REPORT OF THE COMMITTEE ON ANTITRUST

I. Introduction

This report summarizes the energy industry cases invoking the federal antitrust laws during 1994 and 1995. During this reporting period, the Supreme Court decided *Security Services v. Kmart Corp.*[1] Although not an energy case, it is noteworthy as the Supreme Court held that where a company makes an ineffective regulatory filing, it cannot invoke the filed rate doctrine.

II. Tying

In a case involving alleged unlawful tying under Section 1 of the Sherman Act,[2] El Paso Natural Gas Company (El Paso) agreed to settle an antitrust case with the Antitrust Division of the United States Department of Justice (DOJ) that will prevent El Paso from requiring gas well owners to purchase meters from El Paso as a condition to purchasing natural gas gathering services. In its complaint, filed in the United States District Court in Washington, D.C.,[3] the DOJ alleged that El Paso required well operators to purchase meters and meter installation services from El Paso at inflated rates as a condition to connecting their wells to El Paso's gathering system. The government further alleged that El Paso had market power over gas gathering[4] for many of the wells located in the San Juan Basin, and that El Paso had used its market power in gathering to force well operators to use El Paso for meter installation services that might otherwise have been purchased from third parties. In the competitive impact statement filed with the complaint, the Department alleged that well operators in the San Juan Basin would save between $11 and $15 million over the next five-year period if El Paso's well connect policies were changed as proposed by the DOJ Consent Order.

The Consent Order requires that El Paso allow each well owner the option to purchase meter installation services from a third party, or to provide the service itself. El Paso is permitted to specify reasonable standards and procedures which must be followed for meters and meter installations.

In another tying case, *Continental Trend Resources, Inc. v. OXY USA, Inc.*,[5] the United States Court of Appeals for the Tenth Circuit upheld a finding that the defendant lacked sufficient market power to sustain a tying

1. 114 S. Ct. 1702 (1994).
2. 15 U.S.C. § 1 (1995).
3. United States v. El Paso Natural Gas Co., Civ. A. No. 95-0067 (D.D.C. Aug. 4, 1995).
4. The government's assertion that El Paso has market power in gathering appears to be inconsistent with findings of the Federal Energy Regulatory Commission (FERC) in the gathering spin-down proceedings currently before the FERC. *See, Arkla Gathering Servs. Co.*, 67 F.E.R.C. ¶ 61,257 (1994), *order on reh'g*, 69 F.E.R.C. ¶ 61,280 (1994), *order issuing final authorization on reh'g*, 70 F.E.R.C. ¶ 61,079 (1995). *See also, NorAm Gas Transmission Co.*, 70 F.E.R.C. ¶ 61,018 (1995). It is not clear that the DOJ and the Commission are using the same methodology to determine market power.
5. 1995 U.S. App. LEXIS 573 (Jan. 12, 1995).

claim, although it upheld a $30 million punitive damage award on a claim of tortious interference with existing and prospective contracts. Plaintiffs own interests in gas wells in the Sooner Trend, a four-county area in Oklahoma. Williams Natural Gas Company and OXY USA, Inc., which own and operate the processing plant and gathering system, allegedly refused to transport gas from plaintiffs' wells unless they also purchased gas processing from defendants as well.

The district court granted summary judgment for the defendants on the antitrust claims[6] and the Tenth Circuit affirmed. The court rejected plaintiffs' relevant market which consisted of only low-volume gas wells requiring long-term contracts, a market they contended was completely controlled by defendants. The court of appeals agreed with the district court view that the smallest possible relevant market would be all gas wells in the four-county area where the gas wells at issue are located. Defendants controlled less than 10% of that market. Although the court would not hold that a 10% share is *per se* insignificant, the court found that the plaintiffs had failed to rebut the presumption that defendants' relatively insignificant market share did not constitute monopoly power, citing evidence that the four-county area was served by 16 pipelines and gathering systems and 13 gas processing plants, and that plaintiffs themselves sold or transported gas in that four-county area through many other companies.

