REPORT OF THE COMPETITION & ANTITRUST COMMITTEE

This report summarizes antitrust and competition developments of particular interest to energy law practitioners that occurred in the year 2010.*

I. COURT CASES

A. *American Needle, Inc. v. National Football League*

Section 1 of the Sherman Act declares unlawful, "every contract, combination . . . or conspiracy made in restraint of trade."[1] Antecedent to whether there is a "contract, combination or conspiracy" is the question of whether there is concerted, rather than unilateral, conduct. Prior to 2010, the last time the United States Supreme Court addressed this question directly was in *Copperweld Corp. v. Independence Tube Corp.*,[2] where it held that a parent corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of [section] 1 of the Sherman Act."[3] In *American Needle, Inc. v. National Football League*,[4] the Court addressed the concerted action requirement in the context of a joint venture that did not involve a parent-subsidiary relationship. Specifically, the thirty-two teams of the National Football League (NFL) formed a corporate entity, National Football League

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1. Sherman Antitrust Act, 15 U.S.C. § 1 (2006).
2. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).
3. *Id.* at 777.
4. Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2215 (2010).

Properties (NFLP), to manage their intellectual property, such as trademarked logos, and claimed that those licensing activities constituted the actions of a single entity, viz., unilateral conduct, thus escaping section 1 scrutiny.[5] A unanimous Supreme Court held that the NFL teams' intellectual property licensing activities constituted concerted action that is not categorically beyond the reach of section 1 of the Sherman Act because those activities join together separate, self-interested decisionmakers.[6]

1. Factual Background

The NFL is an unincorporated association that currently includes thirty-two separately owned teams, each of which has its own colors and logo, and owns related intellectual property.[7] In 1963, the teams formed NFLP to develop, license, and market their intellectual property. Most of the revenues generated from selling caps, jerseys, and other team-branded items have been shared equally among the teams or given to charity.[8] The teams can, and at times have sought to, withdraw from the arrangement.[9]

Starting in 1963, NFLP granted nonexclusive licenses to a number of vendors that would manufacture and sell apparel with team colors and logos.[10] American Needle was one such licensee.[11] In December 2000, however, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted a ten-year exclusive license to Reebok International Ltd. (Reebok) for the manufacture and sale of trademarked headwear for all thirty-two teams.[12] As a result of this decision, NFLP declined to renew the former nonexclusive license to American Needle.[13]

2. The Underlying Decisions

American Needle filed a complaint alleging that the exclusive agreement between and among the NFL, its teams, NFLP, and Reebok violated section 1 of the Sherman Act.[14] Respondents argued that they were incapable of conspiring to restrain trade within the meaning of section 1 because they were a single economic enterprise with respect to the conduct challenged. The district court granted summary judgment, concluding that, in the particular facts of their operations involving the exploitation of intellectual property, respondents had "so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose."[15]

5. *Id.* at 2206-07.
6. *Id.* at 2215.
7. *Id.* at 2207.
8. *Id.*
9. *Id.* at 2207.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. American Needle also alleged violations of section 2 of the Sherman Act (15 U.S.C. § 2 (2006)), but those allegations were not part of the case before the Supreme Court. *Id.*
15. *Id.* (quoting Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007)).

The United States Court of Appeals for the Seventh Circuit affirmed.[16] Ascribing importance to factual context, the court of appeals limited its inquiry to the particular conduct at issue – i.e., licensing of the teams' intellectual property – and examined whether that conduct "deprives the marketplace of the independent sources of economic control that competition assumes."[17] Noting that the game of football can only be carried out jointly – at least in the sense that it takes two teams to play a football game – the court found that the teams "can function only as one source of economic power when collectively producing NFL football."[18] In recognition of the teams' long-standing collective licensing of their intellectual property, the court of appeals held that section 1 did not apply.[19]

3. Concerted Action Found

On certiorari to the Seventh Circuit, the Supreme Court unanimously reversed, holding that "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of [section] 1."[20] Writing for the Court, Justice Stevens concluded that the teams' control of NFLP, as manager of their separately owned intellectual property, meant that decisions made by NFLP reflected concerted action.[21]

Comparing sections 1 and 2 of the Sherman Act, the Court first emphasized the statutory distinctions between concerted and independent action. Section 1 applies only to the former and condemns it more harshly because it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands."[22] By contrast, section 2 is violated only if an action monopolizes or threatens to monopolize, which avoids both "chilling vigorous competition through ordinary business operations," and "judicial scrutiny of routine, internal business decisions."[23]

The Court explained that the relevant question concerns not merely whether the parties involved are legally distinct entities: "[W]e have repeatedly found instances in which members of a legally single entity violated [section] 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."[24] Rather, citing *Copperweld* for the guiding principle that "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under [section] 1,"[25] the Court declared the relevant inquiry as "whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and

16. *Id.* (citing *Am. Needle, Inc.*, 538 F.3d at 741).
17. *Id*. at 2207-08 (quoting *Am. Needle, Inc*., 538 F.3d at 742).
18. *Id*. at 2208 (quoting *Am. Needle, Inc.*, 538 F.3d at 743).
19. *Id.* (citing *Am. Needle, Inc*., 538 F.3d at 744).
20. *Id.* at 2206-07.
21. *Id.* at 2215.
22. *Id.* at 2209 (quoting *Copperweld Corp.*, 467 U.S. at 768-69).
23. *Id.*
24. *Id.*
25. *Id.* at 2211.

thus of actual or potential competition."[26] If so, "the entities are capable of conspiring under [section] 1."[27]

The Supreme Court rejected the court of appeals' reliance on the necessity of cooperation among teams to produce football, deeming the justification for cooperation irrelevant to whether such conduct is concerted or independent action.[28] Instead, the Court focused on whether the NFL teams had possession of "the unitary decisionmaking quality or the single aggregation of economic power" that would characterize independent action.[29] Finding that the NFL teams did not have those characteristics, the Court explained that each team is "a substantial, independently owned and independently managed business" and, fundamentally, that the teams compete with each other, not only on the playing field, but also to attract fans, for gate receipts, and for contracts with managers and players.[30]

