

REPORT OF THE ANTITRUST COMMITTEE

This report summarizes antitrust developments of particular interest to energy law practitioners that occurred in the year 2000. The topics are covered in the following order: (A) Federal Trade Commission (FTC or Commission) and Department of Justice Antitrust Division (DOJ) Consent Orders Regarding Mergers, Acquisitions, and Joint Ventures; (B) Hart-Scott-Rodino Reform; (C) FTC Midwest Gasoline Price Investigation; (D) Other FTC and DOJ Issuances; (E) B2B Antitrust Issues; (F) Court Decisions; (G) Federal Energy Regulatory Commission and Other Regulatory Agency Orders; and (H) Noteworthy Non-Energy Antitrust Cases.

A. FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE ANTITRUST DIVISION CONSENT ORDERS REGARDING MERGERS, ACQUISITIONS, AND JOINT VENTURES

1. *El Paso Energy Corp. and PG&E Corp.*

On December 21, 2000, the FTC entered into a consent decree package with El Paso Energy Corp. (El Paso) and PG&E Corp. (PG&E) in settlement of a proposed Complaint by the FTC concerning El Paso's proposal to acquire two PG&E subsidiaries, PG&E Gas Transmission Teco, Inc. (PG&E Teco) and PG&E Gas Transmission Texas Corp. (PG&E GTT) for \$840 million.¹ The consent order, which became final on January 30, 2001, permitted El Paso to acquire the two PG&E subsidiaries, but required certain divestitures to ensure that competition is not adversely affected for natural gas transportation in three Texas markets.

El Paso is one of the largest integrated natural gas and electric power companies in the world, and is engaged in, among other things, the exploration, production, transportation, and sale of natural gas in Texas and elsewhere. At the time of its transaction with PG&E, El Paso had full or partial ownership interests in several pipeline systems in Texas, including the Oasis pipeline, which extends from the Permian Basin production area in West Texas to the Katy natural gas trading area; the Channel Pipeline, running from south Texas to the Houston Ship Channel; and the Shoreline and Tomcat gathering systems, which carry gas from offshore production areas along the Texas Gulf Coast to onshore interconnections with transmission pipelines.

PG&E is a California holding company that provides energy services throughout North America. PG&E owns, among other things, natural gas transportation facilities in the northwestern United States through its wholly-owned subsidiary PG&E Gas Transmission Northwest and, prior to

1. Proposed Consent Agreement, El Paso Energy Corp., 65 Fed. Reg. 83,035 (F.T.C. Dec. 29, 2000).

the El Paso transaction, in Texas through PG&E GTT and PG&E Teco. PG&E GTT and PG&E Teco collectively owned approximately 8,000 miles of intrastate pipelines in Texas with a capacity of approximately three billion cubic feet of gas per day. These pipeline systems included the Trans Texas pipeline, which connects the Permian Basin to the cities of San Antonio and Austin, and the Katy trading area.

The FTC's complaint alleged that El Paso's proposed acquisition of PG&E GTT and PG&E Teco would have anticompetitive effects in three natural gas transportation markets in Texas. Specifically, the FTC alleged that the acquisition, if consummated, would diminish competition in: (1) the transportation of natural gas out of the Permian Basin; (2) the transportation of natural gas into the gas consuming area of Central Texas, which includes San Antonio and Austin; and (3) the transportation of natural gas out of the Matagorda Island offshore production area (Matagorda), near Galveston, Texas.

The three counts of the complaint are similar in nature, that following the acquisition, the market for natural gas transportation in the Permian Basin, Central Texas, and Matagorda would be highly concentrated. Thus, the acquisition would likely eliminate actual and direct competition between El Paso and PG&E with the likely effects of increased rates and reduced output of transportation in the market, and diminished production of natural gas. The complaint also alleged that entry into any of the three markets would not be timely, likely, or sufficient to prevent a price increase. The complaint stated that any increased efficiencies due to the acquisition would be small compared to the potential competitive harm.

The consent order is designed to remedy the alleged anticompetitive effects in the natural gas transportation markets in the Permian Basin production area, the San Antonio-Austin area, and the Matagorda offshore area. Among other things, the proposed consent order requires El Paso to divest to so-called "up front" buyers: (1) all of El Paso's interest in the Oasis Pipe Line Company; (2) its ownership (acquired from PG&E) in the PG&E Teco intrastate pipeline, which consists of a fifty percent interest in a pipeline segment running from Waha to New Braunfels, a pipeline segment running from New Braunfels to Dewville, and an interest in the pipeline segment running from Dewville to Katy; and (3) a PG&E pipeline in the Matagorda area. According to the consent order, the divestitures would reduce market concentration levels below pre-acquisition levels.

2. *The Duke Energy/Phillips Petroleum Collaboration*²

In March 2000, the FTC accepted a consent order, subject to final Commission approval, addressing potential anticompetitive effects of the proposed combination by Duke Energy and Phillips Petroleum of the parties' natural gas gathering and processing businesses under a new company

2. See generally Federal Trade Commission, *FTC Agreement Resolves Anticompetitive Concerns Raised by Phillips Petroleum/Duke Energy Collaboration, Duke's Acquisition of Conoco's and Mitchell's Oklahoma Assets* (Mar. 31, 2000), available at <http://www.ftc.gov/opa/2000/03/phillips.htm>.

called Duke Energy Field Services, L.L.C. Under the terms of the proposal, Duke also would acquire gas gathering and processing assets in Central Oklahoma that were owned by Conoco and Mitchell Energy & Development Corporation.

Having identified seven relevant markets where gas producers were limited in their choice of gas gathering services, the FTC determined that the proposed transactions could lead to anticompetitive effects in several counties in Kansas, Oklahoma, and Texas – ultimately leading to increases in gathering rates and an overall reduction in drilling operations and production.

Stating that these effects would be unlikely to be remediated by any new market entry, the FTC alleged that the anticompetitive conditions created by the transactions would constitute violations of section 5 of the Federal Trade Commission Act (FTC Act) and section 7 of the Clayton Act.

