so doing, Congress was assured by the proponents that there was no existing provision of applicable law that required utilities to wheel.

The government's present contention that a duty to wheel is implicit in the Sherman Act of 1890 would make Congresses solemn and explicit assurance, in Justice Douglases words, "a hollow promise."

Since 1935, the proponents of compulsory ruling, including the Justice Department and some amici in this appeal, have repeatedly sought to persuade Congress to reverse its earlier determination. Indeed, in the 1966 hearings, the American Public Power Association, an amicus herein, argued the need for legislation by reviewing the same events in the town of Hankinson upon which the government now predicates this anti-trust suit and your Honors will bear in mind that this whole suit originates out of a refusal in respect to two towns and two towns only.

Having failed to convince Congress of the merits of their position, the government and its amici now seek judicial legislation in the guise of an anti-trust suit. The most elementary regard for the separation of powers, it seems to us, dictates that these arguments and the entire public versus private power controversy be aired in the halls

of Congress and not here.

I now turn, your Honors, to paragraph (C), the injunction against instituting or supporting litigation against towns which have voted to establish municipal power systems was decreed before this court's decision in California Motor Transport and is based upon the erroneous ruling of the Ninth Circuit in that case that the Noerr principle does not apply to litigation. The court relied on the Ninth Circuit decision.

While conceding that there is no evidence that Otter Tail ever denied any competitor access to the courts, the government nonetheless construes California Motor Transport as vitiating the Noerr doctrine where litigation is intended to delay, prevent or interfere with the establishment of a municipal power system.

In other words, litigation having an anti-competitive purpose would fall within the sham exception. So construed, we respectfully submit, the sham exception is co-extensive with the effective operation of the Noerr principle itself and saps that doctrine of all vitality. If this had been the court's intention in California Motor Transport, instead of holding, as it did, that Noerr and Pennington apply to litigation, it would have upheld the Ninth Circuit in confining these cases to appeals to the Executive and Legislative branches of the government.

On the contrary, this court held that Noerr and Pennington apply to litigation and the government's contention and the judgment below, in our opinion, flies in the face of this court's decision.

Now, let me point out, your Honors, that there was no evidence and no finding that Otter Tail's litigation efforts were baseless or without reasonable foundation. Otter Tail's good faith was never question. It is inevitable that any lawsuit challenging the legality of municipal action in establishing an electric system will to some extent delay or interfere with the town's plans.

Let us suppose that a town elects to take over Otter Tail's retail business without first holding the necessary referendum and that it proceeds to market a bond issue in plain contravention of the requirements of state law. Is it not clear that the commencement of an action to subject a municipality to the restraints of applicable state law will inexorably delay, interfere and, indeed, if successful, prevent the establishment of the municipality -- by the municipality of a power system.

Is it also not clear that the judgment below denies Otter Tail of all practical access to the court which is precisely the reverse situation with which this court was confronted in Motor Transport, where the conspiracy had the purpose and effect of depriving the defendant's competitors

of free access to public tribunals.

Here, we bring suit at our peril, the peril of contempt. This court has held that the First Amendment applies to injunctions as well as to statutes and the teaching of the controlling First Amendment cases is that the injunction appealed from here is unconstitutional on its face since it is a naked prior constraint on the right to petition. I have compared the wording of this injunction with the wording of statutes which this court has stricken and I say that under these cases, the restraint here is much broader than those which have been held unconstitutional by the court.

I don't think that the invalidity of this restraint is an even arguable proposition in light of California Transport and the only explanation for it is that the judge followed a decision of the Ninth Circuit which this court overruled.