Of direct relevance to the case is that the teams compete for intellectual property – at least when viewed from the perspective of a firm making hats: the New Orleans Saints and the Indianapolis Colts, for example, are "potentially competing suppliers of valuable trademarks."[31] Applying *Copperweld* in particular, the Court found the teams to be independent centers of decisionmaking of which the marketplace is deprived when the teams decide to enter into a collective and exclusive licensing agreement.[32]

The Court stated that it "generally treat[s] agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits."[33] The Court went on to observe, however, that, when parties to an agreement within a single firm act on interests that are separate from those of the firm itself, the intrafirm agreement may "simply be a formalistic shell for ongoing concerted action."[34] While the business interests of the teams might often coincide with those of NFLP, the Court rejected such coincidence as dispositive, observing that "commonality of interest exists in every cartel."[35] The Court found that the thirty-two NFL teams are separately controlled potential competitors with economic interests distinct from those of NFLP, and NFLP is an instrumentality of the teams for purpose of making licensing decisions.[36]

The profit-sharing aspect of the NFLP arrangement, used by respondents in their defense, was likened to a cartel using a joint venture as a shelter from section 1 exposure. If it were otherwise, said the Court, then any cartel "could

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26. *Id.* at 2212 (internal citations omitted).

27. *Id.*

28. *Id.* at 2214. The Court described the necessity of cooperation as a factor relevant to whether the agreement is subject to the Rule of Reason. *Id.* at 2214.

29. *Id.* at 2212-13.

30. *Id.*

31. *Id.* at 2213.

32. *Id*.

33. *Id.* at 2215.

34. *Id.* (citing United States v. Topco Associates, Inc., 405 U.S. 596, 609 (1972); United States v. Sealy, Inc., 388 U.S. 350, 352-54 (1967)).

35. *Id.* (quoting L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984)).

36. *Id.*

evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products."[37] The Court said that competitors cannot circumvent "antitrust liability by acting through a third-party intermediary or joint venture."[38]

The Court concluded by noting that antitrust law did not "trap" football teams that need to cooperate to produce their product.[39] Although such cooperation may still be concerted action subject to section 1 analysis, it would not necessarily be condemned as per se illegal.[40] Rather, the conduct would be judged under the Rule of Reason and, depending on the restraints involved, that analysis need not be detailed.[41] The Court thus remanded the case for further proceedings applying the Rule of Reason.[42]

B. *United States v. KeySpan Corporation*

In February 2010, the United States Department of Justice (DOJ) Antitrust Division filed a complaint in the Southern District of New York alleging that a financial swap agreement entered into by KeySpan Corporation restrained competition for installed electricity capacity in New York City.[43] Pursuant to the terms of the stipulation and proposed final judgment filed along with the complaint, KeySpan agreed to disgorge $12 million in profits to settle the case.[44]

In New York, electricity retailers must purchase installed electricity capacity from generators in amounts sufficient to meet expected peak demand. The prices for the capacity are set through auctions in which KeySpan participated as a seller using its approximately 2,400 megawatts of generating capacity located in New York City. As alleged in the complaint, KeySpan acquired the right, through a swap involving an intermediary, to receive revenues from a competing generator (Astoria) when electric generating capacity prices rose above a certain level.[45] According to the DOJ:

"Instead of purchasing the Astoria assets, KeySpan decided to acquire a financial interest in [Astoria's capacity]. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions."[46] The competitive effect of doing so would be similar to that of actually purchasing Astoria's capacity. In addition, the DOJ stated:

> KeySpan did not approach Astoria directly and instead sought a counterparty to enter into a financial agreement providing KeySpan with payments derived from the market clearing price for an amount of capacity essentially equivalent to what

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37. *Id.* (quoting Major League Baseball Prop., Inc. v. Salvino, Inc., 54 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

38. *Id*. (internal quotation marks omitted).

39. *Id*. at 2216.

40. *Id.* at 2216.

41. *Id.* at 2216-17.

42. *Id.*

43. Complaint at ¶ 1, United States v. KeySpan Corp., No. 10-cf-1415 (WHP) (S.D.N.Y. Feb. 22, 2010), [hereinafter *Complaint*], *available at* http://www.justice.gov/atr/cases/f255500/255507.pdf.

44. Proposed Final Judgment at 1, United States v. KeySpan Corp., No. 10-cf-1415 (WHP) (S.D.N.Y. Feb. 22, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255509.pdf.

45. *Complaint*, *supra* note 43, at ¶ 5.

46. *Id.* ¶ 24.

> Astoria owned. KeySpan recognized the counterparty would need simultaneously to enter into an agreement with another capacity supplier that would offset the counterparty's payments to KeySpan, and KeySpan knew that Astoria was the only supplier with sufficient capacity to do so.[47]

In suing KeySpan for violating section 1 of the Sherman Act, the DOJ concluded that the revenue stream from the swap provided an incentive for KeySpan to economically withhold capacity from the capacity market, thus raising prices.[48] The revenues KeySpan lost when its withholding strategy priced its own capacity out of the market were offset by KeySpan's receipt, via the swap, of its competitor's share of the higher revenues caused by the withholding strategy:

> Without the swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity and, had it done so, the price of capacity would have declined. The swap, however, effectively eliminated KeySpan's incentive to compete for sales. By adding revenues from Astoria's capacity to KeySpan's own, the KeySpan Swap made bidding the cap [economic withholding] KeySpan's most profitable strategy regardless of its rivals' bids.
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> . . . .
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> By transferring a financial interest in Astoria's capacity to KeySpan, the Swap effectively eliminated KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done.[49]

