REPORT OF THE COMPETITION & ANTITRUST COMMITTEE

This report summarizes antitrust and competition developments of particular interest to energy law practitioners that occurred during 2014.*

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I. FEDERAL COURT CASES

A. *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*

In *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, a Michigan federal court dismissed a plaintiff's complaint that several Chinese solar panel manufacturers had conspired to fix the price of their products sold in the United States below competitive levels in violation of section 1 of the Sherman Antitrust Act.[1] In dismissing the complaint, the court reasoned that the plaintiff had failed to allege that the defendants had a dangerous probability of recouping their profits after capturing a large share of the market.[2]

* This report was prepared by Doron Ezickson, Terence Healy, Bruce McDonald, and Patrick L. Morand.

1. Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd., No. 13-14241, 2014 U.S. Dist. LEXIS 154736 (E.D. Mich. Oct. 31, 2014).

2. *Id.* at *18-19.

Plaintiff Energy Conversion Devices Liquidation Trust (ECD) produced flexible, thin-film photovoltaic solar panels from 2003 until 2012.[3] ECD's annual solar panel revenues dropped by over $100 million between 2009 and 2011 and, in 2011, it filed for bankruptcy.[4]

In October 2013, ECD filed a complaint in federal court against several Chinese solar panel manufacturers and their American subsidiaries, Trina Solar Limited, Yingli Green Energy Holding Company Limited, and Suntech Power Holdings Company, alleging claims under section 1 of the Sherman Antitrust Act and the Michigan Antitrust Reform Act, which mirrors federal antitrust law.[5]

ECD alleged that since 2008, the defendants, through the China New Energy Chamber of Commerce, a trade association for alternative energy, had conspired to sell solar panels at artificially low or below-cost prices, simultaneously reducing their prices by approximately 75%, thereby forcing American companies out of the market and increasing the defendants' collective market share to above 80%.[6] According to ECD, following the annual China New Energy International Forum in 2007, 2008, and 2010, the defendants "uniformly" reduced the price of imported solar panels by 40%, 18%, and 20%.[7]

ECD claimed the defendants' alleged price-fixing conduct was unlawful under Sherman Act section 1 as a per se unreasonable restraint of trade, or alternatively, an unreasonable restraint under the rule of reason (an analysis that weighs a restraint's potential anticompetitive effects against any procompetitive justifications).[8]

The district court noted that, to withstand the defendants' motion to dismiss, ECD had to properly allege it had antitrust standing, which "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior."[9] In other words, to establish a cognizable section 1 claim, ECD must have suffered "antitrust injury," that is, injury that the antitrust laws were designed to prevent.[10]

The defendants alleged that ECD had not suffered antitrust injury because its alleged harm resulted from below-cost pricing, which did not, by itself, confer antitrust standing to bring a Sherman Act claim.[11] According to the defendants, below-cost pricing is only harmful when it is predatory, which would require ECD to show that the defendants priced their products below an appropriate measure of cost, and that the defendants had a dangerous probability of recouping their investment in below-cost pricing by later raising prices above competitive levels.[12] ECD responded that this "recoupment" element only applies to monopolization claims made under section 2 of the Sherman Act and not concerted action alleged

3. *Id.* at *2.
4. *Id.* at *2-3.
5. *Id.* at *1-2. *See also* 15 U.S.C. § 1 (2012); MICH. COMP. LAWS ANN. § 445.772 (West 1985).
6. *Energy Conversion Devices*, 2014 U.S. Dist. LEXIS 154736, at *3.
7. *Id.* at *3-4.
8. *Id.* at *6.
9. *Id.* at *7 (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990)).
10. *Energy Conversion Devices*, 2014 U.S. Dist. LEXIS 154736, at *7-8.
11. *Id.* at *8-9.
12. *Id.* at *9; *see also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993).

under section 1.[13] Pointing to *American Needle, Inc. v. National Football League*, a Supreme Court decision discussing the distinction between section 1 and section 2 claims, ECD argued that Congress decided to treat conduct covered under section 1 more strictly, because "[c]oncerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands."[14] As a result, ECD argued that case law discussing section 2 claims is of little value to a court considering a section 1 claim.[15]

The court analyzed whether ECD had suffered an antitrust injury under a predatory pricing theory.[16] First, the court found ECD had adequately alleged that defendants had engaged in below-cost pricing by pointing to statements by Suntech's former CEO that the company was trying to gain market share in the United States by pricing its products below cost.[17] Moreover, ECD pointed to findings by the United States Department of Commerce and International Trade Commission suggesting the defendants' pricing schemes had resulted in the dumping of Chinese solar panels at below fair values into the United States market and injured the domestic production of solar panels.[18]

The court, however, rejected ECD's contention that it was not required to allege the second element of a predatory pricing claim—the defendants' dangerous probability of recouping foregone profits—to establish a section 1 claim.[19] Rather than relying on *American Needle*, the court instead cited to Supreme Court predatory pricing cases emphasizing the high burden plaintiffs face to establish a predatory pricing claim.[20] The court further noted that, even when a predation conspiracy succeeds in obtaining a dominant position in the market, the conspirators would need also to agree to raise prices to supracompetitive levels to recoup lost profits.[21] That gives courts a second opportunity to punish the conspirators.[22] Moreover, the plaintiff had failed to allege that the solar panel manufacturing industry had barriers to entry sufficient to prevent entrants from undermining the defendants' ability to recover their profits at some future time.[23]

Since ECD had not alleged that the defendants had any probability of recovering their lost profits through such a future conspiracy, the court found ECD failed to adequately allege antitrust injury.[24] As a result, the district court

13. *Id.* at *10; *see also* 15 U.S.C. §§ 1-2 (2004).

