REPORT OF THE COMPETITION & ANTITRUST COMMITTEE

This report summarizes antitrust and competition developments of particular interest to energy law practitioners that occurred during 2013.*

I. FILED RATE DOCTRINE AND FEDERAL PREEMPTION COURT CASES

A. *In re Western States Wholesale Natural Gas Antitrust Litigation*

In the latest chapter of the ongoing litigation that arose out of the western states energy crisis of 2000-2002, the United States Court of Appeals for the Ninth Circuit held that state antitrust claims alleging market manipulation were not preempted by the Natural Gas Act (NGA).[1]

In 2005, a number of retail gas purchasers brought suit against various natural gas traders in state and federal courts, alleging that the defendants had manipulated the price of natural gas, in violation of both state and federal antitrust laws, by (1) reporting false prices to indices published by *Gas Daily* and *Inside FERC* and (2) engaging in wash sales.[2] These cases were eventually consolidated in a multidistrict litigation in the District of Nevada.[3]

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1. *In re* Western 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).

2. *Id.* at 724-25.

3. *Id.* at 724, 728.

Defendants moved for summary judgment on the grounds that such claims were preempted by the NGA and barred by the filed-rate doctrine.[4] 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 Commission) and sales that fell outside the Commission's jurisdiction.[5]

Shortly thereafter, defendants refiled their earlier motions for summary judgment, arguing that plaintiffs' antitrust claims were preempted by the NGA.[6] Those arguments focused primarily on section 5(a) of the Natural Gas Act, which provides that

> 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.[7]

The district court ultimately agreed that plaintiffs' claims were preempted and granted defendants' motion for summary judgment.[8] In doing so, the court "reasoned that pursuant to Section 5(a) of the NGA, [the] FERC has jurisdiction to regulate any 'practice' by a jurisdictional seller that affects a jurisdictional rate."[9]

On appeal, the Ninth Circuit reversed, finding that the district court had interpreted section 5(a) too broadly.[10] 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.[11] 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."[12] 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 nonjurisdictional contracts,[13] the court rejected defendants' expansive reading of section 5(a):

> Interpreting the jurisdictional provision in Section 5(a) broadly to find FERC jurisdiction over price manipulation associated with nonjurisdictional sales would risk nullifying the jurisdictional provisions of Section 1(b), which reserve to the

4. *Id.* at 728.
5. E. & J. Gallo Winery v. Encana Corp., 503 F.3d 1027, 1047-48 (9th Cir. 2007).
6. *In re Western States*, 715 F.3d at 728.
7. 15 U.S.C. § 717d(a) (2012), *quoted in In re Western States*, 715 F.3d at 728.
8. *In re Western States*, 715 F.3d at 728.
9. *Id.*
10. *Id.* at 733.
11. *Id.* at 731-32 (discussing 15 U.S.C. § 717(b)).
12. 15 U.S.C. § 717(b).
13. American Gas Ass'n v. FERC, 912 F.2d 1496, 1503 (D.C. Cir. 1990).

> states regulatory authority over nonjurisdictional sales, such as first sales at the wellhead or from sellers in Canada and Mexico. Under the broad reading of Section 5(a) that Defendants propose, there is no "conceptual core" delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction. There would be nothing stopping a future court from finding that first sales themselves (which are exempted from FERC's jurisdiction pursuant to Section 1(b) of the Act) are "practices" affecting jurisdictional rates that fall within the jurisdictional provision in Section 5(a).[14]

The court rejected that "broad reading" of section 5(a), and 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)*."[15] As a result, the NGA does not preempt state antitrust claims based on such conduct.[16]

Defendants also argued that the FERC's promulgation of a Code of Conduct in 2003 constituted evidence that the Commission had jurisdiction over market manipulation.[17] The court rejected that argument for two reasons.[18] First, the court noted that only two years later, Congress enacted the Energy Policy Act of 2005 (EPAct 2005), which expressly granted the FERC regulatory authority over market manipulation.[19] One of the canons of statutory interpretation "counsels against reading acts of Congress to be superfluous," which "suggests that Congress enacted the relevant portion of [EPAct 2005] because [the] FERC did not already have [that] authority."[20]

Second, the court noted that "a close reading of the Code reveals that [the] FERC limited the application of the Code to sales within its jurisdiction," despite concerns raised by commenters about the potential adverse effects of applying the code only to that portion of the gas market that falls under Commission jurisdiction.[21] According to the court, those jurisdictional limitations did not support the defendants' argument.[22] As a result, the court found that the adoption of the 2003 Code of Conduct did not affect its conclusion that the NGA does not give the FERC jurisdiction over claims arising from false price reporting or other anticompetitive activities associated with non-jurisdictional sales and, therefore, does not preempt state antitrust claims based on such conduct.[23]

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14. *In re Western States*, 715 F.3d at 732-33.

15. *Id.* at 733 (emphasis added). The court also distinguished *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, in which the Court held that a state commission could not conduct a prudence review of utility power purchases required by FERC order. *Id.* at 734-35 (distinguishing Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 376-77 (1988)). According to the court, that case "stands for the proposition that states cannot use their jurisdiction over retail rates to second-guess or review FERC-authorized rates that may affect retail rates." *Id.* at 734. The power allocations mandated by FERC in *Mississippi Power & Light* were not deemed analogous to the alleged "market manipulation associated with nonjurisdictional transactions at issue in the present case." *Id.* at 734-35.

16. *Id.* at 729, 735.

17. *Id.* at 735 (pointing to Order No. 644, *Amendments to Blanket Sales Certificates*, F.E.R.C. STATS. & REGS. ¶ 31,153 (2003), 68 Fed. Reg. 66,323 (2003) (to be codified at C.F.R. pt. 284)).

18. *Id.*

19. *Id.* (citing Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594).

20. *Id.*

21. *Id.* at 735-36.

22. *Id.* at 736.