Now, both this court and prior Justice Department officials such as Professor Turner have expressly recognized the folly of any mechanical application of anti-trust to regulated industries. The artificiality of the government's anti-trust contentions confirms the wisdom of these earlier caveats. The government fails to come to grips with the plain fact that Otter Tail can neither fix prices nor exclude competition. Its rates are regulated by federal,

state and municipal agencies and its inability to exclude competition is demonstrated by the fact that every municipality wishing to defect from the Otter Tail system has succeeded in doing so. In lieu of any functional analysis, the government argues that every municipality -- and the two that are involved here Hankinson and Elbow Lake, one has a population of 1,125 and the other has a population of 1,550 inhabitants and many of the towns have much smaller numbers of inhabitants. The government argues that every municipality, no matter how tiny, constitutes a separate relevant market which means that every seller who has a customer who patronizes him exclusively is a monopolist under the anti-trust laws.

Alternatively, the government would make Otter Tail a monopolist in its area by computing its market share on the basis of the respective number of towns served by it or by independent municipalities and comparing that with the number of towns in the entire region.

In addition to arbitrarily excluding Otter Tail's most significant competitors, this analysis by head count ignores the plain economic fact that a city of 20,000 is simply not equivalent to a town of 20 inhabitants.

The government's claim as to Otter Tail's purported dominance over transmission and without the dominance over transmission there would be nothing to the claim of anti-trust

violation separate and apart from my other arguments -- the claim of dominance ignores the fact that in wholesaling situations the Federal Power Commission has the statutory right and the duty to order interconnections under the circumstances outlined by section 202(B).

Furthermore, and this is very important, there is a complete absence of evidence in this record that Otter Tail in fact enjoys any such dominance with respect to any of the towns in its service area except possibly Hackinson and Elbow Lake and even these towns actually, according to the record, had other feasible sources of power available to them but on a less favorable economic basis.

The government's own expert at Appendix 606 and 608 admitted that he had not studied the availability of alternative means of transmitting power to any of the other 463 -- of the 465 towns serviced by Otter Tail. This is the basis of the repeated statement in the government's brief that Otter Tail had dominance over transmission.

And finally, the government attacks the legality of Otter Tail's contract with the Bureau of Reclamation whereby Otter Tail agreed to wheel Bureau power to municipalities which Otter Tail was then not servicing at retail.

According to this view, a utility may agree to wheel only if its contractual duty is absolute and includes its own customers. In view of the fact that the industry

fought tooth and nail to avoid any such duty in 1935, is there any question that no electric company would ever enter into a coordination agreement with a government agency if it had to do so on such a suicidal basis? Apart from the incontestable, I underscore the word incontestable validity of such agreements under settled anti-trust and the common law of restraint, the result below nullifies the policy stated by Congress and Section 202(A) that voluntary interconnections were to be encouraged. I say this is a fine way of encouraging when you invalidate this type of restriction.

For all of the reasons, your Honors, outlined in this argument and more fully developed in our briefs, this is a very important case and I could only touch the highlights, but we rely upon our briefs for our other contentions and we respectfully submit that the judgment below be reversed and the complaint dismissed.

Mr. Chief Justice, I believe I have about three minutes that I would like to reserve for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Handler.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WALLACE: Mr. Chief Justice and may it please the Court:

The Appellent has used as its starting point in

this case the terms of the anti-trust decree and as is often true in devising a decree to afford effective relief in an anti-trust case, the decree here imposes some restrictions that go beyond the constraints imposed by the anti-trust laws themselves in the absence of a violation and as in most anti-trust cases, I think the best way to look at the case is to begin with the question of whether there was a violation of the Sherman Act before turning to the question of how can effective relief be afforded and whether the district judge properly afforded effective relief.

The evidence in this case focused principally on events in four small towns, Elbow Lake, Minnesota, which had a population in the 1970 census of 1,484, Hankinson, North Dakota, with a population of 1,125, Colman, South Dakota, 456 persons and Aurora, South Dakota, 237 persons.

The basic issue in this case as we see it is whether the normal constraints of section 2 of the Sherman Act on the use of monopoly power to suppress competition can be enforced in the courts to protect the consumers of electricity in towns such as these from being foreclosed from any viable competitive alternative to renewal of the Appellant's franchises, the Appellant's retail franchises when they expire.

