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# Ohio Edison v. Public Utility Commission of Ohio: Affirming the Charitable and Municipal Exception to the Policy Against Anti-Competitive Behavior

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## ***Ohio Edison v. Public Utility Commission of Ohio*<sup>1</sup>: Affirming the Charitable and Municipal Exception to the Policy Against**

### **Anti-Competitive Behavior.**

#### I. Introduction

Today's electricity user takes for granted the quick, convenient supply of electric power. Behind the convenience lies a variety of legal rules and regulations.<sup>2</sup> Public utilities are organized as a monopoly that is heavily regulated by the state. Every consumer of electricity is concerned about the cost of electricity. The Public Utility Commission (sometimes referred to as "Commission") was given the job of guaranteeing that the price of electricity would be the same for all customers.<sup>3</sup> Against this backdrop, the Supreme Court of Ohio has upheld a policy in *Ohio Edison v. Public Utility Commission of Ohio*<sup>4</sup> that some customers deserve special rates.<sup>5</sup> This decision will have a negative impact on competition within the electric utilities' industry for municipal customers.<sup>6</sup>

Two statutes of the Ohio Revised Code ("O.R.C.") are the issue of this Note. First, O.R.C. §4905.33 ("Prohibition Statute") prohibits a utility from charging below cost service for the purpose of destroying competition.<sup>7</sup> Directly following is O.R.C. §4905.34 ("Free Service Statute") which grants a public utility the privilege to give utility service for free or at a reduced charge to the government.<sup>8</sup> Read together, one interpretation would conclude that the legislature gave a public utility the opportunity to charge a municipality free or below-cost service.<sup>9</sup> Yet another interpretation concludes that the legislature intended a bar against destroying competition to include contracts between public utilities and municipalities.<sup>10</sup>

This Note will analyze the effects that the *Ohio Edison*<sup>11</sup> decision will have on the utility industry and on electric consumers.<sup>12</sup> This Note will also explore the common law rule,<sup>13</sup> the background of the rule,<sup>14</sup> and competition in the utility industries.<sup>15</sup> This Note will thoroughly address the opinion and its underlying rationale.<sup>16</sup> Finally, this Note will explore changes within the law and regulation necessary to bring competition to the public utilities industry.<sup>17</sup>

#### II. Background

##### *A. Nature of the Utility Industry*

The utility industry was thought to be a natural monopoly.<sup>18</sup> Generally speaking, utilities are unchecked by competition.<sup>19</sup> In response to potential abuses, government enacted regulations to protect consumers and curb monopolistic power.<sup>20</sup> The goal of regulation is to submit the utility industry to the control of market forces as well as enforce their obligations.<sup>21</sup> Utilities are therefore both "Quasi-public" entities and public interest entities.<sup>22</sup> Regulation is a trade off.<sup>23</sup> The public is served, and, in exchange, the utility is protected from competition.<sup>24</sup> Thus, a utility has duties to serve the public,<sup>25</sup> and those duties place responsibilities upon a utility.<sup>26</sup> As a corollary to the responsibilities, certain

privileges are granted.<sup>27</sup> The most important privilege to this Note is the protection from competition.<sup>28</sup> There is, thus, a public policy of protecting the utilities from competition.<sup>29</sup>

### *B. The Common Law Rule of Free Service to Municipalities*

When the country was expanding utility service around the turn of the century, courts in numerous states recognized a difference between a municipality and other retail public consumers.<sup>30</sup> The various state court decisions dealt with all areas of utility service.<sup>31</sup> The following survey of cases reveals a common law policy in favor of discrimination where there is a public interest involved.<sup>32</sup>

#### 1. The U.S. Supreme Court and the Rights of Consumers

The Supreme Court of the United States held in *Hollis v. Kutz*, that utility rate discrimination in favor of the Federal Government did not violate any personal rights.<sup>33</sup> Earlier, in *Wilcox v. Consolidated Gas Co.*, the Court held that gas rates favoring New York City were not illegally discriminatory.<sup>34</sup>

#### 2. Early Common Law Decisions on Government Discrimination

A variety of state courts deciding the issue of whether a utility discriminates against consumers have upheld a charitable and governmental exception.<sup>35</sup> The Michigan Supreme Court upheld a Public Utilities Commission decision to allow discrimination in water rates for the city of Detroit.<sup>36</sup> The Court reasoned that water used by the city is for the benefit of the general public.<sup>37</sup> Similarly, the New York Court of Appeals upheld telephone rate discrimination in favor of New York City.<sup>38</sup> The Maine Supreme Court agreed with the New York Court of Appeals that discriminations in favor of the public in general are not opposed to public policy.<sup>39</sup> Next, the Washington Supreme Court held that a city owning its own waterworks has a right to furnish water free of charge for charitable and municipal purposes.<sup>40</sup> The Oklahoma Supreme Court held that where service is donated for the public good, it is not unjustly discriminatory.<sup>41</sup> Furthermore, sixty years later the Oklahoma Supreme Court held that a rule limiting contributions by a utility to charitable and civil organizations was invalid.<sup>42</sup> The Pennsylvania Supreme Court held that a city supplying itself with free water is not discriminating against retail consumers.<sup>43</sup> Still further, the Illinois Supreme Court upheld a Public Utilities Commission ruling giving municipalities a preferential electric rate.<sup>44</sup> Thus, various state courts have consistently upheld charitable and municipal exceptions to the rule against rate discrimination.

#### 3. Previous Ohio Decisions

The Supreme Court of Ohio agreed with the common law rule in *State v. Hickey*.<sup>45</sup> First, the Court reasoned that independent of a statute to the contrary, the right of a municipality to give free water for charitable purposes can not be doubted.<sup>46</sup> The Court cited cases from Michigan, Oklahoma, Pennsylvania, and Washington to support its

holding.<sup>47</sup> In a later case, the Ohio Supreme Court upheld a utility's special rate for a school that was lower than the rate charged for the county.<sup>48</sup> The Court reasoned that the unique status and difficulties of a school district justified such discrimination.<sup>49</sup> Although both cases dealt with rate discrimination to municipalities, the statutes at issue in this case were not discussed.<sup>50</sup>

### *C. Background of the Free Service Statute, O.R.C. § 4905.34*

The Free Service Statute was enacted as part of the Utilities Act of 1911.<sup>51</sup> The statute was amended in 1939 to further define an employee.<sup>52</sup> The statute was again amended in 1996 after the present case was initiated to once again expand free service to government employees.<sup>53</sup> This statute has been at issue in the Ohio Supreme Court only once.<sup>54</sup> However, the Court did not interpret the statute because it decided the case without need of the statute as support.<sup>55</sup> Also, the Public Utilities Commission of Ohio, in two opinions, expressly authorized a phone utility to give free service to the police force and not to retail customers.<sup>56</sup> The Commission cited the Free Service Statute as expressly permitting such discrimination.<sup>57</sup> *Ohio Edison* is the first case decided where this statute has been directly at issue.