23. *Id.*

On August 26, 2013, defendants filed a petition for a writ of certiorari with the Supreme Court.[24] On December 2, 2013, the Court invited the Solicitor General to file a brief expressing the views of the United States.[25]

B. Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Ass'n

In *Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Ass'n*, the United States Court of Appeals for the Seventh Circuit held that the federal courts had no jurisdiction over a claim for breach of a long-term requirements contract for the purchase of wholesale electricity.[26]

In 1977, Wabash Valley Power Association, Inc. (Wabash), a not-for-profit power generation cooperative, entered into a wholesale power supply contract with Northeastern Rural Electric Membership Corporation (Northeastern), one of its members, "under which Northeastern agreed to purchase all of its electric power from Wabash [for a period of] forty years."[27] The contract contained a mechanism for periodic price adjustments, as well as a provision indicating that any such adjustments were subject to the approval of the "applicable regulatory authorities."[28] Although such wholesale electric power sales are normally subject to the exclusive jurisdiction of the FERC under the Federal Power Act (FPA),[29] the FERC lacks jurisdiction over entities, such as Wabash, that are financed by the Rural Electrification Administration (REA).[30] As a result, the applicable regulatory authority at the time was the Public Service Commission of Indiana, now known as the Indiana Utility Regulatory Commission (Indiana Commission).[31]

Subsequently, Wabash paid off its REA debt early, effectively transferring regulatory jurisdiction over its wholesale sales of electricity from the Indiana Commission to the FERC.[32] Northeastern subsequently sent a notice to Wabash, claiming that the change in regulatory authorities constituted a material breach of the 1977 wholesale power agreement.[33] In response, Wabash sought a declaratory order from the FERC, asking the agency to find (1) that the FERC had exclusive jurisdiction over Wabash's formula rate tariff, (2) that "any changes to the rates paid by Northeastern . . . [were] subject to approval of the

24. Oneok, Inc., v. Learjet, Inc. (*In re* Western States Wholesale Natural Gas Antitrust Litig.), 82 U.S.L.W. 3107 (U.S. Aug. 26, 2013) (No. 13-271).

25. Oneok, Inc., v. Learjet, Inc. (*In re* Western States Wholesale Natural Gas Antitrust Litig.), 134 S. Ct. 721 (2013).

26. Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, 707 F.3d 883, 885 (7th Cir. 2013), *amended, reh'g denied*, 2013 U.S. App. LEXIS 9015 (7th Cir. Apr. 29, 2013).

27. *Id.* at 885.

28. *Id.* at 888.

29. Federal Power Act, 16 U.S.C. §§ 791a-828c (2012).

30. *Northeastern Rural Elec.*, 707 F.3d at 888 (citing Dairyland Power Coop., 37 F.P.C. 12, 21 (1967) (interpreting 16 U.S.C. § 824(f) to hold that the Federal Power Commission, the FERC's predecessor, lacked jurisdiction over wholesale rates charged by power cooperatives financed by the REA) and Salt River Project Agric. Improvement & Power Dist. v. Federal Power Comm'n, 391 F.2d 470, 474-77 (D.C. Cir. 1968)).

31. *Northeastern Rural Elec.*, 707 F.3d at 888 & n.1, 889.

32. *Id.* at 889.

33. *Id.*

applicable regulatory authorit[y]," and (3) that the FERC was "the applicable regulatory authority with jurisdiction over the rates Northeastern [paid] under the [t]ariff."[34] The FERC granted the petition, finding that "'since 2004, the Commission has had exclusive jurisdiction over the [t]ariff' and that any [rate changes were] subject to FERC approval."[35] The FERC also found, however, that Northeastern's claims for breach of contract were beyond the scope of the proceeding.[36]

Northeastern then filed suit in Indiana state court, alleging that the act of transferring jurisdiction was a breach of the 1977 wholesale power agreement.[37] Wabash removed the case to federal court on the grounds that the claim necessarily arose under the FPA.[38] "The district court denied Northeastern's motion [to] remand and granted Wabash's [request] for a preliminary injunction" on the grounds that "Northeastern's suit [was] 'a collateral attack on a FERC-[approved] rate.'"[39]

On appeal, the Seventh Circuit reversed, rejecting a number of arguments by Wabash that would have established federal jurisdiction or barred the suit by Northeastern.[40] The court began by noting that there was no diversity jurisdiction because the parties were both citizens of Indiana.[41] As a result, "the propriety of removal depend[ed] [upon] the existence of a federal question," which must appear on the face of a well-pleaded complaint.[42] A federal defense to a well-pleaded complaint does not provide a basis for removal.[43]

A plaintiff may not, however, avoid removal by omitting necessary federal questions through artful pleading.[44] While a plaintiff may omit a federal claim to avoid removal, he may not omit a federal element of an included claim.[45] If federal law creates the claim on which a plaintiff is suing, an omission of any reference to federal law will not defeat removal.[46] Likewise, "if federal law preempts all state causes of action in [a given area], under the complete preemption doctrine," the state law claim will be treated as "arising under federal law."[47]

Although Northeastern's complaint was based solely on state contract law, the court noted that it might still provide a basis for federal jurisdiction if the complaint necessarily raised a federal issue.[48] In that regard, Wabash argued that a substantial federal question necessarily existed because Northeastern was

34. *Id.* (internal quotation marks omitted).
35. *Id.* at 890 (quoting *Wabash Valley Power Ass'n*, 137 F.E.R.C. ¶ 61,148 at P 21 (2011)).
36. *Northeastern Rural Elec.*, 707 F.3d at 890; 137 F.E.R.C. ¶ 61,148 at P 22.
37. 707 F.3d at 890.
38. *Id.* at 891; 16 U.S.C. §§ 791a-828c (2012).
39. *Northeastern Rural Elec.*, 707 F.3d at 886.
40. *Id.* at 897-98.
41. *Id.* at 890.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 890-91.
47. *Id.* at 890.
48. *Id.* at 891.

challenging a federally-filed tariff.[49] The court rejected that argument on the grounds that the alleged breach of the 1977 agreement took place before the filing of the federal tariff.[50] As a result, the court found that "the rights at issue cannot be said to arise out of the federal tariff," and the complaint did "not necessarily raise a federal question."[51]

The court then turned to the question of whether the complete preemption doctrine could serve as a basis for federal jurisdiction.[52] It began by noting that "[t]he complete preemption doctrine refers to a limited set of cases in which a properly pled state law claim may be said to arise under federal law because Congress has effectively eliminated state law causes of action in the entire field."[53] The court concluded, however, that this was not the case with respect to Northeastern's claim.[54] Citing the Supreme Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware*,[55] the court first concluded that the NGA did not establish complete preemption with respect to wholesale natural gas regulation.[56] Finding the relevant provisions of the NGA and FPA to be "substantially identical,"[57] and relying on several lower court cases,[58] the court likewise found no complete preemption under the FPA because "federal law leaves a role for state law in wholesale power regulation."[59]