Q Technically, at least, I understood the Appellant's argument to go to the validity of the remedy, the

three aspects of the remedy, i.e., the compulsory interconnection for wholesale electricity, the compulsory wheeling and the injunction against litigation. All those go to the remedy, not to the substantive violation. I suppose your argument will be that if you take away those three things from the remedy you won't have anything left in order to enforce the correction of the antitrust violation.

MR. WALLACE: It seems to me that in approaching the question of the propriety of the remedy, the starting point is what is it that you are trying to remedy. Was there a violation of the antitrust laws here and, if so, how should it be remedied? I don't see how we can start with the remedy in answering the questions in this case.

Q Well, then, what this case is about, then, is the remedy, exclusively the remedy, those three aspects of the remedy the Appellant says are invalid, even assuming a violation. Isn't that right?

MR. WALLACE: Well, Appellant, in its written briefs, is contesting whether there was a violation of the anti-trust laws.

Q Yes, but even assuming a violation it says that the district court, because of the Federal Power Act in the case of two aspects of the remedy and because of the Noerr Doctrine with respect to the third aspect of the remedy, says that those aspects of the remedy are what are

invalid, assuming a violation.

MR. WALLACE: Well --

Q Isn't that right? Or have I misunderstood this?

MR. WALLACE: That is part of Appellant's contention but in responding to that question, Mr. Justice, I would have to start by pointing out that even if I assumed that there was some validity in Appellant's contention, then the court would be faced with the question of whether the remedy should be modified or whether it was improper to impose the remedy, and I believe that the remedy was proper -- that is our contention but it seems to me that before we can answer that question, we have to at least give some attention to what it is that was being remedied and what the court -- what task the court was faced with.

And in that connection I would like to point out that in our brief on pages 55 to 64 we explain that competition palys important roles in the electrical power industry and many of these roles are summarized in a footnote on page 58 of our brief but the one of particular concern to us in this case is the role of competition in the retail market in small towns.

Now, although that role is limited to periodic competition for the retail franchises when they expire, it is of great public importance and, indeed, all three of the

states involved here have sought to safeguard this periodic competition by limiting the maximum length of retail franchises to either ten or twenty years and Otter Tail itself has competed vigorously in this periodic competition for franchises. Its policy has been to acquire existing municipal systems and franchises whenever it is economically feasible for it to do so and since 1947 this record shows Otter Tail has acquired franchises in six towns previously served by municipal systems.

Between 1945 and 1970, there have also been contests in twelve towns served by Otter Tail over proposals to replace Otter Tail with municipal systems.

Q Mr. Wallace, to go back to this acquisition of some of the municipal operations, I am not sure just what point you were making there, that Otter Tail is engaged in competition?

MR. WALLACE: Well, I am trying to point out the importance of the periodic competition for the franchises that Otter Tail does engage in, even though --

Q Well, presumably the municipalities consented or there would have been no takeover. Isn't that correct?

MR. WALLACE: O course.

Q You are speaking of towns that had had a municipal plant and decided, for various reasons, they didn't want to operate on their own and so they sold out to Otter

Tail, is that it?

MR. WALLACE: Well, this is the way that improvements occur in these towns in the quality of service or in the level of rates. It is through this periodic competition. I am pointing out that this competition exists whether the town is presently served by a municipal system or we believe under the antitrust laws it also should exist where the town is presently served by Otter Tail and the importance of this competition to consumers is shown by the contests in the twelve towns served by Otter Tail because on this record it is a direct result of the threatened loss of its franchise in these towns. Otter Tail responded by making such offers as improved street lighting for the town, a more favorable municipal pumping rate, improved local maintenance services, a modernized power distribution system.

In some of these instances, these legitimate competitive responses persuaded the town to stay with Otter Tail rather than to convert to a municipal system.