14. *Energy Conversion Devices*, 2014 U.S. Dist. LEXIS 154736, at *12-13 (citing Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010)).

15. *Id.* at *12.

16. *Id.* at *9.

17. *Id.* at *9-10.

18. *Id.* at *10.

19. *Energy Conversion Devices*, 2014 U.S. Dist. LEXIS 154736, at *10-11.

20. *Id.* at *14-15 (citing *Brooke Grp. Ltd.*, 509 U.S. at 224; Matsushita v. Elec. Indus. Co., Ltd., 475 U.S. 574, 594 (1986)).

21. *Id.* at *15-16 (citing *Matsushita*, 475 U.S. at 594).

22. *Id.*

23. *Id.* at *18.

24. *Energy Conversion Devices*, 2014 U.S. Dist. LEXIS 154736, at *18.

dismissed ECD's section 1 claim and its analogous claim under the Michigan Antitrust Reform Act.[25]

B. ONEOK, Inc. v. Learjet, Inc. (In re W. States Wholesale Natural Gas Antitrust Litigation)

In April 2013, in a lawsuit brought by retail gas purchasers against natural gas companies, the United States Court of Appeals for the Ninth Circuit held that certain state antitrust claims alleging market manipulation were not preempted by the Natural Gas Act (NGA).[26] In July 2014, the United States Supreme Court granted the natural gas companies' petition for a writ of certiorari to determine whether the NGA preempts state-law claims challenging industry practices that directly affect the *wholesale* natural gas market when those claims are asserted by litigants who purchased gas in *retail* transactions.[27]

1. Background

The Supreme Court proceedings are just the latest chapter in the ongoing litigation arising from the western states energy crisis of 2000-2002. In 2005, a number of retail gas purchasers filed state and federal actions against various natural gas traders, alleging that the defendants manipulated the price of natural gas, in violation of state and federal antitrust laws by (1) reporting false prices to manipulate indices published by *Gas Daily* and *Inside FERC*, and (2) engaging in wash sales.[28] The cases were eventually consolidated in a multidistrict litigation in the United States District Court for the District of Nevada.[29]

Defendants moved for summary judgment on the grounds that such claims were preempted by the NGA and barred by the filed-rate doctrine.[30] However, in September 2007, the Ninth Circuit issued its decision in *E. & J. Gallo Winery v. EnCana Corp.*, holding that the filed-rate doctrine did not preclude antitrust claims based on prices reported to indices where the reported prices involved *both* sales that were regulated by the Federal Energy Regulatory Commission (FERC or the Commission) and sales that fell outside the Commission's jurisdiction.[31]

Shortly after the Ninth Circuit's decision, the defendants refiled their motions for summary judgment arguing that, notwithstanding *E. & J. Gallo Winery*, section 5(a) of the NGA still preempted the plaintiffs' claims.[32]

25. *Id.* at *18-19.

26. *In re* W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716 (9th Cir. 2013), *cert. granted sub nom.* Oneok, Inc. v. Learjet, Inc, 134 S. Ct. 2899 (2014) (No. 13-271).

27. Oneok, Inc. v. Learjet, Inc., 134 S. Ct. 2899 (2014) (No. 13-271).

28. *In re W. States*, 715 F.3d at 724-25.

29. *Id.* at 727.

30. *Id.* at 728.

31. E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1047-48 (9th Cir. 2007).

32. Section 5(a) of the NGA provides:

> Whenever the Commission . . . shall find that any rate, charge, or classification . . . [or] rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

In re W. States, 715 F.3d at 728 (quoting 15 U.S.C. § 717d(a) (2012)).

The district court ultimately agreed that plaintiffs' claims were preempted and granted defendants' motion for summary judgment.[33] In doing so, the court "reasoned that pursuant to Section 5(a) of the NGA, FERC has jurisdiction to regulate any 'practice' by a jurisdictional seller that affects a jurisdictional rate."[34]

The Ninth Circuit reversed, finding that the district court had interpreted section 5(a) too broadly.[35] The court noted that section 5(a) cannot be read in isolation; it must be read in conjunction with other sections of the NGA, including section 1(b), which contains specific exclusions from the FERC's jurisdiction.[36] While section 1(b) grants the FERC jurisdiction over gas transportation and sales for resale in interstate commerce, it also provides that the NGA "shall not apply to any other transportation or sale of natural gas."[37] The court rejected defendants' expansive reading of section 5(a), citing cases such as *American Gas Association v. FERC*, in which the D.C. Circuit upheld the FERC's refusal to use its section 5 authority to modify non-jurisdictional contracts.[38] The Ninth Circuit held that the district court "erred in concluding that [the] FERC had jurisdiction over the reporting practices associated with nonjurisdictional sales under Section 5(a)."[39]

2. Supreme Court Proceedings

In August 2013, defendants filed a petition for a writ of certiorari with the Supreme Court,[40] which invited the Solicitor General to file a brief expressing the views of the United States.[41] In its amicus brief, the government argued that the court of appeals erred in concluding that the FERC did not have exclusive authority in 2000 and 2001 to regulate the petitioners' manipulation of the indices.[42] However, the government also argued that further review of the Ninth Circuit's decision was not warranted because the decision did not conflict with any decision of a state supreme court, and the question presented lacked prospective importance because of the highly unusual factual circumstances that existed in 2000 and 2001 during the energy crisis and subsequent changes to the regulatory environment.[43]

In July 2014, the Supreme Court granted the natural gas companies' petition. In their merits brief, petitioners argued that the NGA preempts the respondents' state-law claims because the NGA occupies the field of practices—including index manipulation—that directly affect jurisdictional rates and that the

33. *In re W. States*, 715 F.3d at 728.