In support of that conclusion, the court cited a number of FERC decisions in which the Commission "recognize[d] a role for state contract law in adjudicating contract disputes involving federal tariffs."[60] The principal case was *Portland General Electric Co.*, which involved a contract dispute over a power agreement that was also part of a filed rate.[61] After Southern California Edison Co. filed suit in Oregon state court alleging that Portland General Electric Co. (Portland) was in default on the agreement, Portland filed a complaint with the FERC seeking a declaratory order that the FERC was the only body with jurisdiction to resolve the contract dispute.[62] The FERC denied the request.[63] "Because the complaint in . . . state court did not 'challenge the reasonableness of any [filed rate], or make claims based on the FPA,'" the FERC found the state court action to be appropriate.[64]

49. *Id.* at 893.
50. *Id.*
51. *Id.* at 892.
52. *Id.* at 893.
53. *Id.* at 894.
54. *Id.* at 895.
55. Pan Am. Petroleum Corp. v. Superior Court of Del., 366 U.S. 656 (1961).
56. *Northeastern Rural Elec.*, 707 F.3d at 895.
57. *Id.* (citing Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981)).
58. *Id.* at 893 & n.6.
59. *Id.* at 895.
60. *Id.* at 896.
61. *Portland Gen. Elec. Co.*, 72 F.E.R.C. ¶ 61,009, at p. 61,019 (1995).
62. *Id.*
63. *Id.* at p. 61,019, 61,022.
64. *Northeastern Rural Elec.*, 707 F.3d at 897 (quoting *Portland Gen. Elec.*, 72 F.E.R.C. ¶ 61,009, at p. 61,021).

Finally, the court turned to the role of the filed rate doctrine and held that it is a substantive, rather than a jurisdictional, doctrine that does not provide any independent basis for removal.[65] The court explained that

> [t]he filed-rate doctrine does not on its own eliminate state law causes of action. Plaintiffs, for example, may still bring breach of contract claims in state court seeking to enforce a contractually agreed wholesale rate that is within the bounds of the federal tariff . . . . The filed-rate doctrine prevents courts from second-guessing the reasonableness of terms in a federally-filed rate, but it does not divest state courts of jurisdiction to hear all cases involving wholesale power contracts.[66]

Because the filed rate doctrine does not completely preempt state law, it is "properly treated as a federal defense" and not an "affirmative basis for jurisdiction."[67]

The court concluded that Northeastern was asserting a state breach of contract claim that did not arise under federal law.[68] It did not "seek to enforce or challenge any duty or liability created by a federally-filed tariff, nor did [its] claim necessarily arise under federal law [due to] complete preemption."[69] For those reasons the court found that the federal courts lacked jurisdiction over Northeastern's claim.[70] The case was remanded to the district court so that it, in turn, could remand it to state court.[71]

C. Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.

In *Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.*, the United States Court of Appeals for the Fifth Circuit held that various state-law claims, including alleged violations of Louisiana's Unfair Trade Practices Act, were barred by the filed rate doctrine.[72] Sea Robin Pipeline Co. (Sea Robin) is an interstate pipeline company, engaged in the transportation of natural gas from the Outer Continental Shelf to onshore transportation facilities, and is subject to FERC jurisdiction.[73] Medco Energi US, L.L.C. (Medco) is a natural gas producer and shipper on Sea Robin's system, using interruptible transportation service.[74]

"In September 2008, Hurricane Ike caused over $118 million in damage to Sea Robin's facilities."[75] While repairs were underway, shippers such as Medco were unable to transport gas in an offshore area known as the West Leg.[76]

65. *Id.* at 893, 896.

66. *Id.* at 896.

67. *Id.*

68. *Id.* at 897.

69. *Id.*

70. *Id.* at 897-98.

71. *Id.*

72. Medco Energi US, L.L.C. v. Sea Robin Pipeline Co., 729 F.3d 394, 397 (5th Cir. 2013) (per curiam). Pursuant to Fifth Circuit Rule 47.5, this decision was not published and is considered non-precedential, except under limited circumstances (such as establishing res judicata, collateral estoppel, or law of the case). *Medco*, No. 12-30791, slip. op. at 6 n.* (5th Cir. July 2, 2013) (per curiam).

73. *Medco*, 729 F.3d at 396.

74. *Id.*

75. *Id.*

76. *Id.*

Medco subsequently filed suit in state court, claiming negligence, negligent misrepresentation, detrimental reliance, and fraud, in addition to alleged violations of Louisiana's Unfair Trade Practices Act.[77] The crux of Medco's complaint was that Sea Robin had misrepresented the time when its pipeline facilities would again be available.[78] Medco claimed that it purchased an "additional block of production in reliance on Sea Robin's representations" and suffered damages, including the cost of constructing a new gathering line, as a result.[79]

Sea Robin removed the case to the District Court for the Western District of Louisiana and moved for summary judgment on the grounds that Medco's claims were preempted by the NGA or barred by the filed rate doctrine.[80] The District Court granted summary judgment on both grounds.[81]

On appeal, the Fifth Circuit affirmed.[82] The court began its analysis by noting that transporters of natural gas in interstate commerce are subject to FERC jurisdiction and may "charge only [those rates that the] FERC determines to be just and reasonable."[83] The court further noted that under the filed rate doctrine, "any filed rate—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers."[84] The court added that "[e]ven if a rate is misrepresented to a customer and the customer relies on that rate, the promised rate will not be enforced if it conflicts with the filed rate."[85] The court then turned to the specific terms of Sea Robin's FERC-approved tariff:

> Under Sea Robin's tariff, Medco was subject to all conditions established by Sea Robin, including the following provisions:
>
> (1) Medco's service was on an interruptible basis, with no guaranteed right of delivery;
> (2) Sea Robin made no representation as to the capacity available on its pipeline;
> (3) neither party had liability "arising out of any manner related to the tariff; and
> (4) Sea Robin was not required to perform service unless all facilities necessary to render the requested service existed and were in good operating condition."[86]

The court concluded that "even if all of Medco's allegations of misrepresentation [were] true, allowing Medco to recover damages for its claims would conflict with the filed rate."[87] Those claims were therefore barred by the filed rate doctrine, making it unnecessary to address the issue of federal preemption.[88]

77. *Id.* at 397.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 396.
83. *Id.* at 397.
84. *Id.* at 398 (internal quotation marks omitted).
85. *Id.* (citing American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 222 (1998)).
86. *Id.* at 399.
87. *Id.*
88. *Id.* at 397.