In other instances, these responses were not enough to persuade the town but the fact is that this is an important source of the benefits of competition traditionally protected by the antitrust laws, this periodic competition which the states sought to assume by limiting the length of these retail franchises are the way improvements in service can be obtained by the inhabitants in these towns.

The reason the government brought the present suit is because, in our view, Otter Tail went beyond these legitimate competitive responses and beyond legitimate competition also in the political arena. Otter Tail participated very vigorously in the election campaigns in these towns on a decision whether to convert to a municipal system and we don't challenge that conduct. We believe that was also legitimate conduct.

But we believe that -- and the reason we brought this suit -- was our contention that Otter Tail went beyond these legitimate responses and used what we contend and the district court found were illicit methods to foreclose competition when its franchises were at stake.

Now, in order to understand the district court's finding in this respect, I want to remind the court first that the district court found specifically that considerations of reliability and of economy of scale make it economically impractical to establish isolated electric generation and transmission systems in small towns like those in Otter Tail's service area but there are no such inherent disadvantages to the establishment of small retail distribution systems and they are generally among the 70 percent of the electric utility systems in this country that are engaged solely in distribution and thus are dependent upon larger firms for access to wholesale power, whether through purchase from the

Q Mr. Wallace, this may very well be a naive question, but supposing we have got a, say, a Buick dealer over in Alexandria who is supplied power by the Buick Company wherever Buick produces it and the City of Alexandria, being authorized to do so under Virginia law, decides it wants to go into the Buick dealership business and tells Buick, in effect, we don't want you to keep supplying this Buick dealer in Alexandria, we want you to supply the Alexandria Municipal dealership which we are about to set up. Does Buick require the antitrust laws to disenfranchise its existing Buick dealer and start selling the City of Alexandria?

MR. WALLACE: I don't believe so, Mr. Justice. Certainly that doesn't seem to be what is at stake in this case although analogies of that kind are used in some of the briefs supporting the Appellant and there is a lot of talk about a per se violation and a per se theory being involved here.

Q What is the problem in this case, just in terms of my hypothetical?

MR. WALLACE: Well, the basic difference is that monopolization is what is charged here and it is predicated on the existence of monopoly power and refusals to deal that are designed to preserve that monopoly power and that have that kind of anti-competitive effect and that are not based

on a legitimate business reason other than to preserve that monoploy power. Otter Tail didn't come forward with any legitimate business reason.

In other words, a so-called "per se" violation of the anti-trust laws is a violation for engaging in certain conduct which is so inherently antithetical to competition that it is unlawful regardless of the circumstances in which it occurs or the reasons why it is engaged in or the effect.

In this case, the circumstances, the existence of monopoly power were highly relevant. The reasons to suppress competition and to preserve that monopoly power were highly relevant and the effect was highly relevant and extensive evidence was heard on the effect. So many of the hypotheticals that have been suggested in the brief seem to us quite beside the point in this case. I think this is a much narrower decision than one might assume from reading some of the briefs.

Indeed, it seems to us that these refusals to deal come squarely within the terms of this court's previous decisions interpreting section 2 of the Sherman Act.

Assuming that the monopoly power did exist here, the principles violated are, for one, the general principle perhaps best expressed in United States against Griffith where the court first noted that the antitrust laws are as much violated by the prevention of competition as by its destruction and then said that the use of monopoly power --

Q What kind of a case was that? Public utility?

MR. WALLACE: That was a case involving motion picture distribution and exhibition.

Q Not a public utility case?

MR. WALLACE: It is not a public utility case.

But the use of monopoly power to foreclose competition was held there to be unlawful and there are many cases that indicate that refusals to deal in one market -- here wholesaling or wheeling of power -- for the purpose of maintaining a monopoly in another -- here the retail distribution of power -- are violations of section two and we think there is little question but what these principles are applicable if, in fact, a monopoly power existed here so that there was monopolization.