III. Government Activity and Petitioning

Cases concerning government activity or petitioning continue to constitute a significant portion of antitrust cases involving energy. Several recent cases have applied the state action doctrine. The *Noerr-Pennington* and filed rate doctrines were also considered.

The state action doctrine provides an affirmative defense to antitrust claims if "[f]irst, the State has articulated a claim and affirmative policy to allow the anti-competitive conduct, and second, the State provides active supervision of anti-competitive conduct undertaken by private actors."[7] The immediately preceding antitrust committee report discussed *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*,[8] which involved an allegation that a utility's promotion of the use of heat pumps had anti-competitively increased the utility's share of the home heating market.[9] In that case, the trial court granted summary judgment in favor of the utility on the grounds that its heat pump promotion programs were "conducted pursuant to a clearly articulated state policy and under active state supervision," and therefore were protected by the state action doctrine.[10] The court found it sufficient that the utility's programs "logically followed" from Pennsylvania Public Utility Commission (PPUC) policies that encouraged, although did

6. 1991-2 Trade Cas. (CCH) ¶ 69,510.

7. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992).

8. 804 F. Supp. 700 (E.D. Pa. 1992), *aff'd in part, rev'd in part*, 22 F.3d 1260 (3d Cir. 1994).

9. *Id.*

10. *Id.* at 702.

not compel, state utilities to develop rebate and load management programs.[11] The court also found that the PPUC had ample authority to regulate load management programs, and "through adjudications, rulemakings, and investigations, has exercised its pervasive authority."[12]

On appeal, however, the case was set for hearing. The United States Court of Appeals for the Third Circuit confirmed that the utility was entitled to immunity under the state action doctrine for its program of cash grants and other incentives to builders and developers that offered customers a special rate on the installation of certain electric heating systems. Since the utility offered a service related to those heating systems and that service was approved by the PPUC, the Third Circuit affirmed that the program qualified for immunity under the state action doctrine.

The utility also offered other benefits to builders and developers in connection with "all electric development agreements." The circuit court remanded for hearing before the trial court the allegations concerning the all-electric development agreements.

In *Municipal Utilities Board of Albertville v. Alabama Power Co.*,[13] the United States Court of Appeals for the Eleventh Circuit affirmed a district court dismissal on state action grounds. An antitrust complaint by 30 Alabama municipalities (Municipalities) was filed against Alabama Power Company and several cooperatives claiming that they allocated territory and customers.[14] The Eleventh Circuit applied the *Midcal*[15] two-prong test to determine that the state action doctrine protected the activity of the power company and the cooperatives. The first prong of the *Midcal* test was satisfied in that it was clear that the Alabama legislature had permitted the activity of territory division and customer allocation undertaken by the power company and the cooperatives to "prevent duplication of electric facilities."[16] The second prong of the *Midcal* test, however, was more problematic because it requires a showing that the state actively supervised the conduct of the power company and the cooperatives in implementing the agreements to allocate territories and customers. To make that showing, the Eleventh Circuit remanded the case to the district court for a review of the underlying contracts between the power company and the cooperatives to determine whether the state did, in fact, supervise the actual division of territories under the agreements. On remand, the district court interpreted the Alabama statute as requiring legislative approval for any subsequent transactional changes under the agreements. The court found that state approval of the actual division of territories and customers was required under the statute to comply with the second prong of the *Midcal* test. On appeal, the Eleventh Circuit affirmed.

11. *Id.* at 709.

12. *Id.* at 712.

13. 934 F.2d 1493 (11th Cir. 1991), *cert. denied*, 115 S. Ct. 1096 (1995).

14. 21 F.3d 384 (11th Cir. 1994).

15. *Midcal*, 455 U.S. 97.

16. Municipal Utils. Bd. of Albertville v. Alabama Power Co., 984 F.2d 1493, 1501-02 (4th Cir. 1991).

On November 25, 1994, the Municipalities filed a petition for writ of certiorari with the United States Supreme Court. The Municipalities argued that there was, in fact, no effective state supervision over certain territorial "private agreements" negotiated by the parties which were essentially grandfathered when the state adopted the legislation. In addition, the Municipalities argued that inevitably there will be private party discretion exercised in the reallocation of customers which will not be supervised by any state agency. The Supreme Court refused to hear the case.