II. MARKET MANIPULATION COURT CASES

A. Hunter v. FERC

The decision rendered in *Hunter v. FERC* has jurisdictional and other implications that are significant with regard to the FERC's market manipulation authority.[89] As discussed below, the court in *Hunter* held that the Commission lacked jurisdiction to prosecute its claim for market manipulation of natural gas futures contracts because such jurisdiction belongs exclusively to the Commodity Futures Trading Commission (CFTC).[90]

1. The FERC Proceeding

Initially, the Commission issued an order directing Amaranth[91] and two of its traders, Brian Hunter and Matthew Donohoe, "to show cause why they ha[d] not violated section 1c.1 of [the Commission's] regulations, which prohibits the manipulation of natural gas prices."[92] Prior to the hearing, however, the Commission's Enforcement Staff, Amaranth, and Donohoe filed a joint motion for severance and a joint offer of settlement.[93] That same day, the Commission granted the request of Amaranth and Donohoe to be severed from the proceeding, leaving Hunter as the sole respondent.[94] Less than a month later, the Commission approved an uncontested settlement among Enforcement Staff, Amaranth, and Donohoe[95] and commenced the hearing which resulted in an initial decision finding against Hunter.[96] The Commission affirmed the initial decision[97] and denied Hunter's request for rehearing.[98] Hunter then sought review of those orders in the United States Court of Appeals for the District of Columbia Circuit.[99]

In the proceeding at the FERC, the Commission alleged that Hunter manipulated the price of natural gas futures contracts on the New York Mercantile Exchange (NYMEX) in order to benefit related swap and option positions.[100] Specifically, the Commission found that Hunter accumulated large amounts of natural gas futures contracts "that were subsequently sold off during

89. Hunter v. FERC, 711 F.3d 155 (D.C. Cir. 2013).

90. *Id.* at 160.

91. *Amaranth Advisors L.L.C.*, 120 F.E.R.C. ¶ 61,085 (2007) (referring to Amaranth Advisors L.L.C., Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners LLC, Amaranth Group Inc., and Amaranth Advisors (Calgary) ULC collectively as "Amaranth").

92. *Id.* at 61,417 (footnote omitted) (citing 18 C.F.R. § 1c.1 (2013)).

93. Joint Motion for Severance and Stay at 1-2, *Amaranth Advisors L.L.C.*, FERC Docket No. IN07-26-000 (July 23, 2009); Joint Offer of Settlement and Request for Waiver of Rule 602 Requirements and Expedition at 1, *Amaranth Advisors L.L.C.*, FERC Docket No. IN07-26-000 (July 23, 2009).

94. *Amaranth Advisors L.L.C.*, 128 F.E.R.C. ¶ 61,081 (2009).

95. *Id.* at P 1. Amaranth and Donohoe acknowledged their trading in natural gas futures contracts raised questions about its effect on prices in the physical natural gas markets, conceded to the Commission's jurisdiction, and agreed to pay $7.5 million. *Id.* at PP 6-7, 13.

96. *Hunter*, 130 F.E.R.C. ¶ 63,004 at PP 1, 5 (2010).

97. *Hunter*, 135 F.E.R.C. ¶ 61,054 at P 3 (2011).

98. *Hunter*, 137 F.E.R.C. ¶ 61,146 at P 1 (2011).

99. Petition for Review, Hunter v. FERC, 711 F.3d 155 (D.C. Cir. 2013) (No. 11-1477).

100. *Hunter*, 137 F.E.R.C. ¶ 61,146 at P 2.

the final 30 minutes of trading (i.e., the settlement period) on the final day of trading for those contracts (i.e., the expiration days) in February, March, and April 2006, with the aim of driving down their settlement price."[101] The Commission concluded that "Hunter's trading pattern was intended to benefit the significantly larger short swap and option positions maintained by Amaranth on other trading platforms, whose value increased as the [natural gas] Futures Contracts] settlement price declined."[102]

Although Hunter's trading practices occurred solely within the financial natural gas markets (which are not subject to the Commission's jurisdiction), the Commission nonetheless found that "[g]iven the close relationship between the financial and physical natural gas markets, . . . this manipulation affected the price of FERC-jurisdictional physical natural gas transactions in a number of ways."[103] According to the Commission,

> the settlement price served as the basis for pricing those [natural gas futures contracts] that actually went to physical delivery[;] . . . the settlement price is the largest, or even sole, price component in "physical basis" transactions, which are widely used for monthly physical delivery in North America[;] . . . [and], several monthly price indices—which are widely used in bilateral natural gas markets as a price term—are calculated based on the average price of fixed-price and/or physical basis transactions."[104]

Accordingly, the Commission held that Hunter violated its anti-manipulation rule.[105] The Commission explained that "the elements of a manipulation claim are: (1) use of a fraudulent scheme, (2) with the requisite scienter, (3) in connection with a Commission-jurisdictional transaction" and that "Hunter's conduct during the at-issue trading days satisfies all three elements, and thus violates the [rule]."[106] The Commission found that "Hunter developed a trading strategy . . . that was specifically intended to lower the settlement price of [natural gas futures contracts] in order to benefit his positions on other trading platforms," and that "Hunter acted with reckless disregard as to the impact of his conduct upon the physical market for natural gas."[107] The Commission assessed a $30 million civil penalty against Hunter, explaining that such a penalty "is appropriate and sufficient to discourage Hunter and others from engaging in market manipulation."[108]

2. The D.C. Circuit's Review

In his petition for review of the Commission's orders at the D.C. Circuit, Hunter argued, among other things, that the Commission "lack[ed] authority to fine him because the [CFTC] has exclusive jurisdiction over all transactions

101. *Id.*

102. *Id.* (footnote omitted).

103. *Hunter*, 135 F.E.R.C. ¶ 61,054 at P 16 (2011).

104. *Id.* at P 17.