There is, as we have pointed out in our brief, even though public utilities are involved here, there is no exemption in the applicable laws from the antitrust laws, no express exemption and -- from principles that have been established in many of this court's opinions -- inadequate basis to find an implied exemption because the regulatory powers conferred on the Federal Power Commission in this field are not sufficiently comprehensive to indicate that the normal rule of competition is the regulator of the market where it plays its proper role in this industry is to be displaced.

Of course, we are dealing with an industry where there are natural monopolies existing except for the periodic competition at the time of initiating or renewing franchises but that competition has been emphatically recognized by this court in another area that is also regulated by the same federal regulatory agency in the transmission of natural gas and in this court's opinions dealing with that subject such as the El Paso case.

Q Mr. Handler suggested that the district judge had treated as irrelevant the possibility that Otter Tail would not be able to carry out its mission to other communities. What is your view of the district judge's position on that?

MR. WALLACE: The district judge made extensive findings that there was no basis to believe that.

Certainly, with respect to the existence of the violation here, there was no basis for that contention because all that Otter Tail refused to do that it should have done under the district judge's holding was to continue to supply power to the same towns but at wholesale rather than at retail or through wheeling agreements rather than at retail so it is very difficult to see how that would be any drain on Otter Tail's system and, obviously, Otter Tail would not be expected to be wholesaling power at a loss.

The only possible basis for this contention would

be that Otter Tail's retail rate to the consumers in these towns were such that these consumers were subsidizing other parts of this operation, which Otter Tail did not intend.

Q But, Mr. Wallace, if Otter Tail loses Hankinson and Elbow Lake, doesn't it have to look around for some other potential customers? It may have to supply them at wholesale, but in order to keep the same number of customers, doesn't it have to look around for some others to supplement Elbow Lake and Hankinson?

MR. WALLACE: Well, if it wants to keep the same number of customers. Otter Tail has been, as a matter of fact, growing in recent years, but there is no principle that says the antitrust laws must be put aside so that one competitor will never have his total number of customers reduced. That kind of economic self-interest is not an offense to a violation of the antitrust laws.

Q I thought you suggested in response to the Chief Justice's question that since all Otter Tail was being asked to do was to continue to serve the same communities that it already served, it couldn't possibly claim a business justification and my point was that although it continues to serve them, it does not serve them in the same capacity and very likely it may have to look elsewhere.

MR. WALLACE: Not in the same capacity. Well, if it wanted to maintain the same gross income, that kind of

thing, but it is difficult to see that we are talking about any serious impairment in the particular conduct that was held to be a violation here.

What this contention really goes to is the problem of what the decree requires of Otter Tail and I believe I will have to turn to the decree in this respect and perhaps in a couple of others, because the decree does say that Otter Tail should wholesale and wheel power to other municipalities that ask for it, should agree to do so. But the Appellant did not point out to the court paragraph five of the decree at page 209 which is a very key provision which states that -- 209 of the Appendix -- that the defendant shall not be compelled by the judgment of this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission and this provision of the decree in our view brings into play here, fully, the normal functions of the Federal Power Commission in protecting the furnishing of electric service in this country.

Q It is no part of the normal functions of the Federal Power Commission to require wheeling of power, as I understand it. I understand that has been a bone of contention for years and that Congress has repeatedly and systematically rejected the proposal that the Power Commission

be given that authority.

MR. WALLACE: That is correct, your Honor and this decree does not authorize the Power Commission to compel the wheeling of power. The excerpts from the legislative history quoted in the Appellant's argument here were all of the effect that this bill is not intended to authorize that wheeling be compelled by the Power Commission in the exercise of its functions in determining what is in the public interest in this industry. But nowhere in the legislative history was there any suggestion that the anti-trust laws were being repealed.

Q I was directing myself to this paragraph five to which you have directed our attention.