The consent order required that Duke divest a total of 2,787 miles of its pipeline systems in the relevant markets within 120 days of the Commission's acceptance of the order. Thus, the Commission did not require Duke to find "up front" buyers prior to closing the transaction. However, Duke was required to agree to a "crown jewel" provision requiring the divestiture of additional assets if certain divestitures were not effectuated in a timely fashion.

3. *BP Amoco/ARCO Merger*

On April 13, 2000, the FTC cleared the merger of BP Amoco PLC and Atlantic Richfield Company (ARCO) by accepting a proposed consent order. According to the FTC's complaint, the merger would have lessened competition in the production, sale, and delivery of Alaska's North Slope crude oil; crude oil used by targeted west coast refineries and all crude oil used on the west coast. The complaint also alleged a lessening of competition in the purchase of Alaskan North Slope exploration rights, the sale of crude oil transportation on the Trans-Alaska Pipeline System, the development for commercial sale of natural gas on the Alaskan North Slope, and the supply of crude oil pipeline transportation and crude oil storage in Cushing, Oklahoma.³ The companies agreed to remedy the likely anticompetitive effects of the merger by divesting all of ARCO's assets relating to oil production on Alaska's North Slope to Phillips Petroleum Company. The companies also agreed to sell all of ARCO's assets relating to its Cushing, Oklahoma crude oil business, including ARCO's fifty percent interest in the Seaway Pipeline Company, a partnership with subsidiaries of Phillips, and ARCO's interest in the Basin Pipeline, to Texas Eastern Products Pipeline Company.⁴ The FTC issued a final modi-

3. B.P. Amoco P.L.C., No. C-3938, (F.T.C. filed Apr. 13, 2000), Complaint available at www.ftc.gov/os/2000/04.

4. B.P. Amoco P.L.C., No. C-3938 (F.T.C. filed Apr. 13, 2000), Proposed Consent Order available at www.ftc.gov/os/2000/04.

fied version of the consent order on August 25, 2000.⁵

4. *The Exxon-Mobil Merger*⁶

On March 1, 2000, the FTC announced its approval of the divestiture of Exxon Corp.'s northeastern marketing assets and Mobil Corp.'s mid-Atlantic marketing assets pursuant to a consent decree package that had been accepted and approved by the Commission in November 1999. The settlement resolved charges brought by the FTC that Exxon's acquisition of Mobil would violate federal antitrust laws and, in particular, that it would have anticompetitive effects in "moderately concentrated" refining and retailing markets. Under the terms of the settlement, 2,431 gasoline stations in the Northeast and Mid-Atlantic regions, Texas, and Guam were divested. Other divested assets included certain terminals, a pipeline, and an Exxon refinery in California.

5. *FlowServe Corp. and Ingersoll-Dresser Pump Co.*

In July 2000, the Department of Justice (DOJ) entered into a consent decree with FlowServe Corp. regarding FlowServe's merger with Ingersoll-Dresser Pump Co. (IDP). The DOJ's complaint alleged that the merger would have caused higher prices for and decreased selection of the American Petroleum Institute (API) 610 pump—a specialized pump that performs critical functions in oil refineries, including the movement of erosive, corrosive, hot, and flammable petroleum-based liquids under high pressure — because only three or four credible providers of the pumps were available, including FlowServe and IDP. The complaint also alleged that new entry into the API 610 was unlikely to occur, as entering this market would be "extraordinarily difficult, costly, time consuming and financially risky."⁷

The consent decree required FlowServe to sell certain pump lines, and some of its U.S. production and service facilities. The DOJ also required FlowServe to divest "a perpetual, royalty-free, assignable, transferable license(s) to manufacture the Divestiture Pump Lines," which included six of FlowServe's pump lines and two of IDP's.⁸ The consent decree also required divestment of FlowServe's Tulsa, Oklahoma pump plant and IDP's Phillipsburg, New Jersey pump plant. Finally, the order required divestment of IDP's service centers in Batavia, Illinois, and La Mirada, Califor-

5. See generally Federal Trade Commission, *Consent Agreements Given Final Approval*, (Aug. 29, 2000), available at <http://www.ftc.gov/opa/2000/08/fyi0047.htm>.

6. Federal Trade Commission, *Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets* (Nov. 30, 1999), available at <http://www.ftc.gov/opa/1999/9911/exxonmobil.htm>; *Commission Approval of Proposed Divestiture* (Mar. 1, 2000), available at www.ftc.gov/opa/2000/03/fyi0014.htm; and *Applications for Approval of Transactions* (Mar. 31, 2000), available at <http://www.ftc.gov/opa/2000/03/fyi0018.htm>.

7. *United States v. Ingersoll-Dresser Pump Co.*, No. 001818, at 8 (D.D.C. filed July 28, 2000), Complaint available at www.usdoj.gov/atr/cases/f6100/6129.htm.

8. *United States v. Ingersoll-Dresser Pump Co.*, No. 001818, at 5 (D.D.C. filed July 28, 2000), Proposed Final Judgment available at www.usdoj.gov/atr/cases/indx252.htm.

nia. All the divestments had to be made within the later of five days after notice of entry of the order or one hundred fifty days after the filing of the Complaint.

B. HART-SCOTT-RODINO REFORM

1. *Proposed Amendments to Hart-Scott-Rodino Reporting Requirements*

In December 2000, the President signed into law legislation that included several significant revisions to the premerger notification requirements under the Hart-Scott-Rodino Act (HSR Act). These changes, which took effect in February 2001, are the first significant revisions to the HSR Act since its creation in 1976. The principal changes:

- Reduce the number of reportable transactions by focusing solely on the dollar value of the transaction and raising that threshold to \$50 million (from the current \$15 million). Merely acquiring 15% or more of a company's stock or assets will no longer trigger an HSR filing.
- Increase the filing fees substantially for larger transactions, based on the following graduated scale: Less than \$100 million, \$45,000; \$100 million to less than \$500 million, \$125,000; and \$500 million or more, \$280,000.
- Extend the waiting period following substantial compliance with a second request to thirty days (from twenty days).
- Streamline the filing process by reducing the scope of required information.