In another state action case, *TEC Cogeneration, Inc. v. Florida Power & Light Co.,*[17] a Florida cogenerator (TEC) was permitted to proceed with its section 2 claims against FP&L, based, in part, on the utility's refusal to wheel power from the cogeneration facility to one of its retail customers. The United States Court for the Southern District of Florida ruled that while FP&L's actions were contemplated by the Florida regulatory scheme, they failed the second prong of the *Midcal* test, in that the state public service commission did not actively supervise the conduct that formed the basis of the allegations.

TEC operated a cogeneration facility that sold power to a government office complex in Dade County, Florida. Rather than selling its excess generation back to FP&L, or wheeling to another utility, which it was entitled to do under PURPA[18] and Florida law,[19] TEC wanted to sell its excess power at retail to another government office, by wheeling it over FP&L's lines. FP&L refused to wheel and, according to TEC, took additional steps to frustrate TEC's efforts, including engaging in discriminatory practices with respect to services, rates and interconnection of facilities, improper manipulation of the avoided cost rates, predatory pricing of bids by FP&L's unregulated subsidiary, and attempts to cut off its access to natural gas.

The district court found that the activities alleged were within Florida's clearly articulated policies regarding FP&L's monopoly in the power transmission field.[20] Nonetheless, the court found that the Florida Public Service Commission (FPSC), which establishes and enforces guidelines for interconnection, self-service wheeling, and many applicable price rates, did not directly supervise three specific elements of the anticompetitive conduct allegedly committed by defendants: (1) refusal to wheel; (2) predatory use of rates; and (3) interference with interconnection. The court concluded that while *Ticor* does not require that the state supervise every action taken by an entity with monopoly power, state officials must have *and* must exercise power to review particular anticompetitive acts. While the FPSC had that power, it was not given the opportunity to review FP&L actions toward TEC.[21]

17. 1994-1 Trade Cas. (CCH) ¶ 70,564 (S.D. Fla. Feb. 21, 1994).
18. 16 U.S.C. § 824a-3 (1995).
19. FLA. STAT. ch. 366.051 (1991).
20. 1994-1 Trade Cas. (CCH) ¶ 70,564, at 72,066-68.
21. *Id.* at 72,073.

The court also rejected FP&L's *Noerr-Pennington*[22] defense since defendant's conduct fell within *Allied Tube's*[23] commercial activity's exception with respect to lobbying efforts aimed at Dade County. The court found that FP&L's actions were part of a broader, allegedly illegal, effort to retain Jackson Memorial as FP&L's customer. This effort was in direct contravention to Florida's policies promoting cogeneration, and was aimed at a commercial purchasing decision of the County, not a political or "policy" decision.[24]

In *County of Stanislaus v. Pacific Gas & Electric Co.*, the United States Court for the Eastern District of California invoked the filed rate doctrine to narrow claims against an investor-owned utility.[25] The district court found that acts, forming the basis of section 2 charges against Pacific Gas & Electric Company (PG&E) and its subsidiaries, Alberta and Southern Gas (A&S) and Pacific Gas Transmission Company (PGT), were regulated by the California Public Utility Commission (CPUC), the Federal Energy Regulatory Commission, or the Department of Energy, which polices gas imports. Under *Keogh v. Chicago & Northwestern Railway Co.*,[26] if no antitrust injury beyond that caused by the rate filed with a regulatory body has been alleged, the court may not award damages or direct defendants to take actions which may interfere with the regulatory scheme.