## III. Statement Of The Case

### *A. Statement of Facts*

Youngstown Thermal is a limited partnership formed for the purpose of providing steam services to the Youngstown, Ohio area.<sup>58</sup> In the early 1980's, Mahoning County, Ohio decided to build a 198,000 square foot jail in downtown Youngstown.<sup>59</sup> Youngstown Thermal was interested in providing hot water, heating and cooling services to the jail, but did not have the system constructed at the time.<sup>60</sup> The jail would have been the anchor load<sup>61</sup> for future cooling services to other Youngstown, Ohio customers.<sup>62</sup> Ohio Edison feared losing customers in Youngstown to Youngstown Thermal.<sup>63</sup> Lengthy negotiations occurred between the County Commissioners and both Youngstown Thermal and Ohio Edison.<sup>64</sup> On December 22, 1993, the County signed a contract with Ohio Edison to provide services under the normal rate as well as additional financial assistance.<sup>65</sup>

### *B. Procedural History*

On August 23, 1993, Youngstown Thermal filed a complaint with the Public Utilities Commission of Ohio, alleging that Ohio Edison violated several statutes regarding its contract for the jail.<sup>66</sup> On February 10, 1994, the Commission concluded that even in specific circumstances where discriminatory rates are permitted, no public utility may furnish free or reduced rate services for the purpose of destroying competition.<sup>67</sup> On April 7, 1994, the Commission scheduled hearing dates and decided that the last sentence of the Prohibition Statute, prohibiting the destruction of competition, governs the Free Service Statute.<sup>68</sup> On August 31, 1995, after completion of hearings, the Commission found that Ohio Edison had violated the law by agreeing to provide below cost service to the jail.<sup>69</sup>

The Commission found that the purpose and intent of providing low cost service was to destroy competition.<sup>70</sup> Nevertheless, the Commission declined to impose penalties due to lack of prior legal precedent.<sup>71</sup> On October 18, 1995, the Commission reaffirmed its August 31, 1995 decision.<sup>72</sup> Ohio Edison appealed the Commission's decision to the Ohio Supreme Court.<sup>73</sup>

### *C. Ohio Supreme Court Decision*

Justice Stratton wrote the majority opinion.<sup>74</sup> The Court first stated it would not reverse the Commission order unless such order was against the manifest weight of evidence.<sup>75</sup> However, the Court affirmed it had complete and independent power to review the judgment of the Commission as to questions of law.<sup>76</sup> The main issue the Court decided was the interplay between the Prohibition Statute and the Free Service Statute.<sup>77</sup> The Court, therefore, reviewed the case only as a question of law.<sup>78</sup>

The Court found the Commission's application of both statutes was in error.<sup>79</sup> The Court stated that the Commission should have determined if the Free Service Statute precluded the Commission's review.<sup>80</sup> The Court held that the Free Service Statute applied in this case and was not subject to a prohibition against below cost utility service for the purpose of destroying competition.<sup>81</sup> The Court reasoned that the list of governmental entities in the statute were merely examples of donees of the reduced cost utility services.<sup>82</sup> Consequently, a utility may grant its property for any public purpose.<sup>83</sup> The Court then stated that both statutes were clear and unambiguous.<sup>84</sup> The Court noted that even if the statutes were not clear, the Free Service Statute is a specific statute and would therefore prevail over the general Prohibition Statute.<sup>85</sup> The Court also stated that the intent of the party granting reduced cost utility services is not material under the Free Service Statute.<sup>86</sup> The Court concluded by instructing the General Assembly to change the statute if it intends to restrict anti-competitive behavior to governmental entities as well.<sup>87</sup>

Chief Justice Moyer wrote a dissenting opinion.<sup>88</sup> He emphasized that Ohio Edison had no support for their defense in the evidence of record.<sup>89</sup> Next, he stated that the examples written in the statute were a discrete list of civic opportunities where a utility may provide reduced rate service.<sup>90</sup> In his opinion, competitive bidding situations did not appear to be a designated purpose of this section.<sup>91</sup> He stated that read together, the statutes were in conflict.<sup>92</sup> He continued by stating that the Court should give the Commission's decisions great weight,<sup>93</sup> but the majority gave the Commission's decisions no weight.<sup>94</sup> He argued that the majority overlooked the spirit and policy of the restriction on free or reduced price services.<sup>95</sup> When all factors were considered - history, language, the Commission's analysis, and public policy - he believed the Commission's decision was correct.<sup>96</sup> Finally, he argued that if the contracts between utilities and municipalities were exempt, then utilities could break such contracts without threat of the Commission's review.<sup>97</sup>

## IV. Analysis

### *A. Analysis of Statutory Construction*

## 1. The Court's Construction Upheld the Common Law Rule

By using a rule of statutory construction, the Court determined the legislature intended to give public utilities the ability to destroy competition.<sup>98</sup> A court will use the canons of statutory construction to interpret statutes to give the result it desires.<sup>99</sup> The Court interpreted the statute to uphold the common law rule of discrimination in favor of municipalities.<sup>100</sup>

The O.R.C. also contains rules of construction.<sup>101</sup> First, when two statutes are in conflict, the specific statute must be read as an exception to the general statute.<sup>102</sup> The Free Service Statute begins by citing other statutes that regulate a utility.<sup>103</sup> Next, the Free Service Statute defines the specific circumstances when a utility may grant free or reduced rate services.<sup>104</sup> It first names a public purpose.<sup>105</sup> It then specifically names the Federal, State, and Local government as possible donees.<sup>106</sup> Finally, the statute provides that such contracts are valid and enforceable at law.<sup>107</sup> In contrast, the Prohibition Statute specifically states the categories where it would apply.<sup>108</sup> The categories are a person, firm or corporation.<sup>109</sup> A municipality is specifically not included. O.R.C. ' 4905.35 immediately follows the Prohibition Statute and the Free Service Statute.<sup>110</sup> This statute specifically includes the word locality.<sup>111</sup> Therefore, three statutes of the same legislative act, when read together, define the categories of utility consumers to which they apply.<sup>112</sup> Thus, the legislature must have intended the Free Service Statute to be an exception.<sup>113</sup> The Court, in its conservative construction, gives effect to the common law in the statute.<sup>114</sup>

Second, the Court upholds the common law by construing the circumstances given in the statute as mere examples.<sup>115</sup> The majority construes the words "for any public purpose," as its plain meaning.<sup>116</sup> By using this construction, the Court includes a jail as being a type of contract where a utility may give reduced rate or below cost service.<sup>117</sup> In conclusion, the majority's policy of supporting the common law was affected by their construction of the statutes at issue.