MR. WALLACE: Well, but the Power Commission does have a function in reviewing wheeling agreements. When wheeling agreements are made, they are filed with the Commission and the Commission has power to impose terms and conditions on them , just as --

Q Now, with respect to the furnishing of wholesale electric service, is it your submission that under paragraph five all of the provisions of 202 of the Power Act become applicable?

MR. WALLACE: That is what, in our view, this paragraph of the decree was designed for. Most wholesaling, most interconnections in wholesaling in this country occur

by voluntary agreement rather than by order of the Power Commission and those voluntary agreements are filed with the Power Commission and are subject to the imposition of terms and conditions by the Power Commission that are in the public interest and if, under this decree, a particular agreement was thought by Otter Tail to impair the possibility of its furnishing reliable service to its existing customers when that particular agreement which it was required to enter into under this decree is submitted to the Power Commission for its review, Otter Tail could point out these difficulties to the Power Commission and the Power Commission would, under the decree, under section 202, be free to impose whatever terms and conditions the Power Commission believes are required in the public interest to the point of virtually nullifying that particular agreement in order to protect Otter Tail's existing customers.

Q So that, in your view, under this paragraph five of the decree, the Power Commission could proceed with respect to a compulsory interconnection for wholesale service wholly independently, as though this judicial decree did not exist?

MR. WALLACE: The way it normally proceeds with respect to interconnection agreements, that is correct. That is the principle function of the Power Commission with respect to interconnections. There is nothing in the Power

Act that says that the Power Commission has to authorize an interconnection, a wholesaling agreement before it can be entered into. The voluntary agreements which are what most of them are, are merely subject to terms and conditions being imposed in the public interest.

Q It wasn't a matter of voluntary agreements. The whole point of this case is that they did not voluntarily agree.

MR. WALLACE: Well, that is correct and because that was a violation of section two of the Sherman Act the relief is that they should now enter into agreements that presumably they would have entered into voluntarily but for their policy of seeking to foreclose competition in order to preserve their own monopoly.

Q But if they don't want to, it is your -- do I understand you to say that this will just be a section 202 proceeding as though this judicial decree did not exist?

MR. WALLACE: Well, it would be -- the voluntary agreement will be entered into because the decree exists. What is in contemplation under --

Q I mean, they are not voluntary.

MR. WALLACE: But what would be treated by the Commission as a voluntary agreement will be entered into under the compulsion of this decree. That is the purpose of this decree.

Q That is an odd definition of "voluntary."

MR. WALLACE: Well, that is correct, but the -- I think the best way to explain it is that the decree was designed to see to it that Otter Tail enters into the agreements that it would have voluntarily entered into if it were not for its policy of monopolization.

Q Then what role, if any, does the -- do the provisions of 202 with respect to the power of the Commission to decline to compel an interconnection for wholesale serve? What -- to what degree do they continue to play a part after this judicial decree?

MR. WALLACE: Well, they don't play a part with respect to agreements that Otter Tail enters into under the requirements of this decree. Those are treated by the Commission as most wholesaling is treated.

Q That was part of the extortion case we heard yesterday. I don't -- let's say that -- what happens if Otter Tail says, well, despite the decree under this paragraph five, we are simply not going to do this.

MR. WALLACE: Not going to do what? Not enter into the agreement? Then Otter Tail --

Q Yes, we are not going to interconnect and wholesale power to one of these municipalities.

MR. WALLACE: I think Otter Tail would be in contempt under the decree if it refused to enter into an

agreement to interconnect. It does have recourse under paragraph five to ask the Commission to impose terms and conditions on that agreement that will protect the public interest in the furnishing of service to its existing customers --

Q Then I misunderstood.

MR. WALLACE: -- and those terms and conditions can virtually nullify the agreement.

Q Well, by "virtually nullify," does the Commission have power under this five --

MR. WALLACE: The agreement would still exist.

Q -- to say, no, you don't have to interconnect at all?