Because, as alleged by the DOJ, KeySpan altered its bidding strategy in the auctions and instead entered into a financial derivative agreement, the DOJ believed that the agreement likely resulted in higher prices to retail electricity suppliers. In turn, those retail electricity suppliers, according to the DOJ, passed the prices onto consumers, which therefore paid higher prices than the consumers otherwise would have.[50] The DOJ stated "[b]ut for the [agreement], installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008."[51]

To settle the case, KeySpan agreed to disgorge $12 million in profits to the United States Treasury, a remedy that the DOJ had not previously obtained in an antitrust case.[52] In seeking disgorgement, the DOJ relied on the authority of the district court to order such equitable relief. It sought the remedy because injunctive relief in this case would not have been meaningful. The swap agreement had expired by its own terms and regulatory changes had since eliminated KeySpan's ability to affect the market price for installed electricity capacity. Further, the DOJ stated:

> Disgorgement here will also serve to restrain KeySpan and others from participating in similar anticompetitive conduct. Requiring KeySpan to disgorge a portion of its ill-gotten gains from its recent illegal behavior is the only effective

47. Competitive Impact Statement at 5, United States v. Keyspan Corp., No. 10-cv-1415 (WHP) (S.D.N.Y. Feb. 23, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255578.pdf [hereinafter *CIS*].

48. *Complaint*, *supra* note 43, at ¶ 31.

49. CIS, *supra* note 47, at 7.

50. *Id.* at 1-2.

51. *Complaint*, *supra* note 43, at ¶ 34.

52. *CIS*, *supra* note 47, at 8.

> way of achieving relief against KeySpan, while sending a strong message to those considering similar anticompetitive conduct.[53]

On February 2, 2011, the district court granted the DOJ's motion for entry of the final judgment.[54] The court specifically found that it had "the power to order disgorgement of Keyspan's revenues."[55] It found that "disgorgement comports with established principles of antitrust law,"[56] and that it "is particularly appropriate where, as here, the anticompetitive conduct in question has ceased."[57] It observed that the case "is an important marker for enforcement agencies and utility regulators alike," stating that "[a]pproving disgorgement as part of the Government's arsenal tilts incentives back in favor of competitive bidding and deters the use of derivatives as tools to manipulate a market."[58]

C. Thompson's Gas & Electric Services, Inc. v. BP America, Inc.

As part of a 2007 Deferred Prosecution Agreement between BP America, Inc. and BP Products North America, Inc. (collectively BP), and the DOJ, BP admitted that some of its traders manipulated the February 2004 TET propane market, which is the market for propane stored in and shipped via the Texas Eastern Products Pipeline Company, L.L.C (TEPPCO) pipeline system.[59] The scheme resulted in BP's cornering the TET propane market in February 2004.[60] Plaintiffs, purchasers of TET propane from producers, alleged that they were damaged by paying artificially inflated prices attributable to BP's scheme, and sought recovery under section 2 of the Sherman Act, among other relief.[61] In *Thompson's Gas & Electric Services, Inc. v. BP America, Inc.*, a district court ruled on BP's motion to dismiss plaintiffs' complaint for failure to state a claim.[62]

The first antitrust issue addressed by the court was whether TET propane for February 2004 sufficed as a relevant market. Plaintiffs maintained that the Seventh Circuit had previously "recognized claims for monopolization of month-long commodities markets" in *Peto v. Howell*.[63] BP maintained that a short-term price spike could not define a relevant market absent a "lasting structural change" indicating durable monopoly power.[64] The district court sided with the plaintiffs:

> Prices were driven up during the month of February and plummeted on March 1, partly because, as Plaintiffs concede, "additional supplies of propane were directed

53. *CIS*, *supra* note 47, at 10. With regard to the possibility that KeySpan be directed to provide restitution to New York City ratepayers, DOJ argued that such restitution would raise substantial questions under the filed rate doctrine. *Id.* at 9.

54. United States v. Keyspan Corp., No. 10-cv-1415 (WHP) (S.D.N.Y. Feb. 2, 2011), *available at* http://www.justice.gov/atr/cases/keyspan.htm.

55. *Id.* at 11.

56. *Id.* at 10.

57. *Id.* at 11.

58. *Id.* at 15.

59. Thompson's Gas & Elec. Serv., Inc. v. BP Am. Inc., 691 F. Supp. 2d 860, 862 (N.D. Ill. 2010).

60. *Id.*

61. *Id.* at 863.

62. *Thompson's Gas*, 691 F. Supp. 2d at 873.

63. *Id.* at 866 (citing Peto v. Howell, 101 F.2d 353 (7th Cir. 1938)).

64. *Id.* at 866-67.

> away from the non-TET caverns," increasing supply to the TET cavern. [Other courts have] noted: "Only when an alleged monopolist faces substantial competition from a known competitor who will enter the market in a definite period of time, ought courts to decline to find sufficient market power to satisfy the requirement for the monopolization offense." In this case, competitors did enter the market, but apparently not before the month was over. This supports Plaintiff's allegations that "[t]here was little ability for alternative sources of propane supply to enter the TEPPCO Pipeline Service Area in a timely manner[,]" that BP traders used this and the other alleged barriers to their advantage, and they were, in fact, able to affect market prices. Moreover, *Peto v. Howell*, is still good law in this circuit. . . . *Peto* supports the plausibility of Plaintiffs' monopoly claims. For these reasons, Defendants' motions to dismiss the monopoly claims against it are denied.[65]

The second antitrust issue concerned whether plaintiffs had alleged a dangerous probability that BP would attain monopoly.