34. *Id.*

35. *Id.* at 733.

36. *Id.* at 731-32 (discussing 15 U.S.C. § 717(b)).

37. *Id.* at 725-26.

38. *In re W. States*, 715 F.3d at 732.

39. *Id.* at 733 (discussing 15 U.S.C. § 717(b)).

40. *In re* W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 724, 729 (9th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3107 (U.S. Aug. 26, 2013) (No. 13-271).

41. Oneok, Inc., v. Learjet, Inc., 134 S. Ct. 721 (2013).

42. Brief for the United States as Amicus Curiae, at 10, Oneok, Inc. v. Learjet, Inc., *petition for cert. granted*, 134 S. Ct. 2899 (2014) (No. 13-271).

43. *Id.* at 18, 21.

respondents' state-law actions fall within the preempted field.[44] Respondents argued that their claims involve matters that the NGA, as it existed before 2005, reserves to the states and that, even if that were not the case, the practice at issue did not fall within the FERC's authority under section 5(a).[45] The United States filed an amicus brief in support of the petitioners.[46]

Multiple other amicus briefs have been filed supporting both the petitioners and the respondents. The case was set for oral argument on January 12, 2015.

C. *McCoy v. Iberdrola Renewables, Inc.*

In *McCoy v. Iberdrola Renewables, Inc.*, the United States Court of Appeals for the Seventh Circuit addressed the unusual situation of a claimant having alleged antitrust violations in federal district court, but on appeal, arguing that its claims were so "feeble" as to deprive the district court of subject matter jurisdiction.[47]

1. Background and District Court Decisions

The case began as a personal injury lawsuit after Aaron McCoy was electrocuted while servicing a wind turbine at the Cayuga Wind Farm in Illinois.[48] In Illinois state court, McCoy sued Iberdrola Renewables (Iberdrola), the utility company that operated the turbine, and Gamesa Technology Corp., a subsidiary of the Spanish turbine manufacturer.[49] Iberdrola then impleaded Gamesa Wind US, LLC (together with Gamesa Technology Corp., Gamesa) and Outland Renewable Energy and Outland Energy Services (together, Outland), a company that provided maintenance services for Gamesa-made turbines (and McCoy's employer).[50] Iberdrola sought indemnification related to the accident from Gamesa and Outland under contract and Illinois law.[51]

After the parties removed the case to federal court based on diversity jurisdiction, Outland asserted multiple counterclaims against Gamesa, including federal and state antitrust claims and claims for indemnification.[52] Among other things, Outland alleged antitrust violations from Gamesa's conspiring with its Spanish parent and Iberdrola and Gamesa's alleged tying of maintenance services to the sales of its wind turbines.[53] None of Outland's counterclaims arose out of

44. Brief for Petitioners, at 14-15, Oneok, Inc. v. Learjet, Inc., *petition for cert. granted*, 134 S. Ct. 2899 (2014) (No. 13-271).

45. Brief for Respondents, at 13-14, Oneok, Inc. v. Learjet, Inc., *petition for cert. granted*, 134 S. Ct. 2899 (2014) (No. 13-271).

46. Brief for the United States as Amicus Curiae Supporting Petitioners, Oneok, Inc., v. Learjet, Inc., *petition for cert. granted*, 134 S. Ct. 2899 (2014) (No. 13-271).

47. McCoy v. Iberdola Renewables, Inc., 760 F.3d 674, 678 (7th Cir. 2014).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Iberdrola*, 760 F.3d at 678.

53. *Id.* at 681.

the same case or controversy as the original personal injury claims.[54] As a result, Outland's federal antitrust claims formed the jurisdictional anchor for the federal court to hear Outland's various state law counterclaims.[55]

After the district court dismissed all but one of Outland's counterclaims, Outland moved to alter or amend the judgment under Federal Rule of Civil Procedure (FRCP) 59(e), arguing for the first time that the federal court lacked subject matter jurisdiction over Outland's counterclaims.[56] Specifically, Outland argued that its own antitrust counterclaims against Gamesa were too "feeble" to invoke federal question jurisdiction under 28 U.S.C. section 1331, and that its state claims did not fall within the scope of supplemental jurisdiction under 28 U.S.C. section 1367(a).[57] After the district court denied Outland's motion, Outland appealed.

2. Seventh Circuit Merits Decision

Federal question jurisdiction. On appeal, Outland again claimed that, because its antitrust claims were so "feeble," the district court lacked subject matter jurisdiction. The Seventh Circuit analyzed Outland's antitrust claims separately and found that they were not so "wholly insubstantial and frivolous" as to deprive the district court of jurisdiction.[58]

First, Outland claimed that Gamesa conspired with its Spanish parent company and Iberdrola.[59] While a subsidiary cannot conspire with its parent,[60] a potential conspiracy between Gamesa and Iberdrola raised sufficient antitrust questions as to invoke federal jurisdiction.[61] (For reasons unknown, Outland focused its claim on the conspiracy between Gamesa and its parent corporation, not Iberdrola, so its claim did not survive dismissal.)[62]

Second, Outland alleged that Gamesa had unlawfully tied maintenance services to the sale of its turbines.[63] While Gamesa had only 10% of the wind turbine market, Outland alleged Gamesa could exercise disproportionate market power during the relevant time period due to "serious shortages" in the wind turbine industry and therefore could exercise market power in support of a claim under section 2 of the Sherman Act.[64] While the Seventh Circuit recognized that

54. *Id.* at 680; *see also* 28 U.S.C. § 1367(a) (1990) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the same action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

55. *Iberdrola*, 760 F.3d at 678.