The complaint in this case alleged that PG&E used its exclusive control over the PGT pipeline to protect long-term gas contracts with a pool of Canadian gas producers who did business with A&S by keeping the pipeline filled with A&S gas, such that it was incapable of transporting cheaper gas for non-core customers—larger industrial users—who could, but for the capacity constraint, in theory bargain for alternative sources of supply or price. This conduct resulted in PG&E advancing hundreds of millions of dollars to Canadian gas producers for gas not yet taken and keeping the pipeline full of unneeded, expensive gas. PG&E allegedly could have replaced at least 50% of expensive A&S gas with lower-cost spot gas.

The court noted that the complaint alleged injury in the form of higher utility rates, which were passed on pursuant to the various regulatory schemes to the plaintiff ratepayers. Although the challenged purchases were made by an unregulated wholly owned subsidiary of PG&E, the court, citing *Nantahala Power & Light Co. v. Thornburg*,[27] held that the weight of authority applies the filed rate doctrine to conduct engaged in by closely related entities. The court also found that the CPUC's extensive oversight of PG&E's natural gas sales and purchase decisions, which include "thorough and searching" rate reasonableness reviews, immunize

22. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

23. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 505-07 (1988).

24. 1994-1 Trade Cas. (CCH) ¶ 70,564, at 72,073-75.

25. 1994-2 Trade Cas. (CCH) ¶ 70,782 (E.D. Cal. Aug. 25, 1994).

26. 260 U.S. 156 (1922).

27. 476 U.S. 953, 965 (1986).

the utility under the state action doctrine, but that PGT's actions are not similarly immunized.

IV. Monopolization and Attempted Monopolization

Oneok, Inc. and two of its state-regulated gas transportation subsidiaries were sued for antitrust violations under Oklahoma antitrust laws in the District Court of Rogers County of the State of Oklahoma.[28] Agricultural Minerals, headquartered in Tulsa, Oklahoma, alleged that Oneok and its subsidiaries utilized their monopoly position to charge excessive rates and to insist on secrecy by the customers concerning their transportation rates with defendants. Agricultural Minerals' largest cost component in the production of its fertilizer is the cost of natural gas. Oneok and its subsidiaries supply gas not only to Agricultural Minerals but to its competitors in the fertilizer manufacturing business. Agricultural Minerals further alleged that Oneok and its subsidiaries demand all-requirements service from customers. The claims brought by Agricultural Minerals were dismissed with prejudice on September 7, 1995.

A Canadian gas marketer, Norcen Energy Resources Ltd. and Norcen Marketing, Inc. (collectively Norcen), filed a complaint grounded in several antitrust claims, among other things, against PG&E and PGT in March 1994. Norcen's claims alleged violations of sections 1 and 2 of the Sherman Act and restraint of trade under the Cartwright Act, the California antitrust law. Plaintiffs' complaint alleged that the defendants engaged in an unlawful pattern of behavior which denied them access to interstate transportation services to the California border and encumbered the services that were offered with a requirement that the shipper use noncompetitively priced intrastate facilities owned by defendants. PGT is a pipeline company regulated by the FERC under the Natural Gas Act. It owns and operates a newly expanded interstate pipeline system that connects California with natural gas supplies in Canada. PGT's parent is PG&E which owns and operates intrastate facilities in California. PGT's facilities are connected with PG&E's facilities. PG&E, like PGT, undertook an expansion of its intrastate transmission facilities. The expansion facilities of both PGT and PG&E are priced at a substantial premium above their existing facilities for transporting gas. The Norcen complaint alleged that expansion shippers on PGT are denied access to the more favorably priced capacity on the existing facilities.

The Norcen complaint alleged, among other things, that: (1) PG&E's request to state regulators to prohibit PGT Expansion shippers from selling gas to holders of existing PG&E capacity was an unlawful tying; (2) PGT's refusals to provide service to Norcen from 1987 to 1993 on the pre-PGT Expansion facilities was a violation of the essential facilities doctrine; (3) PGT's and PG&E's failure to disclose its pursuit of the "crossover ban" before state regulators two days before Norcen's 30-year contract for PGT

28. Agricultural Minerals Ltd. v. Oneok, Inc., No. CJ94-93, *filed* March 4, 1994, *dismissed with prejudice* (Rogers County Courthouse, Sept. 7, 1995).