Other noteworthy revisions, according to the FTC, are:

- The Size-of-the-Parties test (which generally requires one side of the transaction to have sales or assets in excess of \$100 million and the other \$10 million) will continue in place for transactions valued between \$50 million and \$200 million. However, transactions valued at more than \$200 million will be reportable without regard to the size-of-the-parties test.
- The filing fee tiers will be adjusted annually, beginning with FY 2005, based on changes in the GNP during the previous year.

2. *Changes to HSR Review Procedures*

On April 6, 2000, the FTC and DOJ announced changes to their procedures for review of proposed mergers and acquisitions under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976.⁹ These changes primarily relate to internal processes regarding "second requests" for information, i.e., requests for additional information under section 7a(e) of

9. See generally U.S. Department of Justice, *Antitrust Division Announces Merger Review Process Improvements* (Apr. 6, 2000), available at http://www.usdoj.gov/atr/public/press_releases/2000/4511.htm; Federal Trade Commission, *Requests for Additional Information: Appeal Procedures*, (2000), available at <http://www.ftc.gov/bc/hsr/appeal-1.htm>.

the Clayton Act, regarding mergers and acquisitions that raise competitive issues.¹⁰ The changes include measures such as centralized review of second requests by senior officials prior to issuance, conferences with merging parties to identify issues, and agency staff training on second request investigations.¹¹

Perhaps the most significant aspect of the new procedures is the establishment of a process for appeals of second requests. The initial step in challenging the scope of a second request by the FTC must be a reasonable effort to obtain changes by agreement with the lead staff attorney and the Assistant Director of the Bureau of Competition supervising the investigation.¹² If that effort fails, the contesting party may petition the General Counsel of the FTC to hear an appeal of the still-unresolved issues. Such an appeal must be submitted before the petitioner asserts substantial compliance with the contested second request and the petitioner must agree not to assert substantial compliance until after its appeal is decided or withdrawn.¹³

The new procedures include a timeline for the submission of briefs and the convening of a conference among the petitioner, the investigating staff, and the General Counsel. Unless the petitioner agrees to a later time, the conference will be convened within seven business days after receipt of the appeal petition and the General Counsel will decide the matter within three business days after the conference.¹⁴

C. FTC MIDWEST GASOLINE PRICE INVESTIGATION

1. June 28, 2000 Testimony

On June 28, 2000, FTC Chairman Robert Pitofsky testified before the House Commerce Committee and the House Committee on Government Reform regarding sharp increases in gasoline prices in the Midwest.¹⁵ Additionally, the FTC Bureau of Competition Director Richard G. Parker testified before the House Judiciary Committee concerning the same topic.¹⁶ The testimony discussed several possible causes for the increased gasoline prices and assured Congress that the FTC planned a "thorough"

10. 15 U.S.C. § 18a(e)(2000).

11. See generally Federal Trade Commission, Memo to Staff (May 16, 2000), available at <http://www.ftc.gov/bc/hsr/MergerReform.htm>.

12. Federal Trade Commission, *Requests for Additional Information: Appeal Procedures* (2000), available at <http://www.ftc.gov/bc/hsr/appeal~1.htm>.

13. *Id.*

14. Federal Trade Commission, *Requests for Additional Information: Appeal Procedures* (2000), available at <http://www.ftc.gov/bc/hsr/appeal~1.htm>.

15. Press Release, Federal Trade Commission, FTC Chairman Testifies Before House Committee Regarding Recent Midwest Gasoline Price Increases (June 28, 2000), available at <http://www.ftc.gov/opa/2000/06/midwestoiltest.htm> [hereinafter FTC Press Release June 28, 2000].

16. Press Release, Federal Trade Commission, FTC Competition Director Testifies Before Senate Regarding Recent Midwest Gasoline Price Increases (June 28, 2000), available at <http://www.ftc.gov/05/2000/07/midwest.htm>.

and “expeditious” investigation into whether the increases were attributable to “anti-competitive, collusive or other illegal behavior.”¹⁷

Pitofsky emphasized the importance of “competition in the energy sector - particularly in the petroleum industry . . . to the health of the economy of the United States,” and stressed the large role played by governmental enforcement agencies in ensuring the petroleum industry remains competitive.¹⁸ The increased prices faced by consumers for gasoline, in such markets as Milwaukee and Chicago, from an average of \$1.85 to nearly \$2.50 per gallon between May 20 and June 19, 2000, called for “scrutiny by antitrust enforcement authorities to determine whether the [higher prices were the] result [of] . . . anti-competitive conduct.”¹⁹

According to Pitofsky and Parker, several factors potentially contributed to the price increases. First, a reduced global supply of crude oil resulted from OPEC’s decreased production.²⁰ Simultaneously, several Asian countries emerged from a recession, which led to increased demand for petroleum.²¹ As worldwide oil consumption exceeded production, the price of crude oil reached \$33 a barrel in June 2000.²²

A factor specific to the Midwest that contributed to the price increases was the phasing in of EPA Phase II regulations for summer-blend reformulated gasoline (RFG), effective as of May 1, 2000, at the wholesale level in Chicago and Milwaukee.²³ The stricter regulations may have caused compliance problems and resulted in unusually low inventories for refiners.²⁴ However, according to the testimony, RFG-related issues did not appear to completely explain the price increases because the price for gasoline overall increased more substantially than the price of RFG-related products alone.²⁵ The testimony also noted that the failure of Explorer Pipeline Company’s mainline, which moves crude oil inland from the Gulf of Mexico, may have caused an increase in the overall price of gasoline.²⁶