## 2. The Court's Construction Upholds the Policy of Free Service for Public Purposes

The result of the Court's decision will be to strengthen the policy of free utility services to municipalities. The state of Kentucky has similar statutes that allow a utility to grant free service to the United States and charitable institutions.<sup>118</sup> Similarly, an exception to the Robinson-Patman Anti-discrimination Act allows price discrimination for charitable institutions.<sup>119</sup> In an early case, the United States Court of Appeals for the Sixth Circuit, in dicta, stated that below-cost materials supplied to the Municipal Housing Commission were not covered by the Federal anti-discrimination act.<sup>120</sup> Also, the United States Court of Appeals for the Seventh Circuit held that discounts to the Federal government that were not given to similar customers did not violate Federal anti-discrimination laws.<sup>121</sup> Thus, courts have upheld a policy of preferential treatment to the government.

Two more examples of the policy of granting free services for public purposes include a tax deduction and an exception from unfair competition laws. First, the Ohio Public

Utilities Commission determined that a utility which was civic minded was able to deduct contributions as operating expenses.<sup>122</sup> Such a tax deduction is usually allowed only where both the utility and its patrons benefit from the contribution.<sup>123</sup> Second, the Federal Trade Commission Act prohibits unfair methods of competition, but the act exempts non-profit organizations.<sup>124</sup> Both examples support a public policy of free service for public purposes.

## *B. Effects of the Decision on Consumers of Electric Power*

### 1. Effects on Retail Customers

The decision will have negative effects on the public. First, as a result of this decision, customers will be forced to pay the government regulated price over the long run.<sup>125</sup> Also, without competition, Ohio Edison will not be subject to market forces that create incentives to innovate and reduce rate prices.<sup>126</sup>

However, the benefits of upholding the policy of free service for public interest would outweigh any negative effects on consumers. First, whether the jail pays or the utility donates the power, the taxpayers will ultimately pay.<sup>127</sup> Thus, the free service creates a reduced jail budget for the county. Second, by preserving a monopoly, electric service is guaranteed as part of Ohio Edison's obligation to the Youngstown area.<sup>128</sup> Furthermore, consumers benefit by simpler billing.<sup>129</sup> Also, the community benefits from programs supported by the revenue Ohio Edison generates.<sup>130</sup> One result of increased competition may be increased prices.<sup>131</sup> With new competition, Ohio Edison would have unused capacity that could only be supported by service rates.<sup>132</sup> The public would pay to maintain that capacity.<sup>133</sup> Also, with various providers, reliable, quality service might suffer.<sup>134</sup> Finally, by using small or new providers, service is not guaranteed as is the case today. In other words, there is a chance of "the lights going out."<sup>135</sup> Thus, the benefits of the current environment outweigh the advantages of competition.

### 2. The Effects on Municipalities

If there is any winner from this case, it is municipalities. First, municipalities will have leverage in contract negotiation with utilities.<sup>136</sup> Besides low cost, there may be additional incentives, such as free equipment or repair service, that would push service below cost.<sup>137</sup> Second, the public will have less of a burden to support the jail through taxes.<sup>138</sup> Municipal budgets will now have added resources to allocate to more beneficial public services. The only negative consequence will be that municipal contracts will be unreviewable by the Public Utilities Commission.<sup>139</sup> Although the results of such a contract may be more beneficial than if it were under the Commission's review.<sup>140</sup>

## *C. The Effect of the Decision on the Policy of Competition*

### 1. Conditions for Competition to be Effective

The practical effects of this decision are that Youngstown Thermal is unable to construct a cooling plant and it has been effectively prevented from starting to operate.<sup>141</sup> However, Youngstown Thermal may not have been a viable competitor in the first place. Three factors are needed for competition to be effective in the utilities' industry.<sup>142</sup> The first major factor is a parity among many competitors.<sup>143</sup> Even though a monopoly would be destroyed by competition, an oligopoly<sup>144</sup> would have the same result on consumer rates.<sup>145</sup> The members of the oligopoly would enjoy the same environment as the monopolist now enjoys.<sup>146</sup> An example is in the airline industry where there are now fewer airlines than before deregulation.<sup>147</sup> Youngstown Thermal may not have been able to survive in an oligopoly with Ohio Edison and other major utility providers.

The second major factor is the absence of a dominant firm.<sup>148</sup> If the monopolist remains the dominant firm in the territory, the competitors will be forced to follow to stay in business.<sup>149</sup> In order to be effective, a number of equal competitors are needed.<sup>150</sup> Ohio Edison would still be the dominant firm for cooling services.

The final factor is the ease of entry and exit into the industry.<sup>151</sup> The cost of building and maintaining facilities to generate power is high. In this case, Youngstown Thermal couldn't even start their business without the jail contract.<sup>152</sup> Thus, even if the Court had held that Ohio Edison was unable to grant free service, retail public customer prices may not have changed.

## 2. Utilities Have Other Legal Tools to Suppress Competition

Utilities have a variety of ways to keep startup companies from competing for customers. First, the entry costs of a utility are very high.<sup>153</sup> The cost of building plants, transmission stations and repair services are high.<sup>154</sup> Second, the utilities may use political pressure to prevent legislation from damaging their market share.<sup>155</sup> Next, utilities could enter into long-term contracts with large consumers to keep startups from getting a foothold in the market.<sup>156</sup> This case is an example of how a long-term contract will prevent the entry of competitors into a market. Also, utilities faced with the threat of competition could merge to create more market power,<sup>157</sup> which would make competing even more difficult for start-up providers.<sup>158</sup> Utilities may also keep prices at bare minimums until its competition goes out of business.<sup>159</sup> Finally, other creative means may be available to suppress competition.<sup>160</sup> Thus, charging below cost service rates to a municipality is not determinative of the success of competition.

