FEBA ANTITRUST COMMITTEE REPORT

I. JUDICIAL DECISIONS

A. Standing

In *City of Pittsburgh v. West Penn Power Co.*,[1] the Third Circuit Court of Appeals affirmed the dismissal of the City of Pittsburgh's (City) antitrust complaint on grounds that the City lacked standing. Believing that competition for retail service would facilitate economic development, the City encouraged Allegheny Power and Allegheny Power Systems (collectively Allegheny) to provide retail electric service to two Redevelopment Zones, which were then being exclusively served by Duquesne Light Company (Duquesne).[2] Both Allegheny and the City filed petitions before the Pennsylvania Public Utilities Commission (Penn PUC) asking that Allegheny Power be awarded a certificate of public convenience and necessity to provide service to the Redevelopment Zones.[3] Before the Penn PUC issued a decision regarding the petitions, Allegheny and Duquesne announced their merger to form West Penn Power Company and entered into a premerger agreement.[4] Allegheny subsequently filed a petition to withdraw its application before the Penn PUC.[5] The City filed a complaint in federal district court against Allegheny and Duquesne and withdrew its petition before the Penn PUC.[6]

The complaint alleged that the premerger agreement was a restraint on trade in violation of section 1 of the Sherman Act.[7] The City also sought injunctive relief, arguing that the merger violated section 7 of the Clayton Act.[8] The district court dismissed the complaint, holding that the City lacked standing because there had been no "antitrust injury."[9] Applying the multi-factor standing test described in *Associated General Contractors of California v. California State Council of Carpenters*,[10] the Third Circuit held that two of the standing factors were not shown to be present: (1) an injury which the antitrust laws were intended to redress; and (2) any causal connection between the defendants' actions and the alleged injury.[11] According to the court, the City could not demonstrate that the actions of the defendant had any anticompetitive effects because no competition was present before the merger.[12] The court did not attribute the ab-

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1. City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998).
2. *Id.* at 259.
3. *West Penn Power*, 147 F.3d at 260.
4. *Id.* at 261.
5. *West Penn Power*, 147 F.3d at 261.
6. *Id.* at 262.
7. *West Penn Power*, 147 F.3d at 258.
8. *Id.*
9. *West Penn Power*, 147 F.3d at 262.
10. Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 537-45 (1983).
11. *West Penn Power*, 147 F.3d at 264.
12. *Id.* at 266.

sence of competition to the premerger agreement or the proposed merger, but instead to the fact that the Penn PUC had never awarded Allegheny a certificate to provide service.[13] Thus, the court reasoned that the inability to provide retail competition was caused by the "regulated nature of utility services."[14] The Court noted that deregulation could make it easier for future plaintiffs to establish standing:

> The very essence of our ruling is that the advent of deregulation will likely remove the break in the causal chain so that future utility arrangements in the free market atmosphere may well pass muster for purposes of standing under the antitrust laws. Had the ability of the utilities to serve various customers in various regions not been subject to the approval of the PUC, our standing analysis would be radically different.[15]

B. *Sufficiency of the Antitrust Complaint*

The Third Circuit affirmed the dismissal of antitrust allegations in *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*[16] The suit arose out of a power purchase agreement between Orange & Rockland Utilities, Inc. (O&R) and Crossroads Cogeneration Corp. (Crossroads), the owner of a qualifying facility (QF) connected to the O&R system.[17] The agreement obligated O&R to purchase up to 4 megawatts (MW) of energy produced by the QF at an established rate.[18] Nine years after the agreement was executed, Crossroads added a new gas turbine to the QF and requested that O&R purchase the additional energy at the established rate.[19] O&R claimed that Crossroads was supplementing the original generators in order to take advantage of the above-market rates specified in the agreement and refused to purchase the excess energy.[20] After the New York Public Service Commission declined to address the correct interpretation of the agreement, Crossroads filed suit in federal district court seeking recovery for breach of contract and antitrust violations.[21] Crossroads accused O&R of monopolization and attempted monopolization in violation of section 2 of the Sherman Act and price discrimination in violation of section 2 of the Clayton Act.[22]

Although the Third Circuit reversed the district court's dismissal of the contract claims, the court upheld the dismissal of the antitrust claims.[23] The court held the allegation that O&R was the sole provider of electric service in certain counties failed as a matter of law to demonstrate monopoly power.[24] Ac-