56. *Id.* at 680.

57. *Id.*

58. *Id.* at 681; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (quoting Bell v. Hood, 327 U.S. 678, 685, 682-83 (1946) ("[T]he District Court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'")).

59. *Iberdrola*, 760 F.3d at 681.

60. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-74 (1984).

61. *Iberdrola*, 760 F.3d at 681.

62. *Id.*

63. *Id.*

64. *Id.* at 681-82.

this would be a "tough theory to prove," Outland's claim was nevertheless not so "utterly frivolous" as to deprive the district court of jurisdiction.[65]

The Seventh Circuit also cautioned that Outland "essentially confessed to sanctionable conduct" by admitting its theory was "so vacuous as to fail to invoke federal question jurisdiction."[66] It suggested Gamesa raise this issue with the district court.[67]

Other claims. Outland argued that the district court lacked subject matter jurisdiction over its remaining state counterclaims because they were not part of the "same case or controversy" as required by 28 U.S.C. section 1367(a).[68] The district court rejected this claim because Outland's antitrust claims put its entire business relationship with Gamesa at issue.[69] Outland's state law claims relating to the Outland/Gamesa relationship, including tortious interference with contract, breach of contract, and defamation, involved the same "nucleus of operative facts" as the antitrust claims.[70] Accordingly, the district court properly exercised jurisdiction over the state law claims.[71]

Finally, the district court rejected Outland's request to amend its counterclaims, finding Outland's proposed amendments were waived, futile, or prejudicial to the other parties.[72] As a result, the Seventh Circuit affirmed each of the district court's judgments.[73]

3. Sanctions

Shortly after the Seventh Circuit's merits decision (and largely in response to the court's dicta regarding sanctions under FRCP 11), Gamesa filed a request for sanctions pursuant to Federal Rule of Appellate Procedure (FRAP) 38, which authorizes damages and single or double costs where an appeal is "frivolous."[74] Under Seventh Circuit precedent, an appeal is "frivolous" where "the result is obvious or when the appellant's argument is wholly without merit."[75]

The court chastised Outland's "desperate attempt" to deprive the district court of jurisdiction over its own federal antitrust counterclaims, noting that Outland could have prevailed on appeal "only by showing that it had violated Rule 11 in the district court."[76] Accordingly, the Seventh Circuit found sanctions appropriate, both to compensate Gamesa and to "deter similar shenanigans in the future."[77]

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65. *Id.* at 682.
66. *Iberdrola*, 760 F.3d at 682.
67. *Id.*
68. *Id.*
69. *Id.* at 683.
70. *Id.*
71. *Iberdrola*, 760 F.3d at 684.
72. *Id.* at 684-87.
73. *Id.* at 678.
74. McCoy v. Iberdrola Renewables, Inc., 769 F.3d 535, 536 (2014); FED. R. APP. P. 38.
75. *Id.* at 538 (citing Harris, N.A. v. Hershey, 711 F.3d 794, 802 (7th Cir. 2013) (collecting cases)).
76. *Iberdrola*, 769 F.3d at 538.
77. *Id.*

II. FERC MARKET MANIPULATION DECISIONS

A. Louis Dreyfus Energy Services L.P.

On February 7, 2014, the FERC entered an order approving a Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Louis Dreyfus Energy Services L.P. (LDES).[78] The order resolved Enforcement's investigation into whether LDES violated the Commission's Anti-Manipulation Rule[79] with respect to its virtual trading in the Midcontinent Independent System Operator, Inc. (MISO) region between November 2009 and February 2010.[80] MISO's Independent Market Monitor referred the trading activity to Enforcement.[81] Following its investigation, Enforcement determined that LDES had violated the Anti-Manipulation Rule.[82] LDES neither admitted nor denied the alleged violations, but agreed to disgorge $3,340,000 plus interest to MISO and to pay a $4,072,257 civil penalty.[83] LDES also agreed to certain compliance obligations, including the submission of compliance reports to the Commission for a minimum of two years.[84] One of the LDES traders agreed to pay a civil penalty of $310,000.[85]

Enforcement alleged that LDES unprofitably traded virtual supply (INCs) and virtual demand (DECs) in a manner intended to benefit certain financial transmission right (FTR) positions held by LDES with a source or sink at a node in North Dakota named "NSP.VELVAVELV" (Velva).[86] Enforcement and LDES stipulated in the Agreement that INCs and DECs have the potential to affect day-ahead congestion at a given node because these positions are bid and cleared in the day-ahead market.[87] The parties further stipulated that "[a] large volume of INCs and DECs . . . could decrease or increase nearby day-ahead congestion enough to affect the value of FTRs that 'source' or 'sink' at that same node or other nearby nodes."[88]

According to the Commission's order, a three-person team at LDES, known as the "FTR Group," conducted LDES's virtual and FTR trading in MISO.[89] The order observed that one trader in the FTR Group wrote a dissertation in support of his PhD that "described in detail a strategy for using virtual trades to increase congestion in an area in a manner that would increase the value of FTR

78. *MISO Virtual and FTR Trading*, 146 F.E.R.C. ¶ 61,072 (2014) (Order and Stipulation and Consent Agreement).