## 3. The Utility Environment Must Change for Competition to be Effective

In order for competition to thrive in the utility industry, public policy must change.<sup>161</sup> A number of factors would encourage consumer choices. First, the law must prohibit long-term contracts between utilities and large customers<sup>162</sup> because this practice locks the bulk of the market share for long time periods, thus disabling startups from succeeding. Second, more technology is needed for startups to generate, store, and transfer energy.<sup>163</sup> The law must create incentives for startups to compete.<sup>164</sup> Also, public policy must create a competitive ideology to encourage competition.<sup>165</sup> Finally, the law should reduce

territorial laws in order to facilitate the transfer of energy across borders.<sup>166</sup> If these factors are implemented, there is a better chance of reducing service rates than there is prohibiting reduced rates for charitable or governmental purposes.<sup>167</sup>

## V. Conclusion

The promotion of competition is a noble cause that is heavily advocated. This Note stands for the proposition that the benefits of competition must be achieved without the need to eliminate the charitable and municipal exception to rate discrimination. Besides the benefits to the public interest, utilities have other ways to sustain their monopolies. One of the biggest factors is the access to large customers by start-up competition. Youngstown Thermal was denied access to what it considered to be a large customer. Youngstown Thermal must be given access to other customers in the Youngstown area in order to become a valid competitor. The legislature, regulators and the courts must work together to change the environment in which the public utilities now operate.

**John E. Farren**

1 Ohio Edison v. Pub. Util. Comm'n of Ohio, 678 N.E.2d 922 (Ohio 1997).

2 See OHIO REV. CODE ANN. Title 49 Public Utilities (Banks-Baldwin 1997).

3 Two statutes give the Public Utilities Commission of Ohio the power to oversee the utility industry in Ohio. See OHIO REV. CODE ANN. (4901.02 (Banks-Baldwin 1997) which states in particular; "The commission shall possess the powers and duties specified in, as well as all the powers necessary and proper to carry out the purposes of Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code." Id. See also Irwin S. Rosenbaum, Legislative History of the Public Utilities Commission of Ohio, 3 U. CIN. L. REV. 138, 139-64 (1929). The author traces the historical development of the Ohio Public Utilities Commission as a solution to the unstructured Railroad Commission. Id. The new agency was empowered to regulate new inventions as they became available to the public. Id. He outlines various laws that were enacted empowering the Commission in Ohio. Id. See OHIO REV. CODE ANN. (4905.04 (Banks-Baldwin 1997). The statute empowers the Commission to regulate public utilities and railroads and to require all public utilities to furnish their products and render all services exacted by the Commission or by law. Id. See also Jeffrey W. Knapp, Comment, Effective State Regulation of Energy Utility Diversification, 136 U. PA. L. REV. 1677, 1679-85 (1988). The author sees a problem with public utilities diversifying into other businesses. Id. He suggests that the Utilities Commissions at state levels are the most appropriate agency for regulations. Id. The Federal government should only step in if there is an emergency. Id.

4 678 N.E.2d 922 (Ohio 1997).

5 See id.

6 See infra Part IV.

7 OHIO REV. CODE ANN. (4905.33 (Banks-Baldwin 1997) ("Prohibition Statute"). The statute reads:

No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Id.

8 OHIO REV. CODE ANN. (4905.34 (Banks-Baldwin 1997) ("Free Service Statute"). Prior to its amendment in 1996, the statute read:

Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code do not prevent any public utility or railroad from granting any of its property for any public purpose, or granting reduced rates or free service of any kind to the United States, to the state or any political subdivision of the state, for charitable purposes, its fairs or expositions, or to any officer or employee of such public utility or railroad or his family. All contracts and agreements made or entered into by such utility or railroad for such use, reduced rates or free service are valid and enforceable at law. As used in this section, 'employee' includes furloughed, pensioned, and superannuated employees.

Id.

9 1 Op. Att'y Gen. 788 (1917) (stating that the policy of the statute is that free service to a municipality does not discriminate against the public because the municipality represents the public interest). See also 64 AM. JUR. 2D Public Utilities §113 (citing many of the cases in this Note as authority for a utility giving away free service to the government or a charity).

10 78 O. JUR. 3D Public Utilities §91 (interpreting legislative policy such that a public utility should not be permitted to leverage its rates for the purpose of destroying competition).

11 Ohio Edison v. Pub. Util. Comm'n of Ohio, 678 N.E.2d 922 (Ohio 1997).

12 See *infra* Part IV.

13 See *infra* Part II. C.

14 See *infra* Part II. A.

15 See *infra* Part II. B.

16 See *infra* Part III and Part IV.

17 See *infra* Part IV. C.

18 See David C. Hjelmelt, Retail Competition in the Electric Utility Industry, 60 DENV. L. J. 1 (1982). The author discusses how

economists have viewed the utility industry. Id. at 3. A natural monopoly occurs where even if there would be numerous competitors, conditions would result in only a few or one dominant supplier. Id. Thus, market forces themselves would tend to create a monopoly. Id.

19 Id.

20 Janal M. Kalis, The Role of Antitrust Law in Promoting Competition in Electricity Generation and Transmission, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 287, 295 (1991) (stating that because a utility is a

monopoly, the government is the only way to protect consumer interests).

21 *Id.* at 295-96. The author describes government regulation of the utilities' industry as "quasi-competitive." *Id.* The effect of regulation is to artificially impose market forces on a utility without having market conditions. *Id.* The effect hoped for is decreased prices and increased innovation. *Id.*

22 John Wyeth Griggs, *Competitive Bidding and Independent Power*

*Producers: Is Deregulation Coming to the Electric Utility Industry?*, 9 ENERGY L. J. 415, 427 (1988). A "Quasi-public" entity is one where the public entrusts the entity with essential public services for which they are granted legal monopolies. *Id.* In exchange, the entity is obligated to provide the public with its services. *Id.* An example would be free electrical power for street lights. *Id.*

23 *Id.*

24 *Id.*

25 Floyd L. Norton IV & Mark R. Spivak, *The Wholesale Service Obligation of Electric Utility*, 62 ENERGY L. J. 179, 180 (1985). The authors state three factors of a utility's duty:

- (1) A duty to serve in a safe and adequate manner all those qualified to receive service in a particular area.
- (2) An obligation to maintain reasonable rates for service.
- (3) The utility's right to serve and be protected in its service area from unwarranted competition of the same kind.

*Id.*

26 *Id.* at 181. The authors list the responsibilities of a public utility:

- (1) Obligation to serve all within an area who request service.
- (2) The obligation to provide service at a reasonable rate.
- (3) The obligation to serve the public without discrimination.
- (4) The obligation to provide service on reasonable terms and conditions.

*Id.*

27 *Id.*

28 Id. Additional privileges include:

- (1) The right to charge a reasonable rate.
- (2) The right to attach reasonable conditions of service.
- (3) The right to eminent domain.

29 Id.

30 See *infra* Part II. C.

31 See *infra* Part II. C.

32 64 AM. JUR. 2d Public Utilities §113.