13. *West Penn Power*, 147 F.3d at 266.
14. *Id.*
15. *West Penn Power*, 147 F.3d at 269.
16. Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 159 F.3d 129 (3d Cir. 1998).
17. *Crossroads*, 159 F.3d at 133.
18. *Id.*
19. *Crossroads*, 159 F.3d at 133.
20. *Id.*
21. *Crossroads*, 159 F.3d at 134.
22. *Id.* at 138, 140.
23. *Crossroads*, 159 F.3d at 134.
24. *Id.* at 141.

cording to the court, a monopolization claim under the Sherman Act required more than allegations of mere market share.[25] Because Crossroads conceded that it competed with O&R in selling capacity and failed to show why it would be prevented from doing so in the future, the court found no indication of other factors, such as anticompetitive conduct or barriers to entry, that would suggest monopolization.[26] Regarding O&R's claim of price discrimination, the court noted that the complaint only alleged that O&R offered to sell electricity at a rate lower than that charged by Crossroads.[27] The court concluded that Crossroads failed to state a claim for price discrimination, because Crossroads failed to allege that O&R had made any sales at different prices or that there was any anticompetitive effect from the offers to sell.[28]

In *Aquatherm Industries, Inc. v. Florida Power & Light Co.*,[29] the Eleventh Circuit affirmed the dismissal of an antitrust complaint against Florida Power & Light Co. (FP&L). During a direct-mail and advertising campaign designed to increase the use of electrical power, FP&L promoted electric heating pumps for swimming pools as "the most cost-effective pool heating method available."[30] Aquatherm Industries, Inc. (Aquatherm), a manufacturer of solar-powered heating systems, filed a federal antitrust action against FP&L alleging monopolization, attempted monopolization, monopoly leveraging, conspiracy to monopolize, and a tying arrangement, all in violation of the Sherman Act.[31] The suit was dismissed by the federal district court, and Aquatherm appealed.[32]

A three-judge panel for the Eleventh Circuit rejected the monopolization and attempted monopolization claims, holding that Aquatherm failed to allege either that FP&L's actions increased its market share in the electric market or that FP&L competed at all in the swimming pool heater market.[33] Likewise, even though a claim of monopoly leveraging could be made where a firm used monopoly power in one market (e.g., electric power) to gain an advantage in another market (e.g., pool heaters), the fact that FP&L never competed in the pool-heater market was fatal to Aquatherm's leveraging claim.[34] The court also found allegations that FP&L conspired with manufacturers and sellers of electric heat pumps to obtain a monopoly or to restrain trade in the pool-heater market to be vague, conclusory, and insufficient as a matter of law.[35] Regarding Aquatherm's tying arrangement claim, the court held that even if FP&L had falsely advertised the efficiency of electric heat pumps, this did not rise to the level of coercion necessary to show that FP&L used its monopoly power in the electric market to

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25. *Crossroads*, 159 F.3d at 141.
26. *Id.* at 141-42.
27. *Crossroads*, 159 F.3d at 142.
28. *Id.*
29. Aquatherm Indus., Inc. v. Florida Power & Light Co., 145 F.3d 1258 (11th Cir. 1998).
30. *Id.* at 1260.
31. *Aquatherm*, 145 F.3d at 1260-61 (citing Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1999)).
32. *Id.* at 1260.
33. *Aquatherm*, 145 F.3d at 1261.
34. *Id.* at 1262.
35. *Aquatherm*, 145 F.3d at 1261-63.

coerce consumers into buying electric heat pumps.[36] The court also found unpersuasive Aquatherm's "group boycott" theory based on allegations that FP&L had enticed pool contractors to refuse to sell or make referrals for solar heat pumps.[37] Aside from the fact that Aquatherm failed to identify any specific group of contractors that were pressured, the court held that the mere offering of enticements fell short of the pressure and coercion necessary to establish a group boycott.[38]

In *Town of Norwood v. New England Power Co.*,[39] the Massachusetts District Court dismissed the antitrust claims of a municipal utility, the Town of Norwood (Norwood), against New England Power Company (NEPCO). The claims arose out of the sale of NEPCO's nonnuclear generation assets to USGen Company and the FERC's approval of tariffs that allowed NEPCO to sell power to its affiliates at discount rates, while selling to Norwood at higher rates that included a "contract termination charge."[40] According to the court, Norwood's antitrust claims were prohibited by the filed rate doctrine, reasoning that "Norwood essentially claims that the FERC-approved market-based rates charged to NEPCO's affiliates and the contract termination charges are the product of antitrust violations, a claim prohibited by the filed rate doctrine because it would ultimately require the Court to assess a just and reasonable rate."[41]