79. 18 C.F.R. § 1c.2 (2014).

80. Order, 146 F.E.R.C. ¶ 61,072 at P 1.

81. *Id.* at P 2.

82. *Id.* at P 6.

83. *Id.* at P 1.

84. *Id.* at P 10.

85. Order, 146 F.E.R.C. ¶ 61,072 at P 10.

86. *Id.* at P 2; *see also* Stipulation and Consent Agreement, 146 F.E.R.C. ¶ 61,072 at P 16 (explaining that "virtual trading at Velva and other nearby nodes from November 2009 through February 2010 incurred a net loss of $76,193 after taking account of RSG costs. This was attributable to a $390,353 loss on the virtual positions taken at Velva itself; the FTR Group had made a profit of approximately $314,159 at other nodes in the area.").

87. Stipulation and Consent Agreement, 146 F.E.R.C. ¶ 61,072 at P 11.

88. *Id.*

89. Order, 146 F.E.R.C. ¶ 61,072 at P 2.

holdings."[90] The trader observed in his dissertation that "[i]t is possible for an FTR holder with [a] relatively large amount of FTR[s] to make extra profit by creating nonreal congestion or aggravating real congestion by submitting virtual transactions" and that "[f]or the FTR holder, bidding an appropriate amount of virtual transactions on the target congestion is risk-free because of the FTR position."[91]

The Commission stated that after this trader began his employment at LDES in April 2009, the volume and number of LDES's FTR positions steadily increased, both volumetrically and with respect to the frequency that "virtual trading favorable to LDES's FTR positions occurred."[92] Enforcement and LDES stipulated that "[o]n an average monthly basis, during the first five months of 2009, the FTR Group traded virtuals into its FTR positions 51[%] of the time. From November 2009 through February 2010, a period in which there was heavy trading at Velva, that rate reached 80[%]."[93]

In addition to the post-April of 2009 changes in the volume and nature of LDES's virtual trading, Enforcement also noted a change in LDES's profitability on those trades.[94] The parties stipulated that before LDES began trading DECs at Velva, LDES's FTR trading near Velva was not profitable.[95] According to the Commission, it was only when LDES began trading DECs at Velva that LDES's FTR trading became profitable and the FTR profits were "directly attributable" to the DECs at Velva.[96] Although the order acknowledged LDES's defense that it traded based upon supply and demand fundamentals at Velva, this defense was dismissed because "Enforcement found no support" for it.[97]

B. Direct Energy Services, LLC

On August 11, 2014, the Commission issued an order approving a Stipulation and Consent Agreement between Enforcement and Direct Energy LLC (Direct Energy).[98] The order resolved Enforcement's investigation into whether Direct Energy violated the FERC's Anti-Manipulation Rule by manipulating natural gas prices during May 2012 at Algonquin and Transco Zone 6 New York (Transco Zone 6), in order to benefit certain financial positions.[99]

The subject trades involved two individuals at Direct Energy who traded physical natural gas at Algonquin and at Transco Zone 6 during certain days in May 2012.[100] The order states that "total physical and financial volumes traded . . . on these days involved 2,123,000 MMBtus, of which the physical fixed price sales accounted for approximately 23% of the fixed-price volume transacted on ICE on

90. *Id.* at P 3.
91. Stipulation and Consent Agreement, 146 F.E.R.C. ¶ 61,072 at P 12.
92. *Id.* at P 13.
93. *Id.*
94. Order, 146 F.E.R.C. ¶ 61,072 at P 5.
95. *Id.*
96. *Id.*
97. *Id.* at P 7.
98. *Direct Energy Services, LLC*, 148 F.E.R.C. ¶ 61,114 (2014) (Order and Stipulation and Consent Agreement).
99. Order, 148 F.E.R.C. ¶ 61,114 at P 1.
100. *Id.* at P 7.

those days."[101] The relevant trades were made "very early in the day when there were very few market participants and sold at prices lower than prices others bought at later in the day."[102] According to the order, Direct Energy purchased next-day physical index gas and sold comparable volumes of fixed-price gas, causing Direct Energy to lose money and lower the Gas Daily Index.[103] At the same time, "Direct Energy held financial positions that benefited from [a] lowered Gas Daily index."[104] The Commission quantified the harm caused to the market to be $69,019.[105]

Direct Energy became aware of the trading activity after being notified by one of its traders of "unusual trading at Transco Zone 6."[106] Direct Energy's back office also independently flagged the trades due to unusually large volumes for delivery.[107] Direct Energy contacted Enforcement in May 2012 to initiate a self-report, which it later submitted on August 20, 2012.[108] Direct Energy also terminated the two traders' employment shortly after discovering the trading activity at issue.[109]

Direct Energy neither admitted nor denied the allegations but agreed to pay a civil penalty of $20,000 and disgorge $31,935.[110] Direct Energy also agreed to certain compliance measures designed to ensure future compliance with all applicable Commission regulations and jurisdictional tariffs.[111] These measures include Direct Energy's agreement:

> [T]o operate for at least two years under either (a) the compliance practices and procedures in effect on the Effective Date (which are an improved version of the practices and procedures that were in effect at the time of the events giving rise to this Agreement) or (b) any superior or improved practices and procedures Direct Energy may implement.[112]

Additionally, Direct Energy must file an annual report with Enforcement.[113]

The FERC's 2014 Report on Enforcement used the Direct Energy settlement as an example to emphasize the importance of internal compliance procedures, self-reporting, and cooperation.[114] According to the report, "Direct Energy

101. *Id.*

102. *Id.* at P 8.