33 *Hollis v. Kutz*, 255 U.S. 452 (1921). This case involved a utility raising the rates of retail consumers while keeping the rate for the Federal Government the same. *Id.* at 452. The court reasoned that a retail utility customer may just elect not to use the service if they feel their rights are violated. *Id.* at 454-55. The plaintiff had no right to equity with the Federal Government. *Id.*

34 *Wilcox v. Consolidated Gas*, 212 U.S. 19 (1909). This case involved a suit by shareholders against a utility to increase the rate of return. One of the issues was free service to New York City. *Id.* at 23-40. The Court ultimately held that a customer may not sue to require a higher return on the assets of a utility. *Id.* at 52-55. The court stated that a rate inquiry was not material to the reasonableness of the utility's rate of return. *Id.*

35 See *infra* Part II. A. 2.

36 See *Preston v. Bd. of Water Comm'rs of Detroit*, 76 N.W. 92 (Mich. 1898). The court reasoned that the rates the city would pay would in turn become a tax on the same citizens that claim discrimination. *Id.* at 94. The court emphasized the discrimination applies only to institutions where the public does not have an interest. *Id.* at 96.

37 See *id.*

38 *New York Tel. Co. v. Siegel-Cooper Co.*, 96 N.E. 109 (N.Y. 1911). The court stated that unreasonable discrimination rests on public policy. *Id.* at 112. The court stated:

Discriminations, however, in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens. In the absence of legislation upon the subject, such discriminations cannot be held illegal, as a matter of law, without overturning the foundation upon which the rule itself is built.

*Id.*

39 *City of Belfast v. Belfast Water Co.*, 98 A. 738 (Me. 1916). The court cited the reasoning of *New York Telephone Co.* in upholding a contract for free water to the city of Belfast. *Id.* at 742.

40 *Twitchell v. City of Spokane*, 104 P. 150, 151 (Wash. 1909) (reasoning that although the city must charge a higher rate to its regular customers, the rate is not a tax because it results in the price that the community must nevertheless pay for water service).

41 *Fretz v. City of Edmond*, 168 P. 800 (Okla. 1916), *reh'g denied*, (1917) (citing as support, *Wilcox*, 212 U.S. 19 (1909); *New York Tel. Co.*, 96 N.E. 109 (N.Y. 1911); *Twitchell*, 104 P. 150 (Wash. 1904); *Preston*, 76 N.W. 92 (Mich. 1898)).

42 *State v. Oklahoma Gas and Elec. Co.*, 536 P.2d 887, 893 (Okla. 1975) (holding that the way a utility spends its return on investment is of no concern to the Commission as long as the public is not prejudiced).

43 *Consolidated Ice Co. v. City of Pittsburgh*, 118 A. 544 (Pa. 1922). The court stated that just because the city supplies itself with free water for fire protection and to charities, it is not an abuse of discretion and affords its paying customers no just grounds for complaint. *Id.* at 546.

44 *Citizens Util. Co. v. Illinois Commerce Comm'n*, 276 N.E.2d 330, 334 (Ill. 1971) (noting that when a city gives a franchise to a utility, that agreement may be taken into consideration when negotiating a service contract).

45 *State v. Hickey*, 30 N.E.2d 802 (Ohio 1940). This case involved an ordinance directing the city of Cleveland waterworks to furnish free water to a long list of charitable purposes and organizations. *Id.* at 803-04. Those institutions sued to enforce the ordinance. *Id.* The Court noted there is no statute or constitutional provision inhibiting such discrimination. *Id.*

46 *Id.*

47 *Id.* The Court stated, "In harmony with such statements are a number of cases which hold or indicate that a municipality operating a waterworks possesses the power to supply water gratis to public, religious, educational, or charitable institutions." *Id.* (citing as support; *Twitchell*, 104 P. at 150; *Consolidated Ice Co.* 118 A. at 544; *Fretz* 168 P. at 800).

48 *County Comm'rs Assoc. of Ohio v. Pub. Util. Comm'r*, 407 N.E.2d 534, 536 (Ohio 1980). The Court reasoned that the Commissioner's decision was not unreasonable or unjustly prejudicial. *Id.*

49 See *id.* at 537. The court reasoned that the differences between a county tax system and a school system are enough to justify a lower rate. *Id.*

50 See Hickey, 30 N.E.2d at 802; see also County Comm'r Assoc. of Ohio, 407 N.E.2d at 534.

51 1911 Ohio Laws 614-72.

52 Public Utilities Act of 1911, 614-72, amended by, OHIO REV. CODE ANN. §4905.34 (1939).

53 See OHIO REV. CODE ANN. (4905.34 (West 1997) (including law enforcement officers living in free housing and their families).

54 County Comm'rs Assoc. of Ohio, 407 N.E.2d at 536. The Court upheld a Commission finding that charging a school a reduced rate compared to that of the county was not a statutory violation. Id. at 536.

55 Id.

56 Re Ohio Bell Tel. Co., 1993 WL 207437 (Ohio P.U.C.) (allowing a per line blocking service free of charge to qualified social service agencies and law enforcement organizations by the telephone utilities; other customers would be charged for the same service). See also Re Chillicothe Tel. Co., 1993 WL 338813 (Ohio P.U.C.).

57 Re Ohio Bell Tel. Co., 1993 WL 207437 (Ohio P.U.C.) (saying that all subscribers should obtain free service due to the fact that law enforcement receives such service is clearly contrary to prudent public policy and ignores express authorization in OHIO REV. CODE ANN. (4905.34. (West 1997)).

58 Youngstown Thermal, Ltd. Partnership v. Ohio Edison Co., 163 P.U.R.4th 471 (1995). Youngstown Thermal's business plan was to build a plant to generate steam that would use underground pipes. Id. at 474. The pipes were already in place. Id. Boilers in the plant would generate steam. Id. The system would also be capable of producing chilled water through the pipe system to the customer's facility. Id.

59 Id. at 475.

60 Id.

61 Id. "Anchor load" is a term used to describe a customer account that would require enough steam to make the entire system economically feasible. Id. Without a major customer, the system would not have enough revenue to stay in business. Id.

62 Id.

63 Id.

64 Id. at 476-79. The county employed a third party expert to evaluate both a steam and electrical cooling system for the jail. The expert concluded that electric cooling and gas boiler heating would be the

most economical alternative for the facility. Youngstown Thermal disagreed with the study. Id.

65 Id. at 479. The additional financial assistance included an Ohio Edison grant to the County of a \$120,000, a zero percent loan to cover the cost of electrical coolers, a \$140,000 assistance payment, and five year comprehensive repair service. Id.

66 See *Youngstown Thermal, Ltd. Partnership v. Ohio Edison Co.*, 1994 WL 73507 (Ohio P.U.C.). See also OHIO REV. CODE ANN. §4905.26 (West 1997). This statute details the process that begins a complaint with the Commission. Id.