The court rejected Norwood's argument that the filed rate doctrine did not apply to the market-based rates being offered to NEPCO's affiliates, stating that "[w]hile reliance on the filed rate doctrine... may be on weaker footing as the electric utility industry returns to the marketplace, no obituary is in order."[42]

C. *Antitrust Immunity under the State Action Doctrine*

In *United States v. Rochester Gas & Electric Corp.*,[43] the district court denied the motion for summary judgment of Rochester Gas & Electric Corp. (RG&E) in an action brought by the Department of Justice (DOJ). The dispute arose when the University of Rochester (University) decided to abandon its plans to build a cogeneration plant after RG&E offered the University reduced rates for electrical service.[44] The DOJ alleged that RG&E's agreement with the University violated section 1 of the Sherman Act, because RG&E offered the rate reduction in exchange for the University's promise not to compete.[45]

RG&E argued that it was immune from antitrust liability under the state action doctrine because the activity in question—awarding discount rates—was authorized by state law.[46] The court rejected the argument, finding instead that

36. *Id.* at 1263.
37. *Aquatherm,* 145 F.3d at 1263.
38. *Id.*
39. Town of Norwood v. New England Power Co., 23 F. Supp. 2d 109 (D. Mass. 1998).
40. *Id.* at 116.
41. *Norwood,* 23 F. Supp. 2d at 117. (citation omitted).
42. *Id.* at 118.
43. United States v. Rochester Gas & Elec. Corp., 4 F. Supp. 2d 172 (W.D.N.Y. 1998).
44. *Id.* at 173
45. *RG&E,* 4 F. Supp. 2d at 173.
46. *Id.* at 175.

New York law did not authorize a utility "to impose anticompetitive conditions on potential competitors in return for discounted utility rates."[47] RG&E also requested summary judgment because: (1) the University was never a competitor in the electricity market; and (2) an agreement not to compete between non-competitors did not violate the Sherman Act.[48] The court found that there was evidence that the University had considered becoming a competitor of RG&E and, therefore, decided that the question was one of fact for the jury.[49] Moreover, the court rejected RG&E's argument that the University's status as a competitor was too attenuated because of the legal and regulatory hurdles associated with selling power on the open market.[50] The court held that this also raised a question for the jury.[51]

Shortly after the court's decision, RG&E entered into a "Stipulation and Consent Judgment" with the DOJ.[52] The stipulation provided, among other things, that RG&E would not enter into or enforce any other provisions in other power sales contracts that would prevent its customers from developing alternative sources of power.[53] The stipulation will end either in ten years or when RG&E accounts for less than 50% of the non-residential retail sales of electricity at unregulated prices in Monroe County, New York, whichever comes first.[54]

In *North Star Steel Texas, Inc. v. Entergy Gulf States, Inc.*,[55] the district court granted summary judgment to Entergy Gulf States, Inc. (Entergy) on the grounds of state action immunity. The lawsuit grew out of Entergy's refusal to accept proposals by North Star Steel Texas, Inc. (North Star) to allow it to purchase power from sources other than Entergy via retail wheeling or earmarking power.[56] The court concluded that Entergy's decision not to proceed with North Star's proposal was protected by the state action doctrine.[57] In this regard, the court found that the state of Texas has a clearly articulated policy of displacing competition with regulation in the electric industry at large and specifically with respect to retail wheeling and earmarking power.[58] The court also held that the Public Utilities Commission of Texas (PUCT) actively supervised this policy, and North Star could file a complaint before the PUCT if it believed it was aggrieved by Entergy's actions.[59]

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47. *RG&E*, 4 F. Supp. 2d at 175.
48. *Id.* at 176 (citing Sherman Antitrust Act, 15 U.S.C. §§ 1-7).
49. *RG&E*, 4 F. Supp. 2d at 177.
50. *Id.*
51. *RG&E*, 4 F. Supp. 2d at 177.
52. United States v. Rochester Gas & Elec. Corp., 1998-1 Trade Cas. ¶ 72,200 (W.D.N.Y. June 17, 1998).
53. *Id.*
54. *RG&E*, 1998-1 Trade Cas. ¶ 72,200.
55. North Star Steel Tex., Inc. v. Entergy Gulf States, Inc., 33 F. Supp. 2d 557 (S.D. Tex. 1998).
56. *Id.* at 559.
57. *North Star Steel*, 33 F. Supp. 2d at 567.
58. *Id.* at 560-64.
59. *North Star Steel*, 33 F. Supp. 2d at 564-66.