103. *Id.* at P 9.

104. *Id.*

105. Order, 148 F.E.R.C. ¶ 61,114 at P 9.

106. *Id.* at P 4. The order states that the trader reported his observations after receiving training about the Commission's *Constellation* settlement. *Id.* (citing *Constellation Energy Commodities Grp., Inc.*, 138 F.E.R.C. ¶ 61,168 (2012)).

107. *Id.* at P 5.

108. Order, 148 F.E.R.C. ¶ 61,114 at P 3.

109. *Id.* at P 6.

110. *Id.* at P 1.

111. *Id.*

112. Stipulation and Consent Agreement, 148 F.E.R.C. ¶ 61,114 at P 21.

113. *Id.* at P 22. The compliance report must include: "(1) any actions taken as of the date of the report to satisfy the terms of this agreement; (2) actions taken to improve compliance, including investments in new measures and training activities during the reporting period; and (3) any additional violations of any Commission regulation(s)." *Id.*

114. STAFF OF THE OFFICE OF ENFORCEMENT, FERC, 2014 REPORT ON ENFORCEMENT, DOCKET NO. AD07-13-008, at 4 (2014).

received a relatively small civil penalty and disgorgement payments due to its self-reporting, strong compliance program, quick action, and full cooperation with Enforcement's investigation."[115]

C. Houlian Chen, et al. (Powhatan)

On December 17, 2014, the Commission issued an Order to Show Cause and Notice of Proposed Penalty (Show Cause Order) against Houlian (Alan) Chen, HEEP Fund Inc., CU Fund Inc., and Powhatan Energy Fund, LLC (Powhatan) (together, the Respondents).[116] The Commission directed the Respondents to show cause why they should not be found to have violated the Commission's Anti-Manipulation Rule by engaging in certain Up To Congestion (UTC) transactions in the PJM Interconnection L.L.C. (PJM) energy markets.[117] The Show Cause Order also directed the Respondents to demonstrate why they should not be assessed civil penalties in amounts ranging from $1 million for Mr. Chen to $16.8 million for Powhatan, and disgorgement ranging from $173,100 for HEEP Fund Inc. to $3,465,108 for Powhatan.[118]

Specifically, Enforcement alleged that Chen, trading on behalf of HEEP Fund and Powhatan, devised and implemented a scheme designed to increase the volumes of UTCs through a series of "wash-like" trades in order to collect PJM market credits associated with paid transmission, known as Marginal Loss Surplus Allocations (MLSA).[119] Enforcement alleged that Chen made large volumes of offsetting UTC trades between the same trading points, at the same volumes, and for the same hours, in order to eliminate any economic risk of spread between day-ahead and real-time prices.[120] According to Enforcement, these UTC trades were done solely to collect the MLSA credits associated with the transmission reserved for those UTC transactions.[121] Enforcement concluded that the Respondents' scheme to "defraud the PJM market persisted for months, involved the reservation of more than 16.5 *million* MWh of transmission, and resulted in the misallocation of over $10 million of MLSA [payments]."[122]

Enforcement determined that Chen's "round trip" UTC trades were functionally equivalent to expressly prohibited wash trades because they were prearranged and lacked any economic risk.[123] In making this determination, Enforcement did not find the Respondents' arguments that the transactions were not wash trades to be persuasive.[124] The Respondents argued that the trades were not wash trades because they: (1) were profitable; (2) were not intended to move

115. *Id.*

116. *Houlian Chen et al.*, 149 F.E.R.C. ¶ 61,261 at P 1 (2014).

117. *Id.* The Commission issued an Order Revising the Show Cause Order on December 18, 2014, making specific edits but leaving the majority of the December 17, 2014 Show Cause Order unaffected. *See generally Houlian Chen et al.*, 149 F.E.R.C. ¶ 61,263 (2014).

118. 149 F.E.R.C. ¶ 61,261 at P 1, app. A, pp. 82-83.

119. *Id.* at P 3.

120. *Id.*

121. *Id.* at app. A, pp. 1-2.

122. *Id.* at app. A, p. 81.

123. *Id.* at app. A, p. 53.

124. 149 F.E.R.C. ¶ 61,261 at app. A, pp. 53-54.

prices in the market or benefit another position; and (3) were not risk-free.[125] In concluding that the Respondents' UTC transactions were the functional equivalent of wash trades, Enforcement found that these UTC trades "involved only notional risk, and were executed to ramp up volumes without actually taking a position in the market, for the purpose of creating the illusion of [] bona fide market activity and thereby capturing an extrinsic benefit[—]the MLSA [payments]."[126]

The Respondents have thirty days to file an answer to the Show Cause Order, addressing any legal, factual, or procedural matter that they would like to submit for the Commission's consideration.[127] In addition, as provided for under section 31(d) of the Federal Power Act, the Respondents have thirty days to elect either: (1) a hearing before a FERC administrative law judge prior to the assessment of a penalty; or (2) prompt assessment of a civil penalty (if the Commission finds a violation) and institution of an action in United States district court for *de novo* review.[128]

D. MISO Cinergy Hub Transactions (Twin Cities)

On December 30, 2014, the Commission issued an order approving Stipulation and Consent Agreements between Enforcement and Twin Cities Power–Canada, Ltd., Twin Cities Energy, LLC, and Twin Cities Power, LLC (collectively, Twin Cities) and with individual traders (Jason Vaccaro, Allan Cho and Gaurav Sharma (collectively, the Traders)), regarding trading activity in the MISO from January 2010 through January 2011.[129] The settlements resolve the FERC's investigation into whether physical trading activity by Twin Cities and the Traders violated the FERC's Anti-Manipulation Rule by manipulating MISO electricity prices to benefit related financial positions.[130]