67 See *Youngstown Thermal, Ltd. Partnership v. Ohio Edison Co.*, 1994 WL 73507 (Ohio P.U.C.).

68 See *Youngstown Thermal, Ltd. Partnership, v. Ohio Edison Co.*, 1994 WL 175113 (Ohio P.U.C.).

69 *Youngstown Thermal, Ltd. Partnership*, 163 P.U.R.4th at 494-95.

The Commission calculated that there was below cost service based total usage and rates from testimony at the hearings on the allegations. Id. See OHIO REV. CODE ANN. §4903.02 (Banks-Baldwin 1997).

70 *Youngstown Thermal, Ltd. Partnership*, 163 P.U.R.4th at 496-98. The Commission used the testimony from the hearing on the allegations to decide if there was intent to destroy competition. Id.. See also *Spectrum Sports v. McQuillan*, 506 U.S. 447, 455 (1993). The Court applied a test to determine if conduct destroys competition under the Sherman Anti-Trust Act, 15 U.S.C.A. §2 (1997):

- (1) The defendant has engaged in predatory or anticompetitive conduct with,
- (2) A specific intent to monopolize, and
- (3) A dangerous probability of achieving monopoly power.

Id. The Court stated that unfair or predatory conduct would be sufficient to prove the necessary intent. The policy behind the test is that the Court should be cautious not to "chill" competition rather than foster it. See also *State ex rel. Monnett v. Buckeye Pipe-Line Co.*, 56 N.E. 464 (Ohio 1900) (holding that that the legislature may prohibit contracts that hurt the public in general, but Defendant's contract destroyed competition in the oil industry).

71 *Youngstown Thermal, Ltd. Partnership*, 163 P.U.R.4th at 500.

72 See *Youngstown Thermal, Ltd. Partnership v. Ohio Edison Co.*, 165 P.U.R.4th 135, 135 (1995).

73 Ohio Edison v. Pub. Util. Comm'n of Ohio, 678 N.E.2d 922 (Ohio 1997). See also OHIO REV. CODE ANN. §4903.12 (Banks-Baldwin 1997) ("No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission....").

74 Ohio Edison, 678 N.E.2d at 925.

75 See OHIO REV. CODE ANN. §4903.13 (Banks-Baldwin 1997) ("A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."). See Cleveland Elec. Illuminating. Co. v. Pub. Util. Comm'n., 666 N.E.2d 1372, 1374 (Ohio 1996), aff'd on reh'g, 669 N.E.2d 479 (Ohio 1996). The Court states the rules for a Supreme Court review of the Commission. *Id.* The dissent in Ohio Edison uses this case to say that the Court should give great weight to the Commission. Ohio Edison, 678 N.E.2d at 929-30 (Moyer, C.J., dissenting). See also Irwin S. Rosenbaum & D.E. Lilienthal, Court Review of Orders of the Ohio Public Utilities Commission, 2 U. CIN. L. REV. 225, 225-27 (1928). The authors discuss three ways for the Supreme Court to review cases. First is a liberal approach where court's reverse only if there is abuse of discretion. *Id.* Second is a de novo review. *Id.* Third is a conservative approach of review of both facts and law. *Id.*

76 See Canton Storage & Transfer Co. v. Pub. Util. Comm'n., 647 N.E.2d 136 (Ohio 1995). The Court stated that it would not reweigh evidence or substitute its judgment for that of the Commission on factual questions where there is sufficient evidence in the record to show that the Commission's order is not against the manifest weight of evidence. *Id.* at 140. Also, the order is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Id.* See MCI Telecomm. Corp. v. Pub. Util. Comm'n., 527 N.E.2d 777, 780 (Ohio 1988) (stating that the Court does have complete and independent review of law).

77 Ohio Edison v. Pub. Util. Comm'n of Ohio, 678 N.E.2d at 925.

78 *Id.* The Court states that Ohio Revised Code is the standard for review. *Id.* It is "unlawful or unreasonable" and will not review a question of fact where the record contains sufficient evidence to support the Commission. *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 See *infra* Part IV and accompanying text.

83 Ohio Edison, 678 N.E.2d at 922. Also, such contracts are valid and enforceable at law. *Id.* at 926.

84 Id. at 927. See *Time Warner AxS v. Pub. Util. Comm'n.*, 661 N.E.2d 1097, 1104 (Ohio 1996) ("Where the language [of a statute] \*\*\*clearly expresses the legislative intent, the courts need look no further."). Justice Douglas wrote a separate concurrence. *Ohio Edison*, 678 N.E.2d at 928 (Douglas, J., concurring). He found the Free Service Statute to be straightforward and unambiguous, emphasizing the phrase "any of its property for any public purpose," to be unrestrictive. Id. He noted that each party in the case fits the elements of the Free Service Statute. Id. Therefore, the plain language should have promptly ended any further inquiry in the case by the Commission. Id. He stated: "It is clear (1) that appellant is a public utility, (2) that the operation of the Mahoning County Jail is a public purpose, (3) that the product generated by appellant is property, and (4) that appellant granted, in writing, its property for a public purpose." Id.

85 *Ohio Edison*, 678 N.E.2d at 927. The rule of statutory construction states that a specific statute is an exception to a general statute. OHIO REV. CODE ANN. § 1.51 (Banks-Baldwin 1997) (infra note 102).

86 *Ohio Edison*, 678 N.E.2d at 928 (Moyer, C.J., dissenting).

87 Id.

88 Id.

89 See supra note 76 and accompanying text.

90 See supra note 4 and accompanying text.

91 *Ohio Edison*, 678 N.E.2d at 928 (Moyer, C.J., dissenting).

92 Id. Justice Moyer stated that the Prohibition Statute prohibited a public utility from granting below cost utility services for the purpose of destroying competition. Id. Yet, he believed the majority's interpretation of the Free Service Statute allowed a utility to destroy competition in spite of a statute prohibiting the same. Id.

93 Id. at 929.

94 Id.

95 Id. By deciding that OHIO REV. CODE ANN. §4905.33 (Banks-Baldwin 1997) is controlling, Justice Moyer concluded that competition is the overriding policy goal of the Revised Code and of the Commission. Id. The analysis of this Note does not support this contention. See infra Part IV.

96 *Ohio Edison*, 678 N.E.2d at 930 (Moyer, C.J., dissenting).

97 Id. Without Commission review, if the municipality makes an error in its negotiations with a utility, the city is at the mercy of that utility. Id.

98 *Id.* at 927.