D. Attorney Fees and Costs

In *Columbia Steel Casting Co. v. Portland General Electric Co.*,[60] a federal district court addressed the appropriateness of an attorneys fees award arising out of an antitrust claim against Portland General Electric Co. (PGE). Columbia Steel Casting Co., Inc. (Columbia Steel) won summary judgment against PGE based on its claim that PGE's agreement with Pacific Power & Light to divide the Portland area into exclusive service territories violated the Sherman Act.[61] After several appeals regarding the underlying claims and an attempt by Columbia Steel to collect its judgment in the state courts of Oregon, Columbia Steel moved for an additional award of attorneys fees and costs.[62]

PGE argued that Columbia Steel had not filed its motion for additional fees within fourteen days after the judgment was filed, as required by Fed. R. Civ. P. 54(D)(2)(A).[63] Unpersuaded, the court allowed the fees and costs, because Columbia Steel filed its motion "within a reasonable time after the amount of fees incurred was known to Columbia Steel."[64] The court also allowed Columbia Steel to recover fees and costs associated with an appeal of a damages issue, even though Columbia Steel ultimately decided to accept PGE's position on that issue.[65] In light of the fact that Columbia Steel had only accepted PGE's position to avoid further litigation and was still entitled to a judgment of close to $2 million, the court concluded that the fees involved with the appeal "were reasonable and prudent expenses."[66] However, the court disallowed certain fees and costs resulting from Columbia Steel's attempt to collect its judgment in state court.[67] The court held that it was not reasonable for Columbia Steel to continue proceedings in state court after the district court approved PGE's supersedeas bond pending appeal.[68]

E. Settlements

In the decision, *In re Lease Oil Antitrust Litigations*,[69] a federal district court addressed the question of whether a state court settlement that purports to release federal antitrust claims protects the settling defendant against litigation in federal court regarding the released federal antitrust claims. The underlying lawsuits consisted of a number of class actions alleging that oil companies had conspired to artificially depress production royalty payments owed to class members.[70] One such class action was filed in Alabama state court and raised claims

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60. Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 31 F. Supp. 2d 866 (D. Or. 1998).

61. Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 770 F. Supp. 562 (D. Or. 1993), *aff'd in part and vacated in part*, 111 F.3d 1427, 1435-36 (9th Cir. 1997).

62. *Columbia Steel*, 31 F. Supp. 2d at 867.

63. *Id.* at 868.

64. *Columbia Steel*, 31 F. Supp. 2d at 868.

65. *Id.*

66. *Columbia Steel*, 31 F. Supp. 2d at 868.

67. *Id.*

68. *Columbia Steel*, 31 F. Supp. 2d at 868.

69. In re Lease Oil Antitrust Litigation, 16 F. Supp. 2d 744, 759 (S.D. Tex. 1998).

70. *Id.* at 745-46.

grounded in state, not federal, antitrust statutes. Mobil Oil Company (Mobil) entered into a settlement agreement in the Alabama action that purported to release all state and federal claims held by class members against Mobil.[71] A number of other class actions that included Mobil as a defendant, and raised federal and state antitrust claims, were consolidated before the United States District Court for the Southern District of Texas by the Judicial Panel on Multidistrict Litigation.[72] Mobil moved to dismiss the consolidated federal action by arguing that, under the Full Faith and Credit Act and the Rooker-Feldman doctrine, the Alabama settlement precluded litigation of the federal antitrust claims against Mobil.[73]