The testimony concluded that the aforementioned factors did not preclude the possibility that “collusion may have occurred at some point that further contributed to higher gas prices for consumers.”²⁷ The FTC, therefore, initiated an investigation focused on whether any petroleum industry participants engaged in collusive behavior to increase the price of gasoline.²⁸ The FTC, as of the June 28, 2000 testimony, had already begun col-

17. FTC Press Release June 28, 2000, *supra* note 15.

18. *Id.*

19. FTC Press Release June 28, 2000, *supra* note 15.

20. *Id.*

21. FTC Press Release June 28, 2000, *supra* note 15.

22. *Id.*

23. FTC Press Release June 28, 2000, *supra* note 15.

24. *Id.*

25. FTC Press Release June 28, 2000, *supra* note 15.

26. *Id.*

27. FTC Press Release June 28, 2000, *supra* note 15.

28. *Id.*

lecting information by the use of both subpoenas and Civil Investigative Demands (CID) to refiners, transporters, and distributors of gasoline in the Midwest as well as pipeline owners and operators, terminal owners and operators, and blend plant owners and operators.²⁹ The FTC also began interviewing market participants, corporate gasoline users, and others to determine who raised prices and whether any illegal behavior affected the price increases.³⁰

2. July 13, 2000 Testimony

Richard Parker provided additional testimony before the Senate Committee on Energy and Natural Resources on July 13, 2000, regarding the ongoing FTC investigation into the Midwest gasoline price increases.³¹ Parker characterized the investigation as “a thorough search for evidence that the industry participants are engaging in, or have engaged in, collusive behavior prohibited by the antitrust laws.”³² In order to prove collusion, the FTC must demonstrate “more than parallel behavior among market participants. . . .”³³ Courts have held, stated Parker, that some “plus factor” beyond the mere presence of an industry-wide price increase is necessary to prove an illegal agreement.³⁴

3. Interim Report Regarding the FTC's Midwest Gasoline Price Investigation

On July 28, 2000, the FTC issued an interim report to Congress that explained why the FTC launched the investigation, provided a status report, and described the work remaining.³⁵ The report examined the several (aforementioned) factors contributing to the price spikes, but did not assess the impact of the factors in combination.³⁶ The FTC, stated the interim report, will continue to investigate the possibility of collusive behavior or other illegal conduct under section 5 of the FTC Act.³⁷ Due to the “immense amount of information being collected in the course of the investigation . . .” the interim report stated, the investigation was likely to continue for *at least* another three or four months subsequent to July 2000.³⁸

29. FTC Press Release June 28, 2000, *supra* note 15.

30. *Id.*

31. Press Release, Federal Trade Commission, FTC Competition Director Testifies Before Senate Regarding Recent Midwest Gasoline Price Increases (July 13, 2000), *available at* <http://www.ftc.gov/opa/2000/07/midwest.htm> [hereinafter FTC Press Release July 13, 2000].

32. *Id.*

33. FTC Press Release July 13, 2000, *supra* note 31.

34. *Id.*

35. Press Release, Federal Trade Commission, Federal Trade Commission Issues Interim Report on Midwest Gas Price Investigation (July 28, 2000), *available at* <http://www.ftc.gov/opa/2000/07/gasreportrelease.htm> [hereinafter FTC Press Release July 28, 2000].

36. *Id.*

37. FTC Press Release July 28, 2000, *supra* note 35.

38. *Id.*

In late July, the FTC issued a second round of subpoenas and CIDs to refiners, pipeline owners and operators serving the Midwest markets, and planned extensive interviews as part of the investigation.³⁹ Once the FTC finished obtaining documents, it would, according to the July 28, 2000 interim report, depose “key decision-making personnel throughout the gasoline distribution chain in the Midwest.”⁴⁰ The FTC staff has coordinated, and will continue to coordinate, its investigative efforts with the Attorneys General of several Midwest states.⁴¹

As of February 2001, the FTC had issued no further reports on the status of the Midwest gasoline price investigation and the investigation remained pending.

D. OTHER FTC AND DOJ ISSUANCES

1. *Antitrust Guidelines for Collaborations Among Competitors*

In April 2000, the FTC and the DOJ issued their joint *Antitrust Guidelines for Collaboration Among Competitors*. The new guidelines summarize the agencies’ antitrust enforcement analysis and policies regarding joint ventures and other collaborative efforts among competitors. The guidelines define “competitor collaboration” as:

a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. . . . Competitor collaborations involve one or more business activities, such as research and development (R&D), production, marketing, distribution, sales or purchasing. Information sharing and various trade association activities also may take place through competitor collaborations.⁴²

The agencies state that they will analyze competitor collaborations under their *1992 Horizontal Merger Guidelines*, as amended, not under the *Competitor Collaboration Guidelines*, in appropriate circumstances. In general, the agencies will apply the merger guidelines when the participants in a collaboration are: (1) competitors in the market affected by the collaboration; (2) the collaboration “involves an efficiency-enhancing integration of economic activity in the relevant market;” (3) the collaboration has the effect of eliminating all competition among the participants in that market; and (4) the collaboration endures for more than “a sufficiently limited period,” i.e., generally for ten years or more.⁴³

39. FTC Press Release July 28, 2000, *supra* note 35.

40. *Id.*

41. FTC Press Release July 28, 2000, *supra* note 35.

42. Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), at 2-3 (footnotes omitted), available at <http://www.ftc.gov/bc/guidelin.htm> [hereinafter *Competitor Collaboration Guidelines*].

43. *Id.* at 5.