105. *Id.* at P 3. The Commission explained that its "enhanced enforcement authority under § 4A of the Natural Gas Act . . . prohibits manipulation in connection with transactions subject to the jurisdiction of the [Commission]." *Id.* at P 1 (citing 15 U.S.C. § 717c-1 (2012)).

106. *Id.* at P 32.

107. *Id.*

108. *Id.* at P 148.

involving commodity futures contracts."[109] Hunter explained that the Commission "never disputed that [his] alleged manipulative conduct or scheme occurred exclusively in the natural gas futures contract market, which is outside [the] FERC's jurisdiction."[110] Thus, Hunter argued that "contrary to its assertions, [the] FERC lacks roving authority over manipulative conduct occurring in any market, let alone over conduct that . . . consists entirely of transactions subject to another agency's [the CFTC's] exclusive jurisdiction."[111] The CFTC intervened in support of Hunter on the jurisdiction issue.[112]

The Commission, by contrast, argued that section 4A of the NGA, 15 U.S.C. section 717c-1, "vests [it] with jurisdiction over 'any entity' that engages in manipulation" and that such "manipulation need not occur in jurisdictional markets, so long as it coincides with—i.e., is 'in connection with,' 'directly or indirectly'—FERC-jurisdictional gas transactions."[113] The Commission argued that Congress, in passing the EPAct 2005,[114] created "concurrent jurisdiction in NGA [section] 4A (EPAct 2005 [section] 315)," as evidenced by "NGA [section] 23 (EPAct 2005 [section] 316) [whereby] Congress directed [the] FERC and the CFTC to coordinate investigative activities through a Memorandum of Understanding" to ensure that "information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative [efforts]."[115]

The court was not persuaded by the Commission's arguments but instead agreed with Hunter and the CFTC, finding that "manipulation of natural gas futures contracts falls within the CFTC's exclusive jurisdiction" and that "nothing in the [EPAct 2005] clearly and manifestly repeal[ed] the CFTC's exclusive jurisdiction."[116] Specifically, the court explained that the plain terms of section 2(a)(1)(A) of the Commodity Exchange Act (CEA) provide that "the CFTC has exclusive jurisdiction over the manipulation of natural gas futures contracts" and that the Commission's contention otherwise finds no support in that statute.[117] The court reasoned that "there are limits to what comes within CEA section 2(a)(1)(A)'s orbit, but once a scheme crosses the statute's event horizon, the CFTC has exclusive jurisdiction."[118]

With regard to the argument that the EPAct 2005 "contemplate[d] complementary jurisdiction between [the FERC] and the CFTC" over manipulation in natural gas futures markets, the court found that "[NGA] section 4A's text fails to answer the question whether [the] FERC may intrude upon the CFTC's exclusive jurisdiction."[119] The court also found that, "because [the]

109. Hunter v. FERC, 711 F.3d 155, 156 (D.C. Cir. 2013).

110. Brief of Petitioner at 18, *Hunter*, 711 F.3d 155 (No. 11-1477), 2012 WL 1202702, at *18.

111. *Id.*

112. *Hunter*, 711 F.3d at 156-57.

113. Brief of Respondent, *supra* note 110, at 18.

114. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

115. Brief of Respondent at 19, *Hunter*, 711 F.3d 155 (No. 11-1477), 2012 WL 2114842, at *19 (internal quotation marks omitted).

116. *Hunter*, 711 F.3d at 156.

117. *Id.* at 158.

118. *Id.* at 159.

119. *Id.* at 160.

FERC is free to prohibit manipulative trading in markets outside the CFTC's exclusive jurisdiction, there is no 'irreconcilable conflict' between the [NGA and CEA] and therefore no repeal by implication [of CEA section 2(a)(1)(A)]."[120] In addition, rather than supporting the argument for concurrent jurisdiction, the court found that "[NGA] section 23 indicates that the CFTC and FERC regulate *separate* markets."[121]

Thus, the court concluded that, because the Commission failed to "demonstrate that [NGA] section 4A encroaches upon the CFTC's exclusive jurisdiction" and to "meet the high bar of showing an implied repeal [of CEA section 2(a)(1)(A)]," the Commission "lack[ed] jurisdiction to charge Hunter with manipulation of natural gas futures contracts."[122]

3. Implications for the FERC's Market Manipulation Authority

The court's holding made clear the CFTC has exclusive jurisdiction.[123] Having resolved the case on jurisdictional grounds, the court did not address other issues Hunter presented for review, including, among others, application of the Commission's anti-manipulation rule to natural persons, the sufficiency with which the Commission stated its market manipulation claim, and the appropriateness of the penalty amount.[124] However, several of these same issues are presently being litigated in similar proceedings: the Commission recently filed to enforce an order assessing civil penalties against Barclays Bank PLC and four of its traders in the United States District Court for the Eastern District of California[125] and issued an order to show cause against BP America, Inc. and several of its affiliates.[126] Resolution of the issues in these cases also will shape the Commission's market manipulation authority and build upon the holding in *Hunter v. FERC*.[127]

B. Kourouma v. FERC

In *Kourouma v. FERC*, the United States Court of Appeals for the District of Columbia Circuit upheld a $50,000 monetary penalty which the FERC had assessed against an energy trader for making false statements and material omissions on forms filed with the Commission and a regional transmission organization, PJM Interconnection LLC (PJM).[128]

The FPA gives the FERC authority to regulate the activities of traders involved in certain energy markets.[129] Pursuant to that authority, the FERC has promulgated various rules that are designed to ensure the integrity and smooth

120. *Id.*

121. *Id.*

122. *Id.*

123. *See, e.g.*, *id.* at 159.

124. Brief of Petitioner, *supra* note 110, at 13-17.

125. Petition for an Order Affirming July 16, 2013 Order, FERC v. Barclays Bank PLC, No. 2:13-cv-02093 (E.D. Cal. Oct. 9, 2013).

126. *BP America Inc.*, 144 F.E.R.C. ¶ 61,100 at P 1 (2013).