> To prove attempted monopolization under section 2 of the Sherman Act, a plaintiff must show (1) specific intent to achieve monopoly power, (2) predatory or anticompetitive conduct directed to accomplishing this unlawful purpose, and most important for purposes of this case, [and] (3) a dangerous probability that the attempt to monopolize will be successful.[66]

The court rejected BP's claim that the structure of the TET propane market prevented a dangerous probability of monopolization, explaining that "[a]ssuming that the relevant market is the February 2004 TET propane market, Plaintiffs can withstand a motion to dismiss this claim. Although suppliers existed that could introduce more propane into the market, they could not do so within the relevant time frame."[67] The absence of timely entry supported the conclusion that the market structure "did not prevent the probability of a successful monopoly."[68]

D. Kay Electric Cooperative v. City of Newkirk

In *Kay Electric Cooperative v. City of Newkirk*,[69] plaintiffs, an Oklahoma rural electric cooperative and rural water district, alleged that defendants, City of Newkirk, Oklahoma, and the city's municipal electric authority, unlawfully refused to provide monopoly sewer services to a new county jail to be located outside the city, unless the jail received electric and water services from the city as well. The city also annexed a strip of land adjacent to the new jail.[70] Plaintiffs claimed that the defendants' actions violated sections 1 and 2 of the Sherman Act by tying the monopoly sewer services to the competitive electric and water services, and by attempting to monopolize the retail electric and water service markets. Plaintiffs also alleged that defendants conduct was unlawful under state law.[71]

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65. *Id.* at 867 (internal citations omitted).

66. *Id.* at 867-68 (quoting Indiana Grocery, Inc. v. Super Value Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989)).

67. *Id.* at 868.

68. *Id.*

69. Kay Elec. Coop. v. City of Newkirk, Okla., No. CIV-10-347-C, 2010 U.S. Dist. LEXIS 84131, at *2 (W.D. Okla. Aug. 16, 2010).

70. *Id.*

71. *Id.*

Defendants filed a motion to dismiss on grounds that the state action immunity doctrine shielded their conduct from federal antitrust liability.[72] The court explained:

> In order for this immunity to apply, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy and the policy must be actively supervised by the State itself. The first prong of this test is satisfied when anticompetitive conduct is a foreseeable result of legislative authorization. In cases of municipal action, the second prong of active supervision is satisfied if the municipality itself supervises the conduct.[73]

The district court concluded that the State of Oklahoma had a clearly articulated state policy to displace competition with regulation, pursuant to a state statute providing that municipalities could raise monies and establish utilities, as well as:

> [s]ell or lease to any consumer or corporation, within or without its boundaries, the commodities and services supplied by such municipally owned or controlled public utility . . . and to enter into such short- or long-term contracts, agreements, and stipulations and do all things necessary and proper to further the capability of the municipality . . . to provide said commodities and services as may be deemed appropriate by the governing body of the municipality.[74]

The court rejected plaintiffs' claim that Oklahoma's aborted retail restructuring law, envisioning that consumers have a choice of retail electric supplier, had supplanted regulation as the state policy.[75]

Regarding the plaintiffs' state law antitrust and annexation claims, the district court declined to exercise supplemental jurisdiction under 28 U.S.C. section 1367 (2006), because it had dismissed the federal antitrust claims over which the court had original jurisdiction and because the parties had spent little time and effort preparing their cases on the state law claims.[76]

E. *Reorganized FLI, Inc. v. The Williams Cos. (In re Western States Wholesale Natural Gas Antitrust Litigation)*

On November 3, 2010, the District of Nevada issued a decision, *Reorganized FLI, Inc. v. The Williams Cos. (In re Western States Wholesale Natural Gas Antitrust Litigation)*, addressing choice of law principles as applied to antitrust claims.[77] Plaintiff, Reorganized FLI, Inc. (FLI), was a fertilizer producer with business operations in Missouri and Kansas, and production facilities in Kansas, Oklahoma, Nebraska, Iowa, and Louisiana.[78] It asserted antitrust claims under Kansas law that a host of natural gas companies that buy, sell, transport, and store natural gas conspired to manipulate and artificially increase the price of natural gas.[79] FLI sought refunds of the amounts it paid to

72. *Id.* at *4.

73. *Id.* at **4-5 (internal citations and quotation marks omitted).

74. *Id.* at **5-6.

75. *Id.* at *7.

76. *Id.* at *9.

77. Reorganized FLI, Inc. v. Williams Cos. (*In re* W. States Wholesale Natural Gas Antitrust Litig.), 2010 U.S. Dist. LEXIS 127556 (D. Nev. Nov. 3, 2010).

78. *Id.* at **19-20.

79. *Id.* at **20-21. FLI's suit was one of several arising out of the 2000-01 Western energy crisis, which were centralized in the District of Nevada for coordinated or consolidated pre-trial proceedings. *Id.* at *19.

defendants at inflated prices, a form of relief available under the Kansas antitrust statute's so-called "full consideration remedy."[80]

Defendants filed a motion for judgment on the pleadings on grounds that, under choice of law principles, FLI's claim was governed by Missouri substantive law, which did not allow a full consideration remedy.[81] The court concluded that, as a federal court sitting in diversity, it must apply the choice of law rules of the forum, i.e., Kansas,[82] and that under those rules, Kansas substantive law should apply as well.[83] It thus denied defendants' motion.

The court concluded that, although Kansas had not squarely addressed the issue, a Kansas court would likely treat a price-fixing violation similar to a tort. In the case of *Merriman v. Crompton Corp.*,[84] the Kansas Supreme Court had concluded in evaluating Kansas's long-arm statute, "that an antitrust price-fixing injury 'occurs at the place of sale because the consumer is injured when he or she pays the artificially inflated price.'"[85] The District of Nevada concluded that a Kansas court would find similar reasoning persuasive in the choice of law context.[86] The court concluded that FLI had experienced its injury, such as paying higher prices and disruption in its ability to make business decisions in a full and free competitive market, in Kansas where it had both production facilities and made business decisions.[87] Even though FLI's principal place of business was Missouri, the court said that FLI had not made natural gas purchases or other business decisions there, making its substantive law inapplicable.[88] Accordingly, applying Kansas substantive law, which would permit a full consideration remedy, the court rejected defendants' motion for judgment on the pleadings.[89]

II. HORIZONTAL MERGER GUIDELINES REVISION

In August 2010, the DOJ and the Federal Trade Commission (FTC) issued revised Horizontal Merger Guidelines (HMG), the first substantial revision of the HMG since 1992.[90] The 2010 HMG were the product of a year-long process that began in September 2009 when the DOJ and FTC (the Agencies) announced a series of workshops to explore whether the 1992 HMG should be revised.[91]

80. *Id.* at *21.