99 See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 395-406 (1950). In this article, the author concludes that statutory construction is a tool for a judge to get the result he wants. *Id.* The author details 56 equal and opposite construction methods used by courts. *Id.* The canon used by the dissent in this case was, "Expressions of one thing exclude another." *Ohio Edison*, 678 N.E.2d at 929 (Moyer, C.J., dissenting). The majority used the exact opposite canon, "The language may fairly comprehend many different cases where some only are expressly mentioned by way of example." *Id.* at 927. Llewellyn would conclude that the majority used this canon as a reason why their policy should be upheld by the case. See Llewellyn, *supra*, at 395-406.

100 See *supra* Part II. A. By using this method, it construed the statute as not discriminatory according to the common law.

101 OHIO REV. CODE ANN. §1.49 (Banks-Baldwin 1997) The statute states:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- a) The object sought to be attained;
- b) The circumstances under which the statute was enacted;
- c) The legislative history;
- d) The common law or former statutory provisions, including laws upon the same or similar subjects;
- e) The consequences of a particular construction;
- f) The administrative construction of statutes.

*Id.*

102 OHIO REV. CODE ANN. §1.51 (Banks-Baldwin 1997) The Statute Reads:

Special or Local Provision Prevails Over General; Exception.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

*Id.* See also *City of Springdale v. CSX Railway Corp.*, 627 N.E.2d 534, 538 (Ohio 1994); *Thrumbull County Bd. of Health v. Snyder*, 658 N.E.2d

783, 785 (Ohio 1996) (supporting the construction of specific controls over general statutes).

103 See *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Township Trustees*, 596 N.E.2d 423, 425-26 (Ohio 1992) (defining a public utility as question of law based on the nature and examination of the business; Ohio Edison is undoubtedly a public utility).

104 See Ohio Rev. Code Ann. § 4905.34 (Banks-Baldwin 1997).

105 See *Bazell v. City of Cincinnati*, 233 N.E.2d 864, 868 (Ohio 1969). Public purpose is defined by the legislative body of a municipality subject to review of the courts. *Id.*

106 See *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 271 (6th Cir. 1990) (defining a political subdivision as something that is given power by statutory authority). See also *Wissel v. Ohio High School Athletic Assoc.*, 605 N.E.2d 458, 462 (Ohio Ct. App. 1992) (using same test).

107 See Ohio Rev. Code Ann. § 1405.34 (Banks-Baldwin 1997).

108 See *supra* note 7 and accompanying text.

109 The majority and concurrence both use the plain language definition for each category. *Ohio Edison v. Pub. Util. Comm'n of Ohio*, 678 N.E.2d 922, 926-28 (Ohio 1997).

110 See OHIO REV. CODE ANN. Title 49 Public Utilities (Banks-Baldwin 1997).

111 See OHIO REV. CODE ANN. §4905.35(A) (Banks-Baldwin 1997) ("No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.") (emphasis added).

112 Compare OHIO REV. CODE ANN. §4905.33, §4905.34 and §4905.35. (Banks-Baldwin 1997).

113 No legislative history is available for these statutes.

114 See *Llewellyn*, *supra* note 99. The author states that the courts interpret a statute to give effect to its own policy determination. *Id.* at 395.

115 *Ohio Edison v. Pub. Util. Comm'n of Ohio*, 678 N.E.2d 922, 927 (Ohio 1997).

116 *Id.*

117 *Id.* In contrast, Justice Moyer's dissent characterized these circumstances as excluding all others except those specifically stated.

Id. at 929-30 (Moyer, C.J., dissenting). Such a construction gives support for his policy against anti-competitive behavior. Id. Justice Moyer supports his policy with precedent that prohibits utilities from engaging in price discrimination between similar customers. Id. The interpretive maxim is *expressio unius est exclusio alterius*. Id. See also *State ex rel Celebrezze v. Nat'l. Lime & Stone Co.*, 627 N.E.2d 538, 542 (Ohio 1994); *Vincent v. Zanesville Civ. Serv. Comm'n.*, 560 N.E.2d 226, 229 (Ohio 1990). The Chief Justice argues this same spirit and public policy would not allow a utility to destroy competition. *Ohio Edison*, 678 N.E.2d at 930 (Moyer, C.J., dissenting). On the other hand, the spirit and policy of the common law would override the need to develop competition because the public utility costs are of a greater benefit than increased competition. Id. See *supra* Part II. A. See also Llewellyn, *supra* note 99. The author gives the exact opposite and equally correct construction than that of Justice Moyer. Id. at 395.

118 KY. REV. STAT. ANN. §278.170(2) (Banks-Baldwin 1997) ("Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions."); KY. REV. STAT. ANN. §278.170(3) (Banks-Baldwin 1997) ("A utility may grant free service or reduced rate service for the purpose of fighting fires, to any city, county, urban-county.").

119 15 U.S.C.A. §13c (West 1997) ("Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.").

120 See *Gen. Shale Prod. Corp. v. Struck Constr. Co.*, 132 F.2d 425 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943). In this case, a subcontractor underbid below cost product to a general contractor building low income housing for the government. Id.

121 See *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980).

122 See Ferdinand S. Tinio, *Charitable Contributions by Public Utility as Part of Operating Expenses*, 59 A.L.R.3d 94 (1975).

123 See *id.*

124 See Bazil Facchina ET AL., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F.L. REV. 85, 105-06 (1993) (setting out numerous examples of benefits to non-profit organizations).

125 See Lori A. Burkhart, *Electric Industry Splits Over National Choice Bill*, 134 NO. 16 PUB. UTIL. FORT. 37, 37-38 (1996) (arguing that if consumers were given choices among utility suppliers, rates would decrease by 43%). See Griggs, *supra* note 22, at 427-28 (proposing that deregulation will decrease rates and promote efficiency).

126 William G. Shepard, *Dim Prospects: Effective Competition in Telecommunications, Railroads, and Electricity*, 42 ANTITRUST BULL. 151,

169 (1997). The author discusses how innovation and advances in technology would be a way for small startups to compete. Id.

127 See 64 AM. JUR. 2D Public Works §37 (1972). The policy requires competitive bidding because the public is interested in the outcome. In the present case the public is interested in a lower rate for the jail. Id.

128 See Norton & Spivak, *supra* note 25, at 180-83.

129 Linda Jones, *Electric Industry Restructuring - Consumers will soon Choose Electric Supplier*, 40 *ADVOC.* 30, 33 (June 1997). The author argues that consumers will be alarmed if they find out what makes up their utility bill. Id.