127. Petition for an Order Affirming July 16, 2013 Order, *supra* note 125; 144 F.E.R.C. ¶ 61,100 at P 1.

128. Kourouma v. FERC, 723 F.3d 274, 276 (D.C. Cir. 2013).

129. *Id.*; Federal Power Act, 16 U.S.C. §§ 791a-828c (2012).

functioning of markets, including Market Behavior Rule 3, which provides: "A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission [or] Commission-approved regional transmission organizations . . . unless Seller exercises due diligence to prevent such occurrences."[130] "The definition of 'Seller' includes 'any person that . . . seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates'" and, therefore, includes energy traders.[131]

Moussa Kourouma worked as an energy trader in various markets for Energy Endeavors LP (Energy Endeavors).[132] When he began his employment, he executed an employment agreement containing a non-compete clause that required him to trade only for Energy Endeavors during his employment and for two years after leaving the firm.[133] Subsequently, he became concerned about the future prospects of Energy Endeavors and formed his own trading firm, Quntum, listing his daughter as the registered agent.[134] To enable the new firm to participate in energy markets, he filed applications with both the FERC and PJM but omitted his own name from both forms in order to hide his participation from his current employer.[135] On one form he listed his daughter's name instead of his own; on the other, he falsely claimed that a friend was the manager of Quntum.[136]

Energy Endeavors ultimately became aware of Kourouma's activities in connection with Quntum and sought enforcement of its employment contract through a civil proceeding.[137] It also protested Quntum's application at the FERC.[138] As a result, the FERC conducted an investigation and subsequently issued an order stating that Kourouma had submitted false and misleading forms to the Commission and PJM, in violation of Market Behavior Rule 3, and directing him to show cause why a $50,000 penalty was not appropriate.[139] The order gave Kourouma two choices: "He could elect for the FERC to 'promptly assess the penalty,'" which would have given him certain appeal rights, or "elect for the Commission to assess the penalty only 'after a determination of violation ha[d] been made on the record [following] an opportunity for [a hearing] . . . before an administrative law judge.'"[140]

In response, Kourouma submitted an affidavit admitting that he had submitted false information in order to avoid making his employer aware of his involvement with Quntum.[141] He asked that the Commission dismiss the case or

130. *Kourouma*, 723 F.3d at 276 (quoting 18 C.F.R. § 35.41(b) (2013)) (internal quotation marks omitted).

131. *Id.* (quoting 18 C.F.R. § 35.36(a)(1)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 276-77.

138. *Id.* at 277.

139. *Id.*; *Kourouma*, 134 F.E.R.C. ¶ 61,105 at P 3 (2011).

140. *Kourouma*, 723 F.3d at 277 (quoting 16 U.S.C. § 823b(d)(2)(A), (d)(3)(A) (2012)).

141. *Id.*

set the matter for hearing.[142] Instead, the FERC found the matter appropriate for summary disposition based upon the affidavit, found that Kourouma's false statements had violated Market Behavior Rule 3, and assessed a $50,000 penalty, "payable over five years to accommodate [Kourouma's] financial condition."[143]

On appeal, Kourouma argued that the Commission had committed a number of procedural and substantive errors.[144] The court rejected all of those arguments.[145]

Kourouma first argued that he was entitled to an evidentiary hearing under 16 U.S.C. section 823(b), which requires that civil penalty orders contain the findings of an administrative law judge.[146] The court disagreed: "Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact."[147] That was true notwithstanding the provisions of section 823(b): "When [a] regulated party's own admissions make clear that no material facts are in dispute, it is unnecessary to require a judge to recite these facts as 'findings' after a hearing."[148] Because "Kourouma admitted that he had falsified and omitted multiple names on [the] forms" filed with the Commission and had done so "to avoid alerting [his employer] to his violation of the non-compete" agreement, his "admissions resolved all disputed issues of material fact, making an evidentiary hearing unnecessary."[149]

Kourouma next argued "that [the] FERC erred because there was no showing that he had any intent to deceive [either the] FERC or PJM," which also received the filings in question.[150] The court rejected that contention on the ground that such a showing was unnecessary under Market Behavior Rule 3.[151] "The Rule's plain text lacks any reference to intent and forgives false and misleading [statements] only if they are made inadvertently despite the filer's due diligence to avoid such errors."[152] The court further concluded that the plain language of the rule provided "ample notice" that the FERC would enforce the rule without requiring intent.[153]

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 277-80.
146. *Id.* at 277.
147. *Id.* at 278.
148. *Id.*
149. *Id.*
150. *Id.* at 278.
151. *Id.*
152. *Id.*
153. *Id.* at 279. Kourouma further suggested that the rule's failure "to provide constitutionally adequate notice" of what conduct "is forbidden [would invite] discriminatory enforcement." *Id.* at 278 n.*. The court found that those "constitutional challenges to a garden-variety ban on making false statements to regulators" were without merit. *Id.* The rule's "clear terms provide[d] sufficient notice . . . of what conduct the [r]ule prohibits, and those clear enforcement parameters prevent . . . unconstitutionally discriminatory enforcement." *Id.*

Kourouma then raised three arguments under the Administrative Procedure Act. First, he claimed that the FERC had violated its own summary disposition rules requiring that evidence be viewed in the light most favorable to the non-moving party.[154] The court rejected that claim because the inference Kourouma sought—that his actions were inadvertent—"could not be reasonable."[155]

Second, he contended that the FERC abused its discretion in refusing to allow him to submit new evidence at a late stage in the proceeding.[156] The court found no abuse of discretion.[157]

Third, he claimed that the $50,000 penalty was not supported by substantial evidence.[158] The court disagreed, citing the FERC's conclusion that he had knowingly and deliberately filed false information, as well as "the seriousness of the threat posed by [his] actions to transparent market operations."[159]

Finally, Kourouma argued that the FERC had improperly enhanced his penalty for the purpose of promoting general deterrence, in violation of the D. C. Circuit's decision in *Clifton Power Corp. v. FERC*.[160] The court rejected that contention because the record showed that the FERC considered general deterrence only in deciding whether to impose a penalty and not in determining the amount.[161]

III. ACQUISITIONS, DIVESTITURES, AND MERGERS

A. Update on Kinder Morgan's Acquisition of El Paso

In 2012, Kinder Morgan Inc. acquired El Paso Corporation.[162] At the time, the two firms had substantial horizontal overlaps, raising concerns that the transaction, as originally proposed, would substantially reduce competition.[163] To address those concerns, the Federal Trade Commission (FTC) issued a consent order in June requiring the divestiture of three interstate pipelines owned by Kinder Morgan: Rockies Express Pipeline LLC, Kinder Morgan Interstate Gas Transmission Pipeline LLC, and Trailblazer Pipeline Company LLC.[164] The FTC order also required Kinder Morgan to provide transactional assistance to the acquirer of those assets for a period not to exceed nine months.[165] Kinder Morgan subsequently divested the pipeline assets to Tallgrass Energy Partners LP (Tallgrass) and entered into an agreement to provide the required transitional assistance to Tallgrass, including services and software support.[166]