81. *Id.*

82. *Id.* at *22. The case was in the District of Nevada solely for coordinated or consolidated pre-trial proceedings. *Id.* at *19.

83. *Id.* at **33-34.

84. Merriman v. Crompton Corp., 146 P.3d 162, 181 (Kan. 2006).

85. *Reorganized FLI*, 2010 U.S. Dist. LEXIS 127556, at *24 (quoting *Merriman*, 146 P.3d at 181).

86. *Id.* at *26.

87. *Id.* at *27

88. *Id.* at *33.

89. *Id.* at *34.

90. Press Release, U.S. DEP'T OF JUSTICE, Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/261642.htm; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf [hereinafter *2010 HMG*].

91. Christine A. Varney, Ass't Att'y Gen., Antitrust Div., Address at the Third Annual Georgetown Law Global Antitrust Enforcement Symposium: Merger Guidelines Workshops (Sept. 22, 2009), *available at*

Almost 100 panelists participated in workshops held in Washington, D.C., Chicago, New York, and California during December 2009 and January 2010.[92] The Agencies issued a proposed revision in April 2010 and solicited comments.[93] The proposal drew on the Agencies' collective experience since 1992 and the input they received during the workshops. More than thirty comments were submitted during the comment period, which ended in June 2010.[94] The Agencies issued the final version of the 2010 HMG, altered slightly from the April proposal on August 19, 2010.

The HMG historically have served as an outline of the main analytical techniques, practices and enforcement policies of the Agencies with respect to mergers and acquisitions under federal antitrust laws. Merger guidelines were first issued in 1968 by DOJ, which issued revisions in 1982 and 1984. In 1992, the DOJ and FTC jointly issued revised HMG.[95] As FTC Chairman Jon Leibowitz noted when the April 2010 proposed revision was issued, it had been eighteen years since the HMG were last revised: "During that time the agencies' approach has evolved significantly, and the Guidelines should reflect that. . . . The proposed Guidelines put out for comment today reflect the current state of merger analysis at the FTC and DOJ, and will help make the process more transparent to American businesses and courts."[96]

The 2010 HMG differ markedly from the 1992 HMG. The 2010 HMG "follow a more integrated and less mechanistic approach" than the prior version.[97] The 1992 HMG described a step-by-step approach to merger analysis that involved identifying relevant markets, computing market shares and concentration, assessing competitive effects (unilateral or coordinated), and assessing entry and efficiencies.[98] The 2010 HMG, on the other hand, describe an approach "that does not necessarily start with market definition or base predictions of competitive effects primarily on market concentration."[99] Notable differences between the 1992 and 2010 HMG include the following:

Market Definition. The role of market definition has been diminished in the 2010 HMG, under which "[t]he Agencies' analysis need not start with

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http://www.justice.gov/atr/public/speeches/250238.pdf; Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm.

92. Christine A. Varney, Ass't Att'y Gen., Antitrust Div., *An Update on the Review of the Horizontal Merger Guidelines*, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop (Jan. 26, 2010), *available at* http://www.justice.gov/atr/public/speeches/254577.pdf.

93. U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES FOR PUBLIC COMMENT (Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf.

94. Public Comments, *Horizontal Merger Guidelines*, FTC FILE NO. P092900, FED. TRADE COMM'N (2010), *available at* http://www.ftc.gov/os/comments/hmgrevisedguides/index.shtm.

95. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992, rev'd Apr. 8, 1997), *available at* http://www.ftc.gov/bc/docs/horizmer.shtm.

96. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Apr. 20, 2010), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm.

97. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707 (2010), *available at* http://faculty.haas.berkeley.edu/shapiro/hedgehog.pdf.

98. *Id.*

99. *Id.* at 708.

market definition."[100] Indeed, "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition."[101]

Evidence of Competitive Effects. The 2010 HMG include a new section on evidence of competitive effects. Among the types of evidence identified are actual effects observed in consummated mergers, natural experiments, concentration, substantial head-to-head competition, and the disruptive role that a merging party (i.e., a "maverick") may play in the market.[102]

HHI Levels, Market Shares, and Likely Competitive Effects. The 2010 HMG raise the Herfindahl-Hirschman Index (HHI) levels that indicate when a merger is likely to have adverse competitive effects.[103] This has the effect of increasing the size of the "safe harbor" for mergers that are not likely to produce adverse effects. Nonetheless, mergers that produce "moderately concentrated markets," i.e., HHIs between 1500 and 2500, and "involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny."[104] The 2010 HMG also eliminate the 1992 HMG's 35% share benchmark for unilateral effects.

