

C. Errors in the Examiner's Analysis

The Commission staff takes exception to four major points in the Examiner's antitrust analysis.

1. Examiner's Assumption that Anticompetitive Purpose Is a Necessary Element of a Bottleneck Boycott

The Examiner assumes that there cannot be an antitrust violation without a showing of anticompetitive purpose on the part of applicants and other members of the Council (Initial Decision, p. 17):

If it could be shown [the Examiner says] that the purpose of ECCNE's exclusion of the Massachusetts Municipals from membership was to prevent them, as pointed out by Staff, from acquiring a valuable business service which would enable them to compete effectively for the procurement of bulk power, among other things, it is possible that such exclusion could constitute a violation of the anti-trust laws, Silver v. N.Y. Stock Exchange, 373 U.S. 341, 347 (1963), but such has not been shown to be the case.

The law unmistakably is that if an exclusionary arrangement has an anticompetitive effect there is an antitrust violation, regardless of the purpose of the exclusion. (And conversely, for combinations which are illegal per se, there is a violation if there is an anticompetitive purpose, regardless of effect.) The Silver case itself, cited by the Examiner in the above