Although the court recognized that, under the Full Faith and Credit Act, state court judgments could preclude claims of exclusive federal jurisdiction (such as antitrust claims), the court concluded that there would be a preclusive effect only if state law indicated that the claim would be barred in litigation before a court of that state.[74] After analyzing Alabama law regarding claim preclusion, the court concluded that Alabama courts would only give a settlement preclusive effect if the state court had "prior jurisdictional competency," i.e., only if the state court could have heard the supposedly precluded claim in the first instance.[75] Because federal antitrust claims are of exclusive federal jurisdiction, the Alabama state court that approved the settlement could not have heard the federal antitrust claim. Therefore, any settlement approved by that court could not preclude subsequent litigation of the federal claims in federal court against Mobil.[76]

The court also held that although the Rooker-Feldman doctrine prevents collateral attacks on state court judgments in federal courts, the doctrine did not apply because the court was not reviewing any part of the state court's decision.[77] The court pointed out it had only decided that the resolution of the state law claims had not precluded litigation of the federal claims.[78] In making this decision, the court had not reviewed the state court's determinations of jurisdiction over the state law claims or the adequacy of the settlement.[79]

II. FEDERAL ENERGY REGULATORY COMMISSION ACTIVITIES

On November 10, 1998, the Federal Energy Regulatory Commission (FERC or Commission) declined to approve, without a hearing, the proposed merger between American Electric Power Company (AEP) and Southwest Corporation (SWC) (collectively the Applicants). Instead, the Commission set for

71. *In re Lease Oil Antitrust Litigation*, 16 F. Supp. 2d at 745-46.
72. *Id.*
73. *In re Lease Oil Antitrust Litigation*, 16 F. Supp. 2d at 747.
74. *Id.* at 747-48.
75. *In re Lease Oil Antitrust Litigation*, 16 F. Supp. 2d at 749.
76. *Id.* at 748-52.
77. *In re Lease Oil Antitrust Litigation*, 16 F. Supp. 2d at 756-57.
78. *Id.*
79. *In re Lease Oil Antitrust Litigation*, 16 F. Supp. 2d at 756-57.

hearing all issues regarding the effect of the merger on competition.[80] Applying the screen analysis described in the Merger Policy Statement, the Commission found that the proposed merger created concentration levels in seven destination markets in excess of the Commission's thresholds.[81] The Commission concluded that the Applicants' proposal to sell power in the concentrated markets would not mitigate alleged market power because the Applicants would still control the capacity.[82] The Commission also questioned the assumptions and data used in the Applicants' screen analysis, noting in particular that the Applicants had not analyzed several customers as destination markets.[83] The Commission stated that the Applicants' screen analysis may not have captured the competitive effect of a number of external factors, such as the use of transmission to frustrate access to markets and AEP's proposed acquisition of certain gas transportation facilities.[84] Finally, at the request of the Missouri Commission, the FERC held that the hearing must include a consideration of the competitive effects of the proposed merger on retail competition in Missouri.[85]

III. DEPARTMENT OF JUSTICE ACTIVITIES

In addition to pursuing the *Rochester Gas & Electric* case, the DOJ was also active in a number of other antitrust areas. On January 21, 1998, Joel I. Klein, head of the DOJ's Antitrust Division, spoke on merger policy and deregulation at the FERC's Distinguished Speakers Series. Klein echoed several themes that have been a part of the DOJ's policy toward the energy industry in the past, such as support for independent system operators (ISOs) and divestiture as the means for addressing "structural competitive problems." However, Klein focused on how increased competition resulting from deregulation would impact review of electric mergers. Klein stated that his primary concern was that the experience and hard data necessary to make informed policy decisions "may be lacking, at least to some degree, during the early stages of a transition to competition, especially in an industry that has experienced little, if any, prior competition."[86] Speaking more to encourage debate rather than establish policy, Klein identified a number of alternatives for dealing with this dilemma, including a "targeted" moratorium on mergers with a "waiver provision" and changes to the burden of proof in merger cases.

The DOJ also issued a business letter declining to challenge a change in the way electric power is priced for the Keystone and Conemaugh generating plants in western Pennsylvania.[87] The plants were jointly owned by ten electric utilities that were also members of the Pennsylvania-New Jersey-Maryland Interconnec-

80. *American Elec. Power Co & Central & Southwest Corp.*, 85 F.E.R.C. ¶ 61,201, 61,809 (1998).

81. *Id.* at 61,814-15.

82. 85 F.E.R.C. ¶ 61,201, at 61,818.

83. *Id.* at 61,818-19.

84. 85 F.E.R.C. ¶ 61,201, at 61,819.