Unilateral Effects. The 2010 HMG substantially expand the discussion of unilateral effects to cover the analysis of unilateral effects for firms distinguished primarily by differentiated products, for firms differentiated primarily by capacity, and for markets where prices are determined through individual negotiations with sellers or auctions.[105] The 2010 HMG also include a discussion of potential unilateral effects on innovation and product variety.[106]

Empirical Tools for Assessing Unilateral Effects. The 2010 HMG discuss three empirical tools for assessing unilateral effects in the case of differentiated products.[107] First, the higher the "diversion ratio" - the fraction of sales diverted to one merging firm if the other merging firm raised price - the greater the likelihood of unilateral effects.[108] Second, the higher the value of diverted sales, the greater the "upward pricing pressure" resulting from a merger.[109] Finally, the HMG note that when sufficient data is available, the Agencies will use "merger simulation" tools, which need not rely on market definition to assess competitive effects.[110]

Partial Acquisitions. The 2010 HMG include a new section concerning partial acquisitions, which notes that a partial acquisition can lessen competition in three ways even where the transaction does not confer effective control: by giving the acquiring firm "the ability to influence the competitive conduct of the targeted firm," by reducing the incentive of the acquiring firm to compete, or "by

100. *2010 HMG*, *supra* note 90, § 4.
101. *Id.*
102. *Id.* § 2.1.
103. *Id.* § 5.3.
104. *Id.*
105. *2010 HMG*, *supra* note 90, § 6.
106. *Id.* § 6.4.
107. *Id.* § 6.1.
108. *Id.*
109. *Id.*
110. *Id.* § 6.1.

giving the acquiring firm access to non-public, competitively sensitive information from the target firm."[111]

Powerful Buyers. The 2010 HMG add a new section on powerful buyers, which notes that powerful buyers may forestall a merger's adverse competitive effects by constraining the ability of the merging firms to raise prices. The HMG state that "[t]his can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry or if the conduct or presence of large buyers undermines coordinated effects."[112]

Merging Buyers. The 2010 HMG include a new section on the analysis of mergers of competing buyers, which may enhance monopsony power. The section notes that the Agencies "employ essentially the same framework . . . for evaluating whether a merger is likely to enhance market power on the selling side of the market."[113]

III. COMPETITION-RELATED FERC ORDERS

A. Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act

1. Background

As discussed in the Competition and Antitrust Committee's 2009 report, the Electric Power Supply Association (EPSA) filed a petition in September 2008, with the Federal Energy Regulation Commission (FERC) seeking guidance regarding control and affiliation issues under sections 203 and 205 of the Federal Power Act (FPA).[114] Among other things, EPSA requested that the FERC determine that an investor that owns less than 20% of a publicly held company's voting securities and that makes filings with the Securities and Exchange Commission (SEC) on SEC Schedule 13G will not be deemed to control or be an affiliate of the publicly held company for market-based rate or FPA section 203 purposes.[115]

In December 2008, the FERC held a workshop to discuss whether it should reconsider its policies on control and affiliation, and as proposed by EPSA, whether filing SEC Form 13G is sufficient evidence of a lack of control for the FERC to relieve public utilities from market-power related filing

111. *Id.* § 13.

112. *Id.* § 8.

113. *Id.* § 12.

114. Petition for Guidance Regarding "Control" and "Affiliation," *Electric Power Supply Assoc.*, Docket No. EL08-87-000 (FERC filed Sept. 2, 2008), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=11798311 [hereinafter *EPSA Petition*].

115. *Id*. at 11-12. The FERC subsequently determined that the petition raised issues that would be better addressed in a more formal process, and opened a new docket, PL09-3-000. Notice Redocketing Proceeding, *Electric Power Supply Association; Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, 73 Fed. Reg. 67,152 (2008).

requirements.[116] More than a year later in January 2010, the FERC issued a notice of proposed rulemaking proposing to amend part 33 of its regulations to grant certain blanket authorizations under sections 203(a)(1) and 203(a)(2) of the FPA.[117] Specifically, the FERC proposed that a company acquiring 10% or more, but less than 20%, of the outstanding voting securities of a public utility or holding company, would qualify for the blanket authorization if it files an Affirmation in Support of Exemption from Affiliation Requirements, as set forth in new FERC Form 519-C (Affirmation), and complies with quarterly reporting requirements thereafter.[118]

The FERC explained that the proposed Affirmation, while similar to SEC Form 13G, is tailored to satisfy certain requirements imposed under the FPA.[119] For instance, the proposed Affirmation requires filers to provide additional information that is particular to public utilities, and requires filers to commit not to: (1) "seek or accept representations on the public utility's board of directors . . . ;" (2) "request or receive non-public information, either directly or indirectly, concerning the business or affairs of the public utility" (non-disclosure commitment); (3) "solicit, or participate in any solicitation of, proxies involving the public utility;" and (4) "seek to influence the management or conduct of the day-to-day operations of the public utility" with a focus on sales, scheduling, and compensation of senior-level management.[120]

Under the Control and Affiliation Notice of Proposed Rulemaking (Control and Affiliation NOPR), the Affirmation, if filed within ten days of the acquisition, would create a rebuttable presumption, rather than operate as a conclusive finding, that the investor does not control the public utility.[121] Thus, the acquirer and public utility would be considered affiliates. The FERC explained, however, that public utilities that are the subject of an Affirmation would qualify for a waiver of certain market-based rate requirements that would otherwise apply.[122] Specifically, such public utilities would not be required to: (1) "include the energy assets of the affiliate for purposes of a market power analysis"; (2) file a change in status report; and (3) comply with the affiliate transaction restrictions under part 35 of the FERC's regulations.[123] To reflect these changes, the FERC also proposed to amend subpart H and subpart I of part 35 of the FERC's regulations to define an affiliate as "any person that controls, is controlled by, or is under common control with such specified company."[124]

116. Notice of Agenda for Workshop, *Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, 73 Fed. Reg. 69,632 (2008).

117. Notice of Proposed Rulemaking, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, 75 Fed. Reg. 4,498 (2010) (to be codified at 18 CFR pts. 33, 35) [hereinafter *Control and Affiliation NOPR*].

118. *Id*.

119. *Id*. at 4,501.

120. *Id*. at 4,503.

121. *Id*. at 4,500-01.

122. *Id.* at 4,501.

123. *Id*.

124. *Id*. at 4,498.