MR. WALLACE: Uh, no, not to say, no, you don't have to interconnect at all but that you don't have to furnish any wholesale power through this interconnection that will impair your ability to serve your existing customers. It is only if you have access power, you know, the terms and conditions can be based on the factual showing that is before the Commission.

Q Mr. Wallace, you mean that the decree could interconnect but they could say we are not going to furnish any power?

MR. WALLACE: Well, they have to agree under this to interconnect for the purpose of furnishing wholesale

power. The terms and conditions on that agreement can be imposed by the Commission as it does on any voluntary agreement to interconnect.

Q And one term that the Commission could impose, according to you, is that you not furnish any power to the --

MR. WALLACE: (Interposing): If the circumstances required the Commission to do that. That is correct. I think it is highly unlikely that such an agreement would be sought by a municipality anticipating that that would be the end result. If there were a situation where Otter Tail said, yes, if you insisted that I enter into this agreement under the decree I'll have to, but I'm going to be able to make such and such a showing to the Federal Power Commission even though in my view you are not going to be able to get any power as a result of this agreement. There is no point in it. I just -- I think we are dealing with unlikely hypotheticals.

Q Well, do you mean to say that that would be a circumstance where they might respond by saying if we carry out this interconnection and deliver this power we won't be able to have proper reserve power for other towns. Would that be the kind of a --

MR. WALLACE: (Interposing): That would be the kind of a condition the Power Commission could then impose.

Q Going back to --

MR. WALLACE: All of this is very unlikely because this record shows ample power over Otter Tail's line. We are only dealing with the extreme situation.

Q Going back to (B), paragraph (B) of the injunction, the transmission, isn't this in effect an order by a district judge to do something that Congress has refused to do for 25 or 30 years?

MR. WALLACE: Well, Congress has denied the Power Commission authority to order wheeling, just because the Power Commission might think it is in the public interest to have wheeling under section 202(B). Now, it is not clear that the Power Commission has no authority to order wheeling. The Power Commission did order wheeling as a condition to the use of hydroelectric resource in the Idaho Power case and this court upheld it and it is quite possible that it could order wheeling in a discrimination case where the utility was wheeling to one customer and not to another but under 202(B) the Power Commission has no authority to order wheeling.

Q Would you say that the district court's injunction here has gone beyond the powers which Congress vested in the Power Commission on the wheeling or transmission?

MR. WALLACE: I would say it has gone beyond the power vested in the Power Commission and that it was

appropriate for the district court not to be limited by those powers when a violation of section two of the Sherman Act had occurred.

Q You place this entirely on the remedial aspect?

MR. WALLACE: That is correct. There is nothing in the Power Act that says there the remedies that district judges can require for redress of violations of the Sherman Act are to be limited because the Power Commission can't order certain things to happen merely because the Power Commission would believe them to be in the public interest when there has been monopolization, when these people have been denied their rights to choose for themselves any viable competitive alternative/being to the continued captive customers of the one supplier, then remedies are required and the law has always been that effective remedies should be devised.

Q Mr. Wallace, I know your time has expired, but what about paragraph (C), engage in litigation.

MR. WALLACE: Well, uh, the only way I can answer that, Mr. Justice, is to point out that abuse of litigation was, I think, very wisely recognized by this court last term in the California Transport case to take many forms that come within what has come to be called the "sham exception to the Noerr Doctrine" and the form that was particularly involved here I think was very well described, with, perhaps, some

foresight in that opinion in the California Transport case as a pattern of baseless, repetitive claims that may emerge which leaves the factfinder to conclude that the administrative and judicial processes have been abused and of course the district judge here did not have the benefit of this opinion when he had to write his opinion but I think his findings indicate that kind of pattern, not merely because of the repetitiousness of the issues and the lack of success involved here but also because of the repeated offers by Otter Tail to reimburse the towns for the expenses incurred in this litigation if they would only abandon their plans to set up their own system and stay with Otter Tail.