According to the FERC's order, "Twin Cities was [] engaged in trading and scheduling physical power between MISO, PJM Interconnection, L.L.C. (PJM) and Ontario, Canada's Independent Electricity System Operator (IESO)" during the relevant period.[131] In addition, Twin Cities traded certain financial products, including the MISO Cinergy Hub Balance-of-Day Swap (Bal-Day Cin) traded on IntercontinentalExchange, Inc. (ICE), which settled based on physical prices at the MISO Cinergy Hub.[132] Enforcement's investigation focused on Twin Cities' trading of Bal-Day Cin, a daily fixed-for-floating financial swap.[133] "The fixed price was the traded contract price, and the floating price was the simple average of the hourly LMPs at the MISO Cinergy Hub," so "changes in physical prices impacted the price of Bal-Day Cin."[134]

125. *Id*.

126. *Id*. at app. A, p. 56.

127. *Id.* at Ordering Paragraphs (A)-(D).

128. *Id*. at (D).

129. *MISO Cinergy Hub Transactions*, 149 F.E.R.C. ¶ 61,278 at P 1 (2014) (Order and Stipulation and Consent Agreement).

130. Order, 149 F.E.R.C. ¶ 61,278 at P 1.

131. *Id.* at P 4.

132. *Id.* at P 5.

133. *Id.* at P 6.

134. *Id.*

Enforcement determined that during January 2010 through January 2011, Twin Cities consistently flowed physical power in the direction of its financial swaps.[135] According to the Commission's order, "Twin Cities imported power into MISO when it held a short swap position, [and] exported power from MISO when it held a long swap position."[136] The Commission stated that "Twin Cities' intent was to move prices at the MISO Cinergy Hub in order to benefit their financial swap positions."[137]

According to the Commission's order, "Twin Cities' physical power flows were not intended to get the best price and were not in response to market fundamentals" and "over time they produced significant losses."[138] The Commission noted that "Twin Cities' physical power flows consistently resulted in gains to, or avoided losses from, its financial swap positions," which were larger than its physical positions.[139] As a result, "the increase in the value of Twin Cities' swaps exceeded the losses from its physical flows."[140] The Commission's order emphasizes that "using physical power flows to influence physical prices for the purpose of enhancing the value of financial positions violates the Commission's Anti-Manipulation Rule."[141]

Twin Cities admitted to the violations and agreed to pay a civil penalty of $2.5 million and to disgorge $978,186 plus interest.[142] Twin Cities also agreed to submit to four years of compliance measures.[143] Specifically, Twin Cities must: (1) institute retention policies and processes for emails and instant messages and retain them in a searchable reproducible format for three years from the date of the communication; (2) institute new compliance policies and processes aimed at detecting potentially manipulative trading; (3) improve compliance training for traders; and (4) submit semi-annual monitoring reports to Enforcement for four years.[144]

The Traders neither admitted nor denied the violations and agreed to pay civil penalties ranging from $75,000 to $400,000.[145] The Traders further agreed to physical scheduling and trading suspensions ranging from four to five years, and to file semi-annual compliance reports with Enforcement for the duration of their suspensions.[146]

135. *Id.* at P 7.
136. *Id.*
137. Order, 149 F.E.R.C. ¶ 61,278 at P 8.
138. *Id.*
139. *Id.*
140. *Id.* at P 7.
141. *Id.* at P 18.
142. Stipulation and Consent Agreement, 149 F.E.R.C. ¶ 61,278 at P 2.
143. Order, 149 F.E.R.C. ¶ 61,278 at P 12.
144. Stipulation and Consent Agreement, 149 F.E.R.C. ¶ 61,278 at PP 31-34.
145. Order, 149 F.E.R.C. ¶ 61,278 at P 13.
146. *Id.*

III. ACQUISITIONS, DIVESTURES, AND MERGERS

A. NorthWestern Corporation's Acquisition of PPL Montana's Facilities

On December 17, 2013, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), submitted an application to the Montana Public Service Commission (Montana PSC) for approval to purchase and operate eleven hydroelectric generating facilities and related assets from PPL Montana, LLC (PPL Montana), to include the hydro assets in its rate base, and to issue securities to complete the purchase.[147] In its application, NorthWestern explained that it obtained a substantial portion of its baseload power from PPL Montana and one of PPL Montana's affiliates through a seven-year contract that was set to expire in mid-2014.[148] NorthWestern also explained that acquiring the hydro assets from PPL Montana would provide NorthWestern with its own predictable baseload power.[149]

The Montana PSC approved the transaction on September 26, 2014, finding that it was in the public interest.[150] Specifically, the Montana PSC "approve[d] the rate base amount of $870 million," finding that NorthWestern's customers will benefit from the addition of "rate-stable, geographic, watershed, and fuel diversified, sustainable, predictable, and zero fuel cost hydroelectric generation to NorthWestern's electric supply portfolio" and that such benefits "substantially outweigh the risks [of the transaction]."[151] The Montana PSC also approved an initial revenue requirement for the hydro assets of $116,865,355,[152] and approved NorthWestern's issuance of securities to finance the transaction.[153]

NorthWestern and PPL Montana also sought approval of their transaction at the FERC.[154] In addition to the eleven hydroelectric generating facilities, the jurisdictional facilities included, "market-based rate tariffs; contracts entered into under [those] tariffs; associated books and records; [the licenses associated with the] hydroelectric generating facilities . . . ; and [related] transmission interconnection facilities."[155] On May 21, 2014, the FERC authorized the transaction.[156] On October 30, 2014, in a separate proceeding, the FERC also

147. NorthWestern Energy's Application for Approval to Purchase and Operate PPL Montana's Hydroelectric Facilities, Docket No. D2013.12.85 (Mont. Pub. Serv. Comm'n Dec. 17, 2013).