2. Commenters

In general, commenters disagreed about the necessity and sufficiency of the commitments included in the Affirmation. Several commenters argued that the commitments are overly broad and interfere with legitimate investment activities, and in particular, focused on the non-disclosure commitment. Financial Institutions Energy Group stated that while an acquirer may be able to certify that it will not request non-public information, it cannot certify that it will not receive non-public information.[125] Harbinger Capital Partners, L.L.C., and KGen Power Management, Inc., further argued that there are times that investors legitimately need non-public information, such as to effectively monitor the value of its investment.[126]

On the other side, commenters generally argued that the commitments are too limited to sufficiently protect against potential market power exercise. The FTC stated that there is an existing body of research, case law, and agency investigations that demonstrates that "partial acquisitions can change the competitive *incentives* of the acquiring and acquired firms," even in the absence of control.[127] To counterbalance these changed incentives, the FTC urged the FERC to adopt two additional certifications: "(1) that the acquirer does not compete in the same product and geographic markets as the issuer and (2) that the acquirer does not own or control inputs to the production of electric energy in the same product and geographic markets in which the issuer participates."[128] The FTC maintained that these certifications, coupled with the certifications proposed in the Control and Affiliation NOPR, provide necessary protections without chilling investments.[129]

The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) urged the FERC to withdraw the Control and Affiliation NOPR because "[n]o conduct rule can remedy" the changed incentives that follow from "the inherent alignment of interests between rival companies in partial-ownership structures of the size contemplated [in the Control and Affiliation NOPR]."[130] If the FERC decides to move forward,

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125. Comments of the Financial Institutions Energy Group at 7, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Docket No. RM09-16-000 (FERC filed Mar. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12305014.

126. Comments of Harbinger Capital Partners LLC at 9, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Docket No. RM09-16-000 (FERC filed Mar. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12304884; Comments of KGen Power Management, Inc. at 5-6, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Docket No. RM09-16-000 (FERC filed Mar. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12304938.

127. Comments of the Federal Trade Commission at 3, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Docket No. RM09-16-000 (FERC filed Mar. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12311238.

128. *Id*.

129. *Id.* at 24.

130. Comments of American Public Power Association and National Rural Electric Cooperative Association at 17, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205*

however, the APPA and the NRECA strongly recommended that it strengthen and broaden the commitments. In particular, they contended that the non-disclosure requirement should prohibit all disclosure of non-public information,[131] encompass the acquired entity's affiliates and subsidiaries,[132] and be a two-way prohibition.[133] As for other issues, the APPA and the NRECA said that the FERC should not revise its definition of affiliates and should instead keep a bright-line test.[134] They argued that relying on the concept of control to determine whether an affiliate relationship exists will introduce unnecessary confusion and uncertainty.[135]

As of January 1, 2011, the FERC had not acted on the Control and Affiliation NOPR.

B. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*

On June 17, 2010, the FERC issued a Notice of Proposed Rulemaking (NOPR) entitled "Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities"[136] proposing to amend the transmission planning and cost allocation requirements established in Order No. 890.[137] In this NOPR, the FERC noted that "Order No. 890 did not specifically address the potential for undue preference to incumbent utilities over nonincumbent transmission developers through practices applied within transmission planning processes."[138] It thus proposed a number of rules related to incumbent and nonincumbent rights and obligations in regional transmission planning.

This summary focuses on the NOPR proposals that address nonincumbent and incumbent rights and obligations in the transmission planning process, and in particular the incumbent right of first refusal to build transmission facilities in transmission plans. Other FERC proposals in the NOPR, including amendments to cost allocation requirements regarding regional and interregional transmission plans, and requiring consideration of public policy mandates in transmission planning, are not addressed in this summary.

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of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, Docket No. RM09-16-000 (FERC filed Mar. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12305026.

131. *Id.* at 18.

132. *Id.* at 18-19.

133. *Id.* at 19.

134. *Id.* at 29-32.

135. *Id.*

136. Notice of Proposed Rulemaking, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 75 Fed. Reg. 37,884 (2010) (to be codified at 18 C.F.R. pt. 35) [hereinafter *Transmission Planning and Cost Allocation NOPR*]. Comments on the NOPR were due on Nov. 10, 2010. *Id.*

137. Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, F.E.R.C. STATS. & REGS. ¶ 31,241, 72 Fed. Reg. 12,266 (2007) (to be codified at 18 C.F.R. pts 35, 37), *order on reh'g*, Order No. 890-A, F.E.R.C. STATS. & REGS. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 F.E.R.C. ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 F.E.R.C. ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 F.E.R.C. ¶ 61,126 (2009).

138. *Transmission Planning and Cost Allocation NOPR*, *supra* note 136, at P 71.

In the NOPR, the FERC noted that "extensive" comments were generated following an October 2009 Request for Comments about whether an incumbent's right of first refusal "unreasonably impedes merchant or independent transmission development and, if so, how this impediment could be addressed."[139] Some commenters characterized an incumbent's right of first refusal as a barrier to entry:

> (1) a right of first refusal provides a disincentive for a merchant or independent developer to propose a project, especially a proposal for a transmission facility that spans multiple utilities' service territories, because any investment that it makes in developing a proposal may be lost if an incumbent transmission owner can exercise its right of first refusal or otherwise delay the project or prevent construction of the project; (2) by discouraging competition and new entry, a right of first refusal likely increases costs to ratepayers; and (3) a merchant or independent transmission developer may have difficulty obtaining financing if investors perceive that its proposed project could be subject to a right of first refusal or is otherwise at a disadvantage compared to a project sponsored by an incumbent transmission owner.[140]

Meanwhile, commenters supporting the right of first refusal argued that an incumbent:

> (1) Has a legally enforceable obligation to maintain reliability on its systems and faces penalties for noncompliance; (2) is obligated under State law to provide reliable service at the lowest reasonable cost; (3) may be required to build facilities included in an RTO's or ISO's regional plan, an obligation that merchant and independent transmission developers lack; (4) is best situated to develop transmission facilities within its service territory, as it is most familiar with the design and operation of its system, its customers' needs, and State and local permitting and siting processes; and (5) may be able to provide transmission services at a lower cost than a merchant or independent transmission developer because it enjoys economies of scale with respect to the staff and resources necessary to maintain and operate new transmission facilities.[141]