85. *Id.*

86. Director of Department of Justice, Antitrust Division, Joel I. Klein, Address at the Federal Energy Regulatory Commission's Distinguished Speaker Series (Jan. 21, 1998).

87. Letter from Joel I. Klein, Department of Justice, Antitrust Division, to Gary L. Kaplan, Reed, Smith, Shaw & McCray, L.L.P., 1998 WL 40952 (D.O.J.) *7 (Jan. 30, 1998).

tion Association (PJM). Consistent with PJM's ISO proposal then pending before the FERC, the joint owners planned to change their pricing method from one based on regulated cost to one based on hourly "market clearing" prices. The new pricing mechanism would "permit each PJM Pool [P]articipant to bid to supply energy to PJM at any price that the Pool [P]articipant deems appropriate." The DOJ stated it would not challenge the change because: (1) the capacity in question was less than 10% of the market; and (2) code of conduct restrictions on the flow of information would "prevent the owners from using the joint ventures as conduits for [anticompetitive] information exchanges."[88]

The DOJ issued a business review letter expressing its intent not to challenge a joint purchasing arrangement between the members of the Textile Energy Association (TEA).[89] Comprised of textile industry firms, the TEA sought to establish a joint purchasing agent to take advantage of reduced transaction costs and rates associated with deregulation of energy markets. The DOJ noted the TEA's program contained safeguards to prevent anticompetitive effects, specifically that: (1) the purchasing agent would be independent of the TEA's members; (2) the purchasing agreement would not share any information regarding the individual needs of different members; and (3) the TEA's members could opt out of the program and purchase energy independently. The DOJ also concluded that there would not be any adverse effects on the textile industry due largely to the fact that the TEA's aggregate needs accounted for no more than 2.1% of industrial energy use in the Southeast.

IV. FEDERAL TRADE COMMISSION ACTIVITIES

The staff of the Bureau of Economics of the Federal Trade Commission (FTC Staff) was active in 1998 filing comments regarding the electric industry before the FERC and several state commissions.[90] When the FERC proposed revising the filing requirements for merger applicants in the electric industry, the FTC Staff commented that the FERC "may wish to expand its merger analysis beyond its current strong emphasis on market share information" by requiring merger applicants to submit additional information concerning themselves and the merger.[91] In addition, the FTC Staff encouraged the FERC to investigate the use of computer simulation modeling in its merger analysis.

In two other filings before the FERC, the FTC Staff continued to question the efficacy of behavioral remedies, as opposed to structural remedies, in addressing generation market power. In comments submitted regarding market power monitoring and mitigation by the New England Power Pool (NEPOOL), the FTC Staff advised that behavioral remedies to anticompetitive behavior were unlikely to be fully effective because of the difficulty in detecting market power

88. *Id.*

89. Letter from Joel I. Klein, Department of Justice, Antitrust Division, to Jesse W. Markham, Jr., Jackson, Tufts, Cole & Black (Sept. 4, 1998) <http://www.usdoj.gov/atr/public/busreview/1928.htm>.

90. Comments of the Federal Trade Commission to the Federal Energy Regulatory Commission, F.E.R.C. Docket No. RM98-4-000 (Sept. 11, 1998).

91. *Id.*

and remaining incentives to discriminate in transmission decisions.[92] The FTC Staff recommended that the FERC consider structural remedies such as operational unbundling. In response to the FERC's request for comments concerning FERC policy on ISOs, the FTC Staff commented that the concerns it identified in the NEPOOL proceeding were generally equally applicable to ISOs and warranted consideration of operational unbundling as an industry-wide solution to market power.[93]

The FTC Staff was also active with state regulators. The FTC Staff filed comments with a number of state commissions and regulatory agencies addressing concerns similar to those addressed in its FERC filings.[94] In addition to addressing some state-specific issues, FTC Staff's comments reiterated the following common themes: (1) the need to consider horizontal market power in generation; (2) the need to apply more sophisticated analysis of market power, such as computer modeling; (3) the weakness of behavioral remedies to address market abuse that is difficult to detect; and (4) the benefits of operational separation or divestiture as an alternative to behavioral solutions to market power.[95] FTC Staff also submitted comments to the Mississippi Public Service Commission on Entergy Mississippi, Inc.'s proposal to create an independent transmission company (Transco) to operate its transmission system.[96]