You had here a spectacle of a public utility using its funds derived from its customers, not to provide better service, but to generate litigation expenses which it would then offer to repay with more of those funds in order to foreclose competition and, faced with this pattern of the abuse of the litigation process, I think it was proper for the district judge to grant relief to this part of the pattern of the monopolization conduct.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Mr. Handler, we have enlarged Mr. Wallace's time and we will enlarge your time accordingly. You will have nine minutes.

MR. HANDLER: Thank you, Mr. Chief Justice.

REBUTTAL ARGUMENT OF MILTON HANDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HANDLER: Mr. Chief Justice and may it please the Court:

We have a spectacle here of the decree being rewritten by the government in its brief and then further rewritten on this oral argument. That makes it quite difficult for one to contend with. We are appealing from the decree as entered in the trial court and it seems to me that that is the decree which measures our rights and our duties.

With respect to paragraph five, the proviso, Mr. Wallace has failed to point out to your Honors that section 202(B) imposes two functions on the Commission, first and foremost to determine whether it is in the public interest to order the interconnection, the wholesaling. Secondly, to determine the terms and conditions on which that interconnection shall be carried out.

The proviso does not cover the first. It covers the second and it is just absolutely wrong to suggest that in passing upon the terms and conditions the court can -- the Commission can also determine whether it is in the public interest to have an interconnection in the first place.

Indeed, it seems to me that my good friend and former student's concessions today establish beyond

peradventure of a doubt that there is the repugnancy here which makes antitrust inapplicable.

You will notice that he has not dealt with that in his argument. Of course, he didn't have the time. But he is suggesting a hybrid form of regulation. The court imposes the duty. The Commission passes upon terms and conditions. The Commission, he said, very frankly, can veto. I say veto. He says nullify. The Commission can nullify the court's obligation to wholesale by imposing onerous terms. I don't think this is what Congress contemplated. I know of no case where this court has approved this kind of hybrid regulation. Indeed, I have the hardihood to say that there is no case in the books where repugnancy is plainer than it is here.

Now, I would like, Justice Stewart, if I may, to clarify one of the points which you raised. If you turn to page 27, the opening sentence, the record 27, the opening sentence of the court's opinion states, "And this action brought into section two of the Sherman Act the basic issue is whether wholesaling of wheeling constitutes monopolization."

Our position here is that wholesaling does not constitute monopolization under the doctrine of primary jurisdiction. Antitrust is ousted. Wheeling does not constitute monopolization because the legislative record, contrary to what Mr. Wallace says, contains an assurance not

merely that the agency cannot order wheeling but that the court cannot order wheeling. This was fully debated at the hearings so that we say that there is no basis for that decreeal provision because it does not constitute a violation of law.

With respect, Mr. Chief Justice, to the erosion argument, at the bottom of page 45 of the Appendix, the opinion, a so-called -- I'm reading -- "a so-called 'erosion study' DX41 offered by Defendants sought to foretell its financial disaster if it is required to serve its former customers which convert to municipal operation."

That is the argument.

The court's answer, "Otter Tail cannot violate the law albeit its avowed purpose is to protect the integrity of its business."

On page 45, "Isn't it rather odd you have an injunction here which is available to every one of the 465 towns that can decide to take over the Otter Tail business and ask Otter TAil either to wheel a subsidized governmental power or to wholesale without regard to the effect on its system, without regard to its financial ability to service customers, without regard to its very survival." This is the injunction and then we are told here solemnly that all that is involved is an injunction sought by one town and that Otter Tail would have the energy to supply a town of 1,450

but that is not the case before this court.

Justice Rehnquist, a voluntary agreement need not be submitted in advance but after it is made, it is filed and the Commission could have the power to review its terms.

Thank you very much, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Handler.

Thank you, Mr. Wallace.

The case is submitted.

(Thereupon, at 11:10 O'clock a.m., the case was submitted.)