Finally, some commenters proposed limits to the incumbent right of first refusal, for example, limiting the duration of the right, or requiring that the incumbent match the proposer's bid.[142]

The FERC concluded that "there appear to be opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within existing regional transmission planning processes."[143] It thus proposed a framework for incumbent and nonincumbent rights and obligations in regional transmission planning:

> Neither incumbent nor nonincumbent transmission facility developers should, as a result of a Commission-approved OATT [open access transmission tariff] or agreement, receive different treatment in a regional transmission planning process. [B]oth should share similar benefits and obligations commensurate with that participation, including the right, consistent with State or local laws or regulations, to construct and own a facility that it sponsors in a regional transmission planning

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139. *Id.* at P 77. On October 8, 2009, the FERC issued a Notice of Request for Comments, *Transmission Planning Processes Under Order No. 890*, Docket No. AD09-8-000 (FERC filed Oct. 8, 2009), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12169163.

140. 75 Fed. Reg. at 37,895.

141. *Id.*

142. *Id.*

143. *Id.* at 37,896.

> process and that is selected for inclusion in the regional transmission plan. [T]he tariff changes to implement these proposed reforms would be developed through an open and transparent process involving the public utility transmission provider, its customers, and other stakeholders.[144]

The FERC proposed "to require removal from a transmission provider's OATT or agreements subject to the Commission's jurisdiction provisions that establish a Federal right of first refusal for an incumbent transmission provider."[145] "If a Commission-approved tariff or agreement contains a reference to a right provided under state or local laws or regulations . . . [it would not be negated by this proposal.]."[146]

The FERC preliminarily found that an incumbent utility's right of first refusal and its obligation to construct new facilities if called upon to do so "are not, and should not be, linked within regional transmission planning processes."[147] The proposed rules would not "modify any existing obligation for an incumbent transmission owner to build unsponsored projects that are identified as necessary in a regional transmission plan."[148]

Beyond the proposal to eliminate the incumbent right of first refusal, the FERC proposed that:

> [E]ach public utility transmission provider must revise its OATT to demonstrate that the regional transmission planning process in which it participates has established appropriate qualification criteria for determining an entity's eligibility to propose a project in the regional transmission planning process, whether that entity is an incumbent transmission owner or a nonincumbent transmission developer.[149]
>
> . . . .
>
> [E]ach public utility transmission provider must revise its OATT to include a form by which a prospective project sponsor would provide information in sufficient detail to allow the proposed project to be evaluated in the regional transmission planning process . . . . [A]ll proposals to be considered in a given transmission planning cycle must be submitted by a single, specified date, to minimize the opportunity for other entities to propose slight modifications to already submitted projects.[150]
>
> . . . .
>
> [E]ach public utility transmission provider participate in a regional transmission planning process that evaluates the proposals submitted to the regional planning process through a transparent and not unduly discriminatory or preferential process.[151]
>
> . . . .
>
> [E]ach public utility transmission provider . . . amend its OATT to describe how the regional transmission planning process in which it participates provides for the sponsor (whether an incumbent transmission provider or a nonincumbent transmission developer) of a facility that is selected through the regional

144. *Id.*
145. *Id.* at 37,897.
146. *Id.* at n.100.
147. *Id.* at 37,898.
148. *Id.* at 37,897.
149. *Id.* at 37,896-97.
150. *Id.* at 37,897.
151. *Id.*

> transmission planning process for inclusion in the regional transmission plan to have a right, consistent with State or local laws or regulations, to construct and own that facility.[152]
>
> . . . .
>
> [B]ecause a regional transmission planning process may result in modifications to proposed projects . . . the public utility transmission provider must ensure that its regional transmission planning process has a mechanism to determine which proposal the modified project is most similar to, with the sponsor of the most similar project having the right, consistent with State or local laws or regulations to construct and own the facilities.[153]
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> . . . .
>
> [I]f a proposed project is not included in a regional transmission plan and if the project's sponsor resubmits that proposed project in a future transmission planning cycle, that sponsor would have the right to develop that project under the foregoing rules even if one or more substantially similar projects are proposed by others in the future transmission planning cycle. The OATT must state that this priority to develop the proposed facility continues for a defined period of time . . . .[154]
>
> . . . .
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> [I]f an incumbent transmission project developer may recover the cost of a transmission facility for a selected project through a regional cost allocation method, a nonincumbent transmission project developer must enjoy that same eligibility.[155]

The FERC also encouraged, but would not "require[,] a transmission developer that does not seek to use the regional cost allocation process to participate in the regional transmission planning process."[156] The FERC stated that "if it found . . . that non-public utility transmission providers are not participating in the planning processes required by Order No. 890, then the Commission may exercise its authority under FPA section 211A on a case-by-case basis," but that it did not believe it necessary at this time to invoke its authority under FPA section 211A.[157]

Among the comments on the NOPR were those filed by the FTC,[158] which examined some of the competition and antitrust implications of the NOPR's proposals. The FTC noted that the NOPR's vision for more and broader regional planning would likely require market participants, who are often competitors, to collaborate in transmission planning, construction, and ownership.[159] It said that, while such collaborations are not immune from antitrust scrutiny, they often are pro-competitive, efficiency enhancing, and lawful.[160] The FTC also supported elimination of the right of first refusal for incumbent transmission providers,

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 37,890.

158. Comments of the Federal Trade Commission, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket No. RM10-23-000 (FERC filed Sept. 29, 2010), *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12449174.

159. *Id.* at 6.

160. *Id.*

because impediments to new entry impair market performance and efficiency.[161] It supported elimination of the right of first refusal not only for regional, multi-system tariffs, but also for single-system tariffs.[162]

161. *Id.* at 7-10.

162. *Id.* at 10.

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