V. UTILITY MERGERS

In March 1998, The Williams Companies, Inc. (Williams) agreed to a consent order addressing its acquisition of MAPCO, Inc. (MAPCO).[97] Questions concerning the merger centered on pipelines owned by both companies that transported propane in Iowa, Illinois, Wisconsin, and Minnesota. The FTC alleged that the merger would give Williams the ability to restrict Kinder Morgan's access to propane. Williams agreed to lease capacity on a long-term basis to Kinder Morgan in order to protect Kinder Morgan's ability to compete in transporting propane. Additionally, Williams was required to connect its gas processing plants in southern Wyoming to any proposed raw mix pipeline that

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92. *In the Matter of New England Power Pool*, Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Federal Energy Regulatory Commission, F.E.R.C. Docket Nos. ER97-237-000 and ER97-1079-000 (Feb. 6, 1998).

93. Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Federal Energy Regulatory Commission, F.E.R.C. Docket No. PL98-5-000 (May 1, 1998).

94. *See, e.g.*, Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Massachusetts Department of Telecommunications and Energy, DTE 97-96 (Oct. 8, 1998); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Public Utilities Commission of Nevada, PUCN Docket No. 97-5034 (Sept. 22, 1998); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Michigan Public Service Commission, Case No. U-11290 (Aug. 7, 1998); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Public Service Commission of West Virginia Charleston, Case No. 98-0452-E-GI (July 15, 1998); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Louisiana Public Service Commission, LPSC Docket No. U-21453 (May 15, 1998).

95. *Id.*

96. Comment of the Staff of the Bureau of Economics of the Federal Trade Commission to the Public Service Commission of the State of Mississippi, Docket No. 96-UA-389 (Aug. 28, 1998).

97. *In re The Williams Companies, Inc.*, FTC File No. 9810076 (Mar. 27, 1998).

could possibly compete with MAPCO holdings. This requirement addressed the reality that MAPCO remained the only raw mix pipeline in Southern Wyoming and that construction of a competing line was unlikely without a connection to Williams' plants.

On March 9, 1998, the DOJ ended its first challenge to a merger between a gas and an electric utility by entering into a settlement agreement with Enova Corporation (Enova) concerning its merger with Pacific Enterprises.[98] Enova provided electric service in southern California through its subsidiary San Diego Gas & Electric Co., while Pacific Enterprises' subsidiary, Southern California Gas Co., provided natural gas transportation and storage to industrial consumers. The settlement agreement required Pacific Enterprises to sell its two largest electric plants and to obtain the DOJ's approval if it wished to increase its presence in the California power market in the future. Without the sale, the DOJ believed that the merged entity would have had the incentive to withhold gas or transportation from competing plants, thereby raising the costs of the merged entity's competitors.

In another proposed "convergence merger," PacifiCorp (an electric utility) made a bid for The Energy Group (TEG) and TEG's subsidiary, Peabody Coal (Peabody). The FTC became concerned with the merger, because PacifiCorp allegedly could have raised the generating costs of its competitors by virtue of its control over two coal plants owned by Peabody. PacifiCorp agreed to a consent order that would have enabled the merger to go through,[99] which required divestiture of the plants. Ultimately, PacifiCorp's bid for TEG failed because of a higher competing offer.

Shell Oil Company (Shell) and Tejas Energy, L.L.C. (Tejas), a Shell subsidiary, agreed to a consent order regarding the acquisition of gathering facilities owned by ANR Field Services Co. and ANR Production Co. (collectively ANR), both subsidiaries of The Coastal Corporation (Coastal).[100] The FTC concluded that the proposed merger would eliminate competition between Tejas and Coastal in certain parts of Texas, Kansas, and Oklahoma where competition was already sparse. The consent order required Shell and Tejas to divest themselves of the ANR assets in those areas.

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98. Department of Justice, Antitrust Div., *Justice Department Requires Enova Corporation to Divest Electricity Plants Before Approving Its $6 Billion Merger with Pacific Enterprises*, Press Release (Mar. 9, 1998) <http://www.usdoj.gov/atr/public/press_releases/1998/1584.htm>.

99. *In re PacifiCorp*, FTC File No. 971-0091 (filed Aug. 27, 1998).

100. *In re Shell Oil Co.*, FTC Docket No. C-3843 (filed Oct. 1, 1998).

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