Expansion capacity was binding gave rise to antitrust injury; and (4) PGT's and PG&E's entire course of conduct was anticompetitive.

On September 19, 1994, the United States Court for the Northern District of California dismissed with prejudice all antitrust claims arising from the state's adoption of the crossover ban on the grounds of state action and *Noerr-Pennington*. The remaining antitrust claims were resubmitted in an amended complaint, against which several motions to dismiss have been lodged and currently are pending.

In *Florida Municipal Power Agency v. Florida Power & Light Co.*,[29] a municipal power supply agency sued FPL on antitrust and contract grounds for FPL's alleged refusal to sell network, as opposed to point-to-point, transmission services. The district court held that FMPA's suit was barred on filed rate doctrine grounds, because FPL had point-to-point transmission contracts on file at the FERC. It also held that the court could not determine damages because it could not set a proper, retroactive transmission rate. The court held that it could grant injunctive relief, but that the FERC was handling the matter.

The court of appeals reversed, holding that if point-to-point and network services are different services and FPL had no filed network rate, then a court can award damages for a utility's refusal to deal in network services, even though it has point-to-point contracts on file. It vacated the district court's grant of summary judgment and denial of injunctive relief and remanded for the district court to make a finding whether the services are, in fact, different.[30]

Antitrust agencies remain skeptical of regulatory controls because they can be manipulated by regulated firms. The Federal Trade Commission (FTC) recently prevented a major pipeline acquisition using its authority under section 5 of the Federal Trade Commission Act and section 7 of the Clayton Act.[31] The FTC challenged the transfer of a 50% interest in Kern River Gas Transmission Company to Questar Corporation, the only pipeline serving Salt Lake City. Kern River was a potential competitor in the Salt Lake City market. As a result of the FTC's proceeding, the acquisition was abandoned and another pipeline is now acquiring the interest in Kern River. The alternative purchaser is not an actual or potential competitor in the Salt Lake City market.

V. Hart-Scott-Rodino Act

The federal antitrust enforcement agencies also continued their active enforcement of the reporting requirements under the Hart-Scott-Rodino Act (Act).[32] In *United States v. Pennzoil Co.*,[33] Pennzoil Company agreed

29. Florida Mun. Power Agency v. Florida Power & Light Co., 839 F. Supp. 1563, 1571-72 (M.D. Fla. 1993), *rev'd*, 64 F.3d 614 (11th Cir. 1995).

30. Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 616-17 (11th Cir. 1995).

31. FTC v. Questar, Civil No. 2:95 CV 11275S (C.D. Utah filed December 27, 1995).

32. 15 U.S.C. § 18A (1994).

33. No. 94-CVO-2077, 1994 WL 655049 (D.D.C. Oct. 28, 1994).

to pay a $2.6 million civil penalty to settle charges that it failed to file a premerger notification form and observe the statutory 30-day waiting period before acquiring more than $2.1 billion worth of voting securities in Chevron Corporation.

According to the complaint, Pennzoil acquired in excess of $15 million worth of voting securities in Chevron in September 1989 without complying with the Hart-Scott-Rodino Act. It went on to acquire approximately 8.9% of Chevron stock for approximately $2.1 billion, again without notifying either enforcement agency. Pennzoil waited until 10 months after the transactions to file under the Act.

The Act exempts investments made "solely for investment," as long as the acquisition constitutes less than 10% of the acquired company,[34] which was the case here. The DOJ and the FTC, however, take the position that the exemption does not apply where the acquiring company contemplates active participation in the acquired company's management or where the acquiring and acquired company are competitors. In this case, Pennzoil's senior management anticipated membership on Chevron's board of directors and participation in the formulation of Chevron's business decisions. Pennzoil and Chevron also are direct competitors in a number of markets.