The agencies state that they recognize that collaborations among competitors may benefit consumers in a variety of ways. While they do not rule out finding that a collaboration may present a *per se* violation of antitrust law,⁴⁴ the agencies concede that most collaborations will be subject to the rule of reason antitrust analysis. Accordingly, "the central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."⁴⁵ In light of the many types of collaborations that competitors may undertake, "rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances."⁴⁶

The agencies describe their rule of reason analysis as a tiered approach. They start with examining the nature of the agreement, including its business purpose and whether, if it is already operative, it has caused any harm to competition. If the absence of market power and the nature of the agreement combine to show no anticompetitive harm, the agencies do not challenge the agreement.⁴⁷

If initial examination indicates the likelihood of anticompetitive harm or reveals evidence that an existing collaboration has harmed competition, the agencies state that they will challenge the collaboration without undertaking a detailed market analysis.⁴⁸ If the initial analysis indicates possible anticompetitive effects, "but the agreement is not one that would be challenged without a detailed market analysis," the agencies will undertake further analysis, typically commencing with defining relevant markets and measuring market shares and concentration.⁴⁹ The agencies state that they will also take into account other relevant factors, such as the likely effect of the collaboration agreement's duration and exclusivity (or lack thereof), and the likelihood of timely and sufficient entry by other competitors that would prevent or minimize anticompetitive effects.⁵⁰

44. Competitor Collaboration Guidelines, *supra* note 42, at 8.

Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation. The integration must be of a type that plausibly would generate procompetitive benefits.

Id.

45. Competitor Collaboration Guidelines, *supra* note 42, at 7.

46. *Id.* at 7-8.

47. Competitor Collaboration Guidelines, *supra* note 42, at 10.

48. *Id.* at 10-11.

49. Competitor Collaboration Guidelines, *supra* note 42, at 11. The agencies state that their calculations of market shares will conform to section 1.4 of the Horizontal Merger Guidelines. *See generally id.* at 17.

50. Competitor Collaboration Guidelines, *supra* note 42, at 17.

If these steps indicate that collaboration has had, or is likely to have, anticompetitive effects, the agencies “consider whether the agreement is reasonably necessary to achieve ‘cognizable efficiencies.’”⁵¹ Such efficiencies are assessed net of costs of the collaboration and are those that the agencies have verified, “that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means.”⁵² The agencies offer assurances that they will consider “only alternatives that are practical in the business situation faced by the participants” and will not search for “a theoretically less restrictive alternative that is not realistic. . . .”⁵³

The agencies state that they base their decision on whether to challenge competitor collaboration on the balance of the indicated anticompetitive harm and cognizable efficiencies. In general, the greater the anticompetitive harms of collaboration, the greater the magnitude of the effort’s cognizable efficiencies that will be necessary to avoid challenge by the agencies.⁵⁴

The guidelines describe two “safety zones” for competitor collaborations. In general, if collaboration is within the scope of one of these “safety zones,” the agencies “presume the arrangements to be lawful without inquiring into particular circumstances.”⁵⁵ Neither safety zone applies, however, to any agreement that is *per se* illegal under antitrust laws or that the agencies would challenge without a detailed market analysis, or to competitor collaborations that the agencies otherwise would analyze under the *Horizontal Merger Guidelines*.⁵⁶

With regard to the first safety zone, guidelines state that, except in “extraordinary circumstances,” they do not challenge collaborations when the market shares of the collaboration and its participants collectively do not exceed twenty percent of each relevant market that the collaboration could affect.⁵⁷

The second safety zone is for R&D collaborations. The agencies state that, in the absence of “extraordinary circumstances,” they do not challenge collaborations “on the basis of effects on competition in an innovation market” where there are at least three other independently controlled R&D efforts that have the requisite characteristics and incentives that are “close substitutes” for the collaboration in question.⁵⁸ The agencies will

51. *Id.* at 23.

52. Competitor Collaboration Guidelines, *supra* note 42, at 24.

53. *Id.*

54. Competitor Collaboration Guidelines, *supra* note 42, at 25.

55. *Id.*

56. Competitor Collaboration Guidelines, *supra* note 42, at 26.

57. *Id.*

58. Competitor Collaboration Guidelines, *supra* note 42, at 26-27.

An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of

consider a variety of technical and financial factors in assessing whether other R&D efforts are "close substitutes" for one another.⁵⁹

2. *Business Review Letter for the Electric Power Research Institute, Inc.*

The Electric Power Research Institute (EPRI) requested a business review letter from the DOJ regarding a proposed information exchange. The EPRI presented the following facts. The energy industries have become increasingly dependent on computers, which have made the industry increasingly vulnerable to cyber-threats. Information sharing and industry cooperation are the quickest and most effective means of protecting against cyber-based security threats. The EPRI's Enterprise Infrastructure Security (EIS) program is its proposed response for industry security.

The EPRI assured the DOJ that the proposed information exchanges will not disadvantage any firm or market segment. Participation in the EIS will be open to all firms directly involved in generation, production, transmission, and distribution. Associate memberships and affiliate memberships would be available to indirect participants in production and supply, and to vendors of operating equipment, information systems, and security services in the industry.

Two principal types of information would be exchanged: (1) information involving energy industry-specific best practices for cyber-security programs, and (2) information from participants regarding their identified cyber-security vulnerabilities in operating equipment, electronic information, and communications systems on a product-by-product basis. The EPRI noted that the product-specific information exchanges could lead to the identification of electronic security requirements and features in the form of commonly accepted functional security specifications for future technology. The EIS may eventually include collaborative reporting, discussion, and analysis of actual real-time cyber threat and attack information.

The EPRI noted measures that it was taking to lessen the possibility of anticompetitive effects of the EIS. The information exchanged will be strictly limited to that relating directly to physical and cyber security. There will be no discussion of specific prices for equipment, electronic information, or communications systems. No competitively sensitive information will be exchanged and no discussions or negotiations relating to such information will occur among vendors, manufacturers, or service providers. The EPRI and the participants will not recommend for or against any product or system.

Based on the information provided by the EPRI, the DOJ issued a business review letter on October 2, 2000, concluding:

it does not appear that the proposed information exchange will restrict competition in any of the energy-related markets in which the participants do

specific firms.

Id. at 17.