154. *Id.* at 279.
155. *Id.*
156. *Id.*
157. *Id.* at 279-80.
158. *Id.* at 280.
159. *Id.*
160. *Id.* (citing Clifton Power Corp. v. FERC, 88 F.3d 1258 (D.C. Cir. 1996)).
161. *Id.*
162. *E.g.*, Report of the Competition & Antitrust Committee, 34 Energy L.J. 313, 317-20 (2013).
163. *Id.* at 318.
164. *Id.* at 320.
165. *Id.*; Kinder Morgan, Inc., No. C-4355, slip op. at 7 (Fed. Trade Comm'n June 12, 2012).
166. *Id.* at 320.

On August 7, 2013, Kinder Morgan filed a petition with the FTC, asking it to "reopen and modify the consent order" in order to "extend the time period allowed for transitional assistance from nine to fourteen months, with an option [for Tallgrass] to extend the [agreement by] five additional one-month periods."[167] Section 5(b) of the Federal Trade Commission Act provides that the FTC may reopen a proceeding and modify an order if it determines that the public interest so requires.[168] The Commission found that the public interest required the modification requested by Kinder Morgan because the purpose of the required divestiture was "to maintain competition in the market for the transportation of natural gas in geographic markets located in Wyoming and Colorado [and] [w]ithout the continued transitional assistance," the ability of Tallgrass to compete effectively in those markets would be materially diminished.[169] The FTC further noted that it seeks to limit the time during which transition assistance is provided in order to avoid "ongoing entanglements" among competitors, but in this case, it did not believe that the requested extension would raise concerns about such entanglements or "otherwise frustrate achieving the remedial purposes of the Order."[170]

B. Peoples Natural Gas Company's Acquisition of Equitable Gas Co.

In December 2012, Peoples Natural Gas Company LLC (Peoples) announced a proposed acquisition of Equitable Gas Company LLC (Equitable), a local gas distribution company serving retail customers in Pennsylvania, West Virginia, and Kentucky.[171] Peoples is an indirect subsidiary of SteelRiver Infrastructure Fund North America LP (SteelRiver).[172] Equitable is an indirect subsidiary of EQT Corporation (EQT).[173]

The proposed transaction included the merger of Equitable into Peoples; the transfer of certain transmission pipeline and storage assets from Peoples to EQT; and the transfer of certain pipeline, gathering, and other assets between EQT companies.[174] The transaction required the approval of the Pennsylvania Public Utility Commission (Pa. PUC), the West Virginia Public Service Commission (W.Va. PSC), and the FERC.[175] The Kentucky Public Service Commission found that it did not have jurisdiction over the transaction.[176]

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167. Kinder Morgan Inc., No. C-4355, 2013 WL 5945228, at *1 (Fed. Trade Comm'n Oct. 28, 2013).

168. Federal Trade Commission Act § 5, 15 U.S.C. § 45(b) (2012).

169. *Kinder Morgan*, 2013 WL 5945228, at *3.

170. *Id.*

171. Erich Schwartzel, *Peoples Seeks to Buy Equitable Gas*, PITTSBURGH POST-GAZETTE (Dec. 21, 2012, 12:00 AM), http://www.post-gazette.com/businessnews/2012/12/21/Peoples-seeks-to-buy-Equitable-Gas/stories/201212210251.

172. *E.g.*, Press Release, EQT, EQT Closes Gas Utility Sale (Dec. 17, 2013), http://ir.eqt.com/press-release/eqt-closes-gas-utility-sale.

173. *Id.*

174. Schwartzel, *supra* note 171.

175. *Id.*

176. PNG Companies LLC, No. 2013-00163, 2013 WL 4772992, at *55 (Ky. P.S.C. Sept. 3, 2013).

1. Pennsylvania Public Utility Commission Approval

On November 14, 2013, the Pa. PUC approved the transaction by granting the necessary certificate of public convenience and necessity.[177] The parties to the proceeding submitted two stipulations (Settlement) that addressed all of the contested issues.[178]

Under the governing statute, the Pa. PUC was required to find that "the granting of [the] certificate is necessary or proper for the service, accommodation, convenience, or safety of the public."[179] That standard "requires the Commission to find that the Proposed Transaction will 'affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.'"[180] "The 'substantial public interest' standard is satisfied by a simple preponderance of the evidence of benefits, and such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed."[181] In addition, "the substantial public benefit test does not require that every customer receive a benefit from the Proposed Transaction."[182]

The Pa. PUC found that the proposed transaction would provide numerous public benefits.[183] Perhaps the most significant was the ability of the combined companies to avoid significant capital costs.[184] In what has been described as a "unique situation," western Pennsylvania has certain geographic areas that are served by two different gas distribution companies.[185] Peoples and Equitable serve a number of those areas and, as a result, have "many miles of duplicative pipelines . . . a significant number of which are located on the same streets."[186] By avoiding the need to replace duplicative facilities as they replace bare steel and cast iron mains, the combined companies expect to save approximately $162 million.[187] They also expect to save "approximately $750,000 in current year pipeline extension costs for new or improved services that can be . . . avoided" and $50,000 per year in leak surveillance costs that can be avoided as "coincidental pipe is eliminated."[188]

177. Peoples Natural Gas Co., et al., Nos. A-2013-2353647, -2353649, -2353651 (Pa. P.U.C. Nov. 14, 2013). The Pa. PUC adopted the November 1, 2013 Initial Decision of its administrative law judge as its action in this matter. *Id.* As a result, subsequent citations with specific page references are citations to the Initial Decision.

178. *Id.*

179. Joint Application of Peoples Natural Gas Co. et al. for Authority and Necessary Certificates of Public Convenience, Nos. A-2013-2353647, -2353649, -2353651, slip op. at 63 (Pa. P.U.C. Nov. 1, 2013) (quoting 66 Pa. Cons. Stat. § 1103(a) (2014)) [hereinafter Initial Decision]. Other aspects of the transaction required approval under other Pennsylvania statutes.