148. *Id.* at 2 (Whitney Letter).

149. *Id.*

150. Final Order, *In re Application of NorthWestern Energy for Hydro Assets Purchase*, Order No. 7323k, Docket No. D2013.12.85 at P 161 (Mont. Pub. Serv. Comm'n Sept. 26, 2014).

151. *Id.*

152. *Id.* at PP 140, 188.

153. *Id.* at P 165.

154. NorthWestern Corporation and PPL Montana, LLC, Joint Application for Order Authorizing Acquisition and Disposition of Jurisdictional Facilities Under Section 203 of the Federal Power Act, Docket No. EC14-41-000 (Jan. 10, 2014).

155. *NorthWestern Corp.*, 147 F.E.R.C. ¶ 62,138 at P 1 (2014) (Order Authorizing Disposition and Acquisition of Facilities).

156. *Id.*

authorized NorthWestern's financing for the transaction including the issuance of securities.[157] The transaction closed on November 18, 2014.[158]

B. Exelon Corporation's Proposed Acquisition of Pepco Holdings Inc.

On April 30, 2014, Exelon Corporation (Exelon) and Pepco Holdings Inc. (PHI) announced their proposed merger.[159] Under the terms of the all-cash transaction, Exelon would acquire PHI's outstanding shares for $27.25 per share, and PHI would become a wholly-owned subsidiary of Exelon.[160] PHI and its regulated public utility companies, which include Potomac Edison Power Company (Pepco), Delmarva Power & Light Company (Delmarva), and Atlantic City Electric Company, would be placed in the corporate structure indirectly under Exelon Energy Delivery Company which owns Exelon's regulated public utility companies, Commonwealth Edison Company, PECO Energy Company, and Baltimore Gas & Electric Company.[161] PHI's unregulated subsidiaries would be placed in separate branches of Exelon's holding company structure.[162]

Exelon and PHI filed applications for approval of their proposed merger with the FERC, the Delaware Public Service Commission, the Public Service Commission of the District of Columbia, the Maryland Public Service Commission, the New Jersey Board of Public Utilities, and the Virginia State Corporation Commission (VSCC).[163] Additionally, the transaction is subject to the notification and reporting requirements of the Federal Trade Commission's premerger notification program established under the Hart-Scott-Rodino Act.[164] Exelon and PHI anticipate obtaining the necessary regulatory approvals to close the transaction in the second or third quarter of 2015.[165]

On October 7, 2014, the VSCC issued an order granting approval to transfer control of Delmarva and Pepco from PHI to Exelon.[166] On November 20, 2014, the FERC issued an order authorizing the proposed merger, finding it consistent with the public interest, subject to certain clarifications.[167] Specifically, while the FERC found the proposed merger will not have an adverse effect on rates, it

157. *NorthWestern Corporation*, 149 F.E.R.C. ¶ 61,083 at P 1 (2014) (Order Authorizing Issuances of Securities).

158. NorthWestern Corporation and PPL Montana, LLC, Notice of Closing, Docket No. EC14-41-000 (Nov. 21, 2014).

159. Press Release, Exelon, Exelon to Acquire Pepco Holdings Inc., Creating the Leading Mid-Atlantic Electric and Gas Utility (Apr. 30, 2014), http://www.exeloncorp.com/Newsroom/pr_20140430_EXC_PEPCO.aspx.

160. Exelon Corporation and Pepco Holdings Inc., Joint Application for Authorization of Disposition of Jurisdictional Assets and Merger Under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC14-96-000, at 13 (May 30, 2014).

161. *Id.* at 13, exhibit C-3.

162. *Id.* at 13-14, exhibit C-3.

163. *See, e.g.,* The Exelon & Pepco Holdings Combination: Frequently Asked Questions, EXELON, *available at* http://www.exeloncorp.com/Documents/Exelon-PHI%20Fact%20Sheet-Web-updated-11%2026%2014.docx.

164. *Id.*

165. *Id.*

166. *Pepco Holdings, Inc. et al.*, Order Granting Approval, Case No. PUE-2014-00048, at 5 (Va. State Corp. Comm'n Oct. 7, 2014).

167. *Exelon Corp. and Pepco Holdings, Inc.*, 149 F.E.R.C. ¶ 61,148 at P 1 (2014).

nonetheless accepted the commitment made by Exelon and PHI to hold transmission customers harmless for five years from costs related to the proposed merger.[168] The FERC clarified that if Exelon and PHI "seek to recover merger-related costs that are the subject of a hold harmless commitment, they must submit a *new* filing under FPA section 205, and a concurrent informational filing in this docket, in order to do so."[169] The FERC also conditioned its approval on Exelon and PHI "submitting an informational filing in this docket within 10 days of each relevant state commission approval of [the merger's] proposed ring-fencing provisions."[170] At the time of writing, the other relevant state commissions have not yet issued orders approving the proposed merger.

168. *Id.* at P 105.

169. *Id.* (footnote omitted).

170. *Id.* at P 135 (footnote omitted).

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