59. Competitor Collaboration Guidelines, *supra* note 42, at 27.

business. As long as the information exchanged is limited, in the manner discussed above, to physical and cyber-security issues, the proposed interdictions on price, purchasing and future product innovation discussions should be sufficient to avoid any threats to competition.⁶⁰

The DOJ, therefore, stated its present interest to take no enforcement action against the EIS program.

*3. FTC Staff Comments on Virginia State Corporation Commission's Proposed Rules For Regional Transmission Entities (RTE).*⁶¹

In February 2000, the Staff of the FTC's Bureau of Economics submitted comments to the Virginia State Corporation Commission (SCC or Commission) on its implementation of provisions of the Virginia Electric Utility Restructuring Act (Act). The Act requires incumbent electric utilities to: (1) join or establish RTEs by January 1, 2001, and (2) seek authorization from the SCC to transfer their transmission assets to such RTEs. The Staff noted that the SCC is using the FERC's Order No. 2000 as a starting point for the essential characteristics and functions of an acceptable RTE, and that there existed the potential for additional state RTE requirements, beyond the FERC's minimum, to vary or even be inconsistent with Order No. 2000. The Staff suggested that the SCC delay adoption of any additional state requirements until after it is determined whether the FERC's minimum requirements work.

However, in the event that the SCC decides to supplement the FERC's requirements for RTEs, the Staff offered three suggestions regarding the SCC's proposed requirements as to reliability practices, and pricing and access standards. First, RTEs should encourage market approaches to the operation of the transmission grid, i.e., transmission customers should receive pricing that reflects the consequences of their transmission usage decisions. Second, the SCC may wish to require that the RTE analyze existing market power as part of its market-monitoring responsibilities. Third, the SCC should permit market power information developed by the RTE to be shared with federal antitrust authorities and the state attorneys general.

4. FTC Staff Submits Comments To Arkansas Public Service Commission Regarding Retail Electric

Competition Issues: In April 2000, the Staff of the FTC's Bureau of Economic Competition and Policy Planning Office filed comments with the Arkansas Public Service Commission (APSC) regarding its proposed requirements to govern how electric utilities operating in Arkansas should analyze whether they have market power pursuant to the Arkansas Elec-

60. United States Department of Justice, Antitrust Division, Business Review Letter (Oct. 2, 2000), available at <http://www.usdoj.gov/atr/public/busreview/6614.htm>.

61. Press Release, Federal Trade Commission, FTC Staff Comments on Virginia State Corporation Commission's Proposed Rules For Regional Transmission Entities (Feb. 17, 2000), available at <http://www.ftc.gov/opa/2000/02/vartecomment.htm>.

The latter concerns B2Bs that are markets for marketplaces.

Information-Sharing Agreements: B2Bs permit the collection and sharing of extensive information about transactions made through them, often on a real-time basis. This includes information regarding price, quantity, delivery, parties, and execution time. The B2B's contracts or operating rules would determine whether confidential or proprietary information were to be made available to B2B users, the general public, or persons within the B2B, and the conditions for that disclosure. These rules could facilitate collusion.

One area of particular concern analyzed by Commission Staff concerns incentives of B2B participant-owners "to share competitively sensitive information only among themselves."⁶⁴ The FTC's B2B Report, permitting such sharing could permit buyers or sellers to collude on price. Information-sharing agreements are assessed under section 1 of the Sherman Act under the rule of reason.⁶⁵ Factually, five factors, among others, are relevant to the analysis of whether anticompetitive coordination has occurred: (1) the structure of the market served by the B2B; (2) who is sharing information; (3) the type of information; (4) the information's age; and (5) ability to obtain the information from sources other than the B2B. Other relevant considerations include the efficiencies generated or enhancements of competition delivered by the B2B, and the existence of a practical and significantly less restrictive alternative. Such alternatives could include nondisclosure, confidentiality agreements, and audits.

Joint Purchasing: The FTC also will consider whether a B2B could facilitate the exercise of monopsony power, or buyer-side market power. Purchasers could coordinate their trades to reduce demand and, thus, drive down production and price. The purchaser or purchasing group must control a sufficient share of inputs into the market in order to drive down the price for those inputs. This is of greater concern when the purchasers are buying direct inputs, because the market for indirect inputs is likely to cover multiple industries.

Exclusionary Practices: B2Bs may be established by consortiums and owned by several major players in an industry. Discrimination against or overt exclusion of rivals of those owner-participants could undermine competition in that industry. In addition to exclusion, owner-participants could potentially disadvantage rivals by, for example, obtaining rebates on fees that are unavailable to rivals, presenting (or withholding) information in ways that advantage themselves, or implementing discriminatory operating rules or access to electronic interchange standards.

In order to rise to the level of an antitrust violation, however, such discrimination or exclusion must harm market competition, not just competitors. Assessment of the market for services rendered by the B2B is the first point of analysis. The likely impact on competition in the markets in

64. *Id.*

65. 15 U.S.C. § 1 (1997).

which the excluded firm participates would be key. If anticompetitive harm were likely, the analysis would consider whether the exclusion or discrimination were reasonably necessary to achieve offsetting procompetitive benefits. Conduct that raises rivals' costs in the market for inputs and impairs downstream competition in the market for outputs is analyzed by a sequential analysis of the input and output markets. These analyses will be highly fact-specific.

Exclusivity in B2Bs that are Markets for Marketplaces: The competitiveness of a B2B will be influenced by a number of factors. One key is that the B2B achieve sufficient transaction volume or liquidity. In order to achieve sufficient volume, a B2B may improperly encourage or require participants to use the B2B to the exclusion of other B2Bs or markets. It may do so through profit interests for owner-participants, rebates, or revenue sharing in exchange for certain transaction volume, minimum volume, or percentage requirements, bans on investments in rival B2Bs, up-front required costs in the form of membership fees or software investments, or other means. Over-inclusive B2B ownership within an industry may have a similar effect.

Exclusivity among competitors who establish a B2B may be analyzed as a concerted refusal to deal. Where B2B founders attempt to enforce exclusivity on suppliers or customers, the practices would be analyzed as vertical exclusive dealing arrangements. Inquiries into monopolization or attempts to monopolize may also be appropriate.