180. *Id.* (quoting City of York v. Pennsylvania Pub. Util. Comm'n, 295 A.2d 825, 828 (1972)).

181. *Id.* (citing Popowsky v. Pennsylvania Pub. Util. Comm'n, 937 A.2d 1040, 1057 (2007)).

182. *Id.* (citing Popowsky, 937 A.2d at 1061).

183. *Id.* at 65-66.

184. *Id.* at 66.

185. Federal Trade Comm'n v. Equitable Res., Inc., 512 F. Supp. 2d 361, 363 (W.D. Pa. 2007).

186. Initial Decision, *supra* note 179, at 66.

187. *Id.* at 65-66.

188. *Id.* at 66.

The Pa. PUC also found that the proposed transaction would (1) provide $10 to $20 million per year in synergy savings due to merging the operations and management of the two companies,[189] (2) improve retail supply competition by combining the two companies' markets and instituting new policies and practices designed to encourage such competition,[190] and (3) encourage the development of Pennsylvania-produced gas and the expansion of pipeline infrastructure, which should create additional jobs and increase state and local tax revenues.[191]

The Pa. PUC further noted that Peoples had agreed to keep its corporate headquarters in or near Pittsburgh for at least ten years and that each LDC's current rates—as adjusted for asset transfers included in the transaction—"will be capped until January 1, 2018, unless there are substantial changes in regulation or federal tax rates or policy."[192] Moreover, if Peoples files a rate case with new rates becoming effective prior to January 1, 2019, it will demonstrate at least $15 million in synergy savings from the transaction.[193]

In order to satisfy concerns raised by the FTC involving the effect of the transaction on competition, Peoples agreed to maintain current "gas-on-gas" discounts for a period of five years after the closing.[194] Under the Settlement, however, Peoples is committed to phasing out gas-on-gas competition and moving those customers to cost-of-service tariff rates in the first rate case after the expiration of the five-year period.[195]

Finally, the Pa. PUC found that the applicants had satisfied the various "public interest factors" that it considers in deciding whether to grant a certificate of public convenience, such as the acquirer's experience as an owner and operator of public utilities, creditworthiness, and community presence.[196]

2. West Virginia Public Service Commission Approval

On November 8, 2013, the W.Va. PSC issued an order granting its consent, pursuant to West Virginia Code section 24-2-12, for the proposed transaction to go forward without approving the underlying terms.[197] As in the Pennsylvania proceeding, the parties entered into a stipulation resolving all of the key issues; although, the West Virginia stipulation recommended certain changes to the transaction as a condition of approval.[198] As a result of concerns about the proposed transfer of certain assets out of the West Virginia utility and into EQT's midstream or production businesses, it was agreed that those assets would remain with the utility.[199]

189. *Id.* at 65, 67-68.

190. *Id.* at 65, 68-70.

191. *Id.* at 65-66, 70-73.

192. *Id.* at 74, 84.

193. *Id.* at 74.

194. *Id.* at 75. "Gas-on-gas" discounts are provided to customers whose geographic location enables them to take service from more than one gas distribution company.

195. *Id.*

196. *Id.* at 82-86.

197. PNG Companies LLC, No. 13-0438-G-PC, slip op. at 10 (W. Va. P.S.C., Nov. 8, 2013).

198. *Id.*

199. *Id.* at 5, 7.

In addition, base rates will not change before 2017 unless there are substantial changes in regulation or federal tax rates or policy that would cause extreme economic hardship, and in the first base rate case, if any, filed within seven years after the moratorium, the customers will receive a $2,250,000 credit, payable over a period of seven years at $321,500 per year.[200] The new utility, Peoples Gas WV, "will continue to buy as much locally produced natural gas as possible to supply utility customers."[201] Finally, there are no plans to reduce the workforce; all of Equitable's West Virginia employees at the time of the closing would be offered continued employment, and Peoples Gas WV would maintain a West Virginia office.[202]

After reviewing the record, the W.Va. PSC found that the stipulation was fair and reasonable and that the proposed transaction, as modified by the stipulation, was in the public interest.[203]

3. FERC Approval

FERC approval was also required because the transaction involved the transfer of certain gathering facilities from Equitrans L.P. (Equitrans), an interstate pipeline, to Equitable Gas.[204] Although natural gas gathering is excluded from FERC jurisdiction under section 1(b) of the NGA,[205] some of these assets were originally certificated as transmission facilities under section 7(c) of the NGA.[206] The divestiture of any such facilities requires abandonment authority from the FERC under section 7(b) of the NGA, regardless of the current function or functionalization of those facilities.[207]

The FERC, however, had previously determined that the primary function of the facilities in question was gathering.[208] The FERC has acknowledged that where facilities to be abandoned are performing a nonjurisdictional gathering function, it has no authority to deny abandonment authorization.[209] The abandonment authority requested by Equitrans was granted on December 5, 2013.[210]

On December 17, 2013, SteelRiver announced that the acquisition of Equitable was complete.[211]

200. *Id.* at 3.

201. *Id.* at 5.

202. *Id.* at 3, 5.

203. *Id.* at 7.

204. *Equitrans L.P.*, 145 F.E.R.C. ¶ 61,195 at P 10 (2013).

205. 15 U.S.C. § 717(b) (2012).

206. 145 F.E.R.C. ¶ 61,195 at P 5.

207. *Id.* at P 18 (citing *Tennessee Gas Pipeline Co.*, 137 F.E.R.C. ¶ 61,105 at P 24 (2011); *Columbia Gas Transmission Corp.*, 86 F.E.R.C. ¶ 61,214, at p. 61,762 (1999)).

208. *Id.* at P 18.

209. *Tennessee Gas Pipeline Co*., 137 F.E.R.C. ¶ 61,105 at P 24.

210. 145 F.E.R.C. ¶ 61,195 at P 18. A group of protestors had raised a number of issues, such as the possibility of rate stacking after ownership of the gathering facilities was divided between two owners, but those concerns were addressed, and they did not oppose the abandonment. *Id.* at PP 11-12.

211. Press Release, Business Journals, SteelRiver Closes Third Regulated Gas Utility Acquisition and Creates the Largest Natural Gas Distribution Company in Pennsylvania (Dec. 17, 2013), http://www.bizjournals.com/prnewswire/press_releases/2013/12/17/SF34933.

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