VI. Attorney Fees

The long-standing battle between Williams Natural Gas Company and eight of its municipal customers in Kansas yielded a decision by the United States Court of Appeals for the Tenth Circuit. The case stems from Williams' decision in 1987 to end a temporary open access program. Early in the case, plaintiffs had obtained a preliminary injunction, which was vacated after the FERC approved Williams' permanent open access plan. The plaintiff cities pursued their damage claims, eventually losing on the merits in a decision construing the business justification defense to the essential facilities doctrine.[35] Despite that decision, plaintiffs asked the court for attorneys fees under section 16, of the Clayton Act.[36] The Tenth Circuit rejected plaintiffs' argument that they qualified as the "prevailing" parties in the case due to their success in obtaining a preliminary injunction against Williams and a partial settlement that resulted in Williams filing an open access tariff at the Commission.[37] The court ruled that, in order to be entitled to attorney fees, plaintiffs had to demonstrate that they "substantially prevailed" on the merits in connection with their damage claims.

The "substantially prevailed" test comes from an interpretative framework developed in the civil rights context under 42 U.S.C. § 1988, and the Tenth Circuit agrees that this is the correct test to apply—even though sec-

34. *See* 15 U.S.C. § 18A(c)(9) (1994).

35. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992).

36. 15 U.S.C. § 26 (1994).

37. City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041 (10th Cir. 1994).

tion 16 contains slightly different language.[38] While a preliminary injunction, in some circumstances, qualifies as judicially-awarded relief supporting a fee award,[39] the preliminary injunction in this case did not represent "the final word from the courts on the merits of the case." Nor did the court find that plaintiffs have met the "catalyst test," since the defendant's change in position was not required by law in view of the ultimate decision against plaintiffs. The Tenth Circuit concluded that the court will not reward the cities for any benefits they achieved (if any) through this litigation where their antitrust allegations "lacked merit from the inception of the suit, regardless of any preliminary determination by the district court."[40]

VII. Business Review Letters

A group of 37 electric and gas companies, municipal utilities, municipalities, regional utility organizations, and independent power producers obtained a favorable business review from the DOJ for their plan to form and operate a joint venture to develop and commercialize alternative means to generate electricity.[41] The Department determined that the group, which is called the Fuel Cell Commercialization Group (FCCG), is unlikely to facilitate price fixing or otherwise reduce competition in the development of alternative energy sources. FCCG proposed to help Energy Resource Corporation (ERC), a manufacturer of molten carbonate fuel cells, overcome the technical and economic barriers to the commercial use of the cells as a source of clean and reliable electrical power.

FCCG was formed pursuant to the National Cooperative Research and Production Act.[42] It would coordinate research and development contributions to ERC and would publish and disseminate regularly, information about the benefits of power plants to electric utilities around the country. Individual FCCG members would be acting for themselves, however, in contributing to the cost of the demonstration unit and in placing contingent orders for ERC's plants. FCCG members would be free to engage in similar relationships with other fuel cell manufacturers. FCCG would also work with additional fuel cell manufacturers that are capable of meeting objective criteria. The DOJ noted that where FCCG members compete for customers, their limited cooperation would not facilitate collusion in utility markets, and that the FCCG commercialization program would not limit other utilities' access to the resultant fuel cell power plants

38. Section 16 of the Clayton Act, authorizes fees in which the plaintiff "substantially prevails." Section 1988 provides that fees may be awarded where a party "has received at least some relief on the merits of [its] claim by judicial determination," Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 109 S.Ct. 1486, 1493 (1989), or where the plaintiff has been a "significant catalyst" causing a defendant to change a position where the change was required by law. Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

39. *See* Dahlem v. Board of Educ., 901 F.2d 1508, 1511-14 (10th Cir. 1990).

40. *City of Chanute*, 31 F.3d at 1049.

41. Dep't of Justice—Antitrust Division, Business Review Letter, 1994 DOJBRL LEXIS 6 (Apr. 20, 1994).

42. 15 U.S.C. § 4301-4305.

or limit FCCG members from participating in other programs relating to this technology. FCCG's limited life span of five to eight years was cited as further assurance that no unreasonable competitive advantage would be conferred on its members.

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