B2B development may be impacted strongly by network effects, calling for heightened scrutiny of exclusivity restrictions. "Network effects" exist when the value of a product to a user is dependent on the total number of users. Antitrust review, therefore, should focus closely on the harms and benefits of the exclusivity practices or ownership structure. Potential harms include higher prices, less efficient service, reduced innovation, and creation of barriers to entry.

Overall, the inquiry should focus on the impact of the practice or ownership structure on the ability of rivals to form competing marketplaces and the resulting consequences on competition. If anticompetitive effects are indicated, the procompetitive benefits of the restrictions should also be considered. These inquiries are likely to be highly fact-specific and may assess the particular activities of the B2B, the presence and strength of network effects, whether the restrictions are necessary to realize efficiencies, and whether interoperability between competing B2Bs would allow comparable efficiencies without harming competition. The report offered guideposts. All else being equal, competitive concerns are magnified by: (1) the greater the B2B owners' market share, (2) the greater the exclusivity restrictions, and (3) the less the interoperability with other B2Bs.

2. Covisint B2B Joint Venture

On September 11, 2000, the FTC terminated the Hart-Scott-Rodino Antitrust Improvements Act (HSR) waiting period for the Covisint B2B joint venture.⁶⁶ While the venture itself relates to the automobile industry, it is directly applicable to other industrial sectors including energy, as it is the first B2B venture reviewed and approved by the FTC.

The Covisint joint venture is intended to act as an electronic internet supply link between major auto manufacturers and suppliers of automobile components. It will streamline auto-manufacturing operations and is intended to result in cost savings throughout the supply chain and for the end user who purchases automobiles at the retail level. Covisint was formed by Daimler-Chrysler, the Ford Motor Company, General Motors, and Renault/Nissan, which together make automobile component purchases of about \$300 billion a year.⁶⁷ Commerce One and Oracle facilitated the joint venture.

Alice Miles of Ford Motor Company noted that "there is an excess [of] inventory and inaccurate communications [in the auto industry]. . . ."⁶⁸ She added, "if the major automakers are able to use the efficiencies of the internet to cut only a few percentage points of costs from the purchasing process, it will mean billions in annual savings for each."⁶⁹

The FTC granted early termination to the Covisint venture, because there was no evidence that it violated section 7 of the Clayton Act.⁷⁰ However, as the venture is still in the early stages of development and because the companies involved represent such a large share of the automobile market, the Commission cannot say that the venture will not cause competitive concerns in the future. Consequently, the Commission has reserved the right to take further action as public interest may dictate.

The FTC indicated that B2B electronic marketplaces offer great promise as means through which significant cost savings can be achieved, with the potential to benefit both businesses and consumers.⁷¹ It noted, however, as is the case with any joint venture, that B2B ventures must be organized in ways that maintain competition.⁷² The antitrust analysis of an individual B2B "will be specific to its mission, its structure, its particular market circumstances, procedures and rules for organization and opera-

66. See generally Press Release, Federal Trade Commission, FTC Terminates HSR Waiting Period for Covisint B2B Venture, available at <http://www.ftc.gov/opa/2000/09/covisint.htm>.

67. The Covisint venture is expected to handle as much as \$1 trillion of annual purchases by automakers and auto parts suppliers.

68. Elise Ackerman, *Automakers B-to-B Venture Approved by FTC*, San Jose Mercury News, Sep. 12, 2000.

69. Big Three Gets B2B Ok, CNN/Fn, Sep. 11, 2000, available at <http://cnnfn.com>. (Comments by Alice Miles).

70. See generally *supra* note 2, at 1.

71. *Id.* at 2.

72. See generally *supra* note 2, at 2.

tion, and actual operations and market performance.”⁷³

E. COURT DECISIONS

1. *Town of Norwood v. New England Power Co.*

In *Town of Norwood v. New England Power Co.*, the First Circuit relied on the filed rate doctrine in largely affirming the district court’s dismissal of the Town of Norwood’s suit alleging violations of federal antitrust laws by New England Power Co. (Nepco) and others under the Sherman and Clayton Acts.⁷⁴ The Town of Norwood’s suit alleged that certain defendants engaged in price fixing, monopolization, and illegal tying, and that Nepco’s sale of generating assets to subsidiaries of PG&E Corp. was anticompetitive. The Sherman Act claims were based on regulatory filings that Nepco made in 1996 to restructure itself and to revise its existing tariffs for wholesale power sales in the Northeast. To accommodate the policies of its affiliated retail distribution companies, Nepco proposed a temporary, non-cost-based wholesale offering called “standard offer service.” Under this temporary offering, Nepco would provide power at predetermined rates, increasing rapidly over a multi-year period, to those retailers required by the states to offer counterpart retail standard offer rates to their own customers.

The first of Norwood’s two primary antitrust claims, based on section 2 of the Sherman Act, alleged that Nepco engineered a “price squeeze” designed to undercut Norwood’s ability to compete with Nepco’s own retail affiliates. This claim rested on the combined effect of two different tariffs: a contract termination charge imposed on Norwood under New England Power’s amended tariff; and the wholesale standard offer rate that was offered to Nepco’s affiliates, but not to municipalities like Norwood. Norwood argued that even though the FERC actively reviewed and approved both tariffs, the filed rate doctrine should not apply to its price squeeze claim. The court rejected Norwood’s argument, although it did note a split among federal courts as to whether to apply the doctrine to price squeeze cases. According to the court, Norwood’s situation was distinguishable from price squeeze cases that had found a limited exception to the filed rate doctrine in situations where no regulatory agency could afford full relief, because the FERC actively regulated both of the tariffs in question. The court also held that the filed rate doctrine applied even though Norwood sought declaratory and injunctive relief, as opposed to merely damage claims. Lastly, Norwood argued that the filed rate doctrine should not apply to block a claim brought by a plaintiff who is a competitor of the defendant. The court rejected this argument on the ground that Norwood was primarily a customer, not a competitor, challenging a filed rate.