130 Id. Jones also contemplates the fate of social programs funded by tax revenues from public utilities. Id.

131 See Lee A. Rau, *Open Access in the Power Industry: Competition, Cooperation, and Policy Dilemmas*, 64 *ANTITRUST L. J.* 279, 279-83 (1996). The author argues that if competition takes over, costs of new construction will need to be recovered in higher rates. Id. Also, any savings may only benefit a certain group and may not benefit ultimate consumers. Id.

132 James I. Serota, *Increasing Competition in the Electric Utility Industry and Decreasing Consumer Welfare: An Antitrust Paradox*, 64 *ANTITRUST L. J.* 303, 304 (1996). The first paradox the author states is when there is a number of competitors, the utility still has a duty to provide. Id. In order to accomplish this, they would purchase excess capacity and store it for emergencies. These purchasing costs would have to be borne by the rate payers. Id. Thus, competition would increase rates. Id.

133 See *id.* at 303-10.

134 Id. The second paradox the author describes occurs when a customer chooses one supplier, the second supplier must still have excess capacity in case of emergencies. Id. A utility under regulation is forbidden to refuse to service a customer. Id. Under competitive circumstances, customers may not have reliable sources of backup which would risk service quality. Id.

135 See *id.*

136 See *supra* Part III. A.

137 See Serota, *supra* note 132, at 303-10.

138 See *supra* note 127. Where tax dollars are concerned, there is policy to achieve the lowest contract through competitive bidding. Id.

139 See *supra* note 97 and accompanying text. Without some mechanism for reviewing a contract between municipalities and utilities, there is no

recourse if there is a problem. *Id.* Also, terms may not always be favorable to a municipality. *Id.*

140 See *supra* Part III. A. If the contract was under Commission review, provisions beneficial to a municipality may not be acceptable.

141 See *supra* Part III. A.

142 See Shepard, *supra* note 126, at 154. The author details what environment is necessary for competition in the utility industry to survive. *Id.*

143 *Id.*

144 See George A. Hay, *Oligopoly, Shared Monopoly, And Antitrust Law*, 67 CORNELL L. REV. 439, 443-44 (1982). An oligopoly is where a few companies have a majority of business in a given market. *Id.* They hold enough market power to charge a higher price than if there were more competition but would lose market share if their price was raised. *Id.* Thus, a firm is a price taker such that it has high profits but is not a market maker such that it may not charge a higher price. *Id.* See also Richard A. Posner, *Oligopoly And The Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1566 (1969) (a theory of oligopoly behavior is that no participant will reduce prices because it will cause all other participants to match the change negating the advantage).

145 See Douglas Gagax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 YALE J. ON REG. 63, 80-87 (1993).

146 *Id.*

147 *Id.* The authors state that deregulation does not necessarily mean competition. *Id.* As an example, they use the airline industry that has fewer airlines in operation than it did in 1978 before deregulation. *Id.*

148 See Shepard, *supra* note 126, at 155.

149 *Id.*

150 See Hay, *supra* note 144 and accompanying text.

151 See Shepard, *supra* note 126, at 155.

152 See *supra* Part III. A.

153 See Shepard, *supra* note 126, at 158. As part of the needs of competition, for a competitor to even enter the industry, a large capital downpayment is needed to build facilities. *Id.* See also *infra* note 155. Shepard states that entry requires a substantial sunk cost. Shepard, *supra* note 126, at 158. A sunk cost is defined as capital

outlays needed to make a business operate that may not be recovered if the business is sold. Id.

154 See *id.* The risk of being unable to dispose of facilities in case of financial failure is high. Id.

155 See Sam Randazzo (Mailbag), *Why We Sign Those Secret Deals*, 135 NO. 8 PUB UTIL. FORT. 12 (1997). The author writes that Ohio is a state that is critical of secret deals between utilities and customers for long-term contracts. Id. However, political pressure by the utility industry has hampered the effort. Id. He indicates that the environment will not change unless customers are given the tools to change it. Id.

156 See Shepard, *supra* note 126, at 153. The author notes that dominant firms constantly think ahead so as to create barriers to competition. Id. One of the barriers is to lock in major customers with long-term contracts. Id.

157 See Serota, *supra* note 132, at 303-10. The author also states that utilities will think ahead. Id. He believes that utilities faced with competition will combine and pool their resources into regional or national giants. He believes that as competition increases, the industry will get away from regional or state markets and move towards national or global markets. Id.

158 See *id.*

159 See James A. Orr & Barrett K. Hawks, *Case Studies in Electric Utility Competition Litigation*, 8 NAT'L RESOURCES & ENV'T 29, 58 (1994). The authors detail various cases where a utility used various cash or service incentives to reduce costs to certain customers while keeping overall rates high. Id.

160 See Douglas G. Green & J. A. Bouknight Jr., *Electric Utility Antitrust Issues in an Era of Bulk Power Market Competition*, 8 NAT'L RESOURCES & ENV'T 20, 53 (1994). The authors note the utilities will block competition with contracts. Id. Such tactics would probably comply with anti-competition laws because they are in response to competition. Id. They predict the use of Antitrust laws to break utility monopolies. Id.

161 See Hjelmfelt, *supra* note 18, at 12. The author suggests various policy and regulation changes that would promote competition. Id. They include new territorial laws, forcing utilities to open transmission stations to competition, and to get legislators, regulators, and courts to recognize that regulation is not a substitute for competition. Id.

162 See Shepard, *supra* note 126, at 169. The author states that a major barrier to competition is secret long-term contracts. He recommends ways to stop such discounts including:

(1) Voiding all existing long-term contracts.

(2) Prohibiting future long-term contracts.

(3) Limiting contracts to one year.

(4) Requiring full disclosures of discounts to large customers.

Id.

163 Philip R. O'Connor ET AL., *The Transition to Competition in the Electric Utility Industry*, 8 ENERGY L. & POL'Y 223, 229 (1988). The authors indicate that improvements in transmission technology will enable utilities to move energy across great distances thereby expanding the marketplace. Id. Other improvements include the ability to allow large customers to generate their own electricity. Id. The result is that new technology will make competition financially feasible. Id.

164 See Hjelmfelt, *supra* note 18, at 15.

165 O'Connor, *supra* note 163, at 230. Another barrier the authors discuss is the ideology of the industry. Id. They suggest that in order for competition to survive, the government, consumers and the industry must realize that regulation accomplishes little for the public interest. Id.

166 See Hjelmfelt, *supra* note 18, at 15. The author states that state bounties make competition difficult. Id.

167 See William J. Collins, *Electric Utility Rate Regulation: Curing Economic Shortcomings Through Competition*, 19 TULSA L. J. 141, 164-84 (1983). The author recommends changing regulations to promote competition. Id. He suggests competition will solve problems of the utility industry. Id.