73. *Id.*

74. *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000).

Norwood's Clayton Act claim alleged that Nepco's sale of its fossil and hydroelectric generating assets to PG&E would enhance market power in the wholesale electricity market in New England and tend to exert upward pressure on wholesale prices to the detriment of purchasers in that market, including Norwood. According to the court, the FERC had previously found that the sale would not enhance market power, because the power generated by those assets was already committed under long-term contracts and was therefore not a viable constraint on prices in New England. The court found the filed rate doctrine inapplicable to this claim because, aside from its applicability to federally regulated rates and matters underlying such rates, "there is otherwise no across-the-board anti-trust immunity for agency-approved transactions."⁷⁵ The court thus remanded Norwood's Clayton Act claim for consideration and development of a record regarding the merits of the claim. However, the court also expressed doubt about the strength of Norwood's argument, noting that there was no indication that the FERC's test for evaluating the likely competitive effects of the asset sale was weaker or any different from that mandated by the Clayton Act.

2. *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*⁷⁶

In February 2000, the United States District Court for the Western District of New York, rejected various claims, including antitrust claims, asserted by Bath Petroleum Storage, Inc. (BPSI) against Market Hub Partners, L.P. (MHP). BPSI alleged that MHP made fraudulent statements to several administrative agencies that were regulating BPSI and that, as a result, BPSI's attempt to create a gas storage facility failed. In addition to claims under the Civil Rico statute and New York law, BPSI claimed that MHP and its affiliates violated federal and state antitrust laws, including section 2 of the Sherman Act.⁷⁷ The court applied the Noerr-Pennington doctrine in dismissing BPSI's claims on summary judgment.

The court noted that "[t]he Noerr-Pennington doctrine provides that activities directed toward influencing governmental action, such as litigation and lobbying, are immunized from antitrust liability, unless such activities are shown to be a mere sham."⁷⁸ Using this definition, the court examined defendant MHP's actions before the New York Department of Environmental Conservation, the Environmental Protection Agency, and the FERC and held that MHP was entitled to Noerr-Pennington immunity for any claims arising out of its actions in the administrative proceedings before those agencies that were "not objectively baseless."⁷⁹ The court

75. *Id.* at 422.

76. *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 2000 WL 1279160 (W.D.N.Y. Feb. 25, 2000).

77. 15 U.S.C. § 2 (1997).

78. *Bath Petroleum Storage, Inc.*, 2000WL 1279160, at *12.

79. *Id.* at *14.

concluded that because all of BPSI's claims were based upon the statements MHP made to those agencies, all of BPSI's claims were barred under the Noerr-Pennington doctrine.

3. *Paladin Associates, Inc. v. Montana Power Co.*

In *Paladin Associates, Inc. v. Montana Power Co.*, the federal district court granted the summary judgment motion of Montana Power Co. (MPC), North American Resources Co. (NARCO), Northridge Petroleum Marketing, Inc. (Northridge), and TransCanada Gas Services Limited (TransCanada) in an action brought by Paladin Associates, Inc. (PAI), a natural gas marketer, and Paladin Associates (PA), a natural gas consulting business.⁸⁰ PAI and PA alleged that MPC, NARCO, and Northridge engaged in acts of anticompetitive conduct relating to MPC's interstate and intrastate natural gas transportation and storage services. MPC and NARCO argued that all of the claims asserted against them were barred by the filed rate doctrine and the state action doctrine. MPC and NARCO also argued that the antitrust claims asserted by PA should be dismissed due to lack of standing. Finally, all defendants moved for summary judgment on all of the claims arguing that such claims failed on the merits as a matter of law.

The court rejected MPC's and NARCO's filed rate doctrine defense on the grounds that the antitrust claims at issue did not implicate the rate-approval role of the FERC.⁸¹ The court also held that the state action doctrine was not applicable because the anticompetitive conduct alleged by the plaintiffs was not a foreseeable consequence of the regulatory structure adopted by the State of Montana to regulate the intrastate transportation, sale, and storage of natural gas.⁸² However, the court dismissed the antitrust claims asserted by PA because the plaintiffs did not allege that PA's consulting business sustained damages as a result of the alleged antitrust violations. Therefore, the court held that PA did not have standing to assert an antitrust violation.

With respect to the claims asserted by the other plaintiffs, the court granted the defendants' motion for summary judgment. Count one alleged that MPC engaged in a tying arrangement to compel on-system, non-core customers to purchase assignments of NOVA Corporation of Alberta and Canada (NOVA) firm transportation capacity was held by MPC in violation of section 1 of the Sherman Act.⁸³ The court summarily rejected the tying claim "because it [did] not involve two separate products or services offered for sale by MPC."⁸⁴

80. *Paladin Associates, Inc. v. Montana Power Co.*, 97 F. Supp. 2d 1013 (D. Mont. 2000).

81. *Id.* at 1026.

82. *Paladin Associates, Inc.*, 97 F. Supp. 2d at 1027.

83. 15 U.S.C. § 1.

84. *Paladin Associates, Inc.*, 97 F. Supp. 2d at 1029.

The plaintiffs alleged in count two that MPC conspired with Northridge to boycott PAI in violation of section 1 of the Sherman Act. The plaintiffs' claimed that the boycott was designed to persuade and/or coerce the on-system, non-core customers not to purchase natural gas from PAI for a period of five years following the advent of unbundled natural gas service. The court found that the plaintiffs failed to present evidence upon which a jury could reasonably infer that a conspiracy to boycott existed between MPC and Northridge. Furthermore, the court held that the alleged boycott did not constitute an unreasonable restraint of trade under either a *per se* or rule of reason analysis.⁸⁵

Counts three and four alleged that MPC and NARCO monopolized and attempted to monopolize access over MPC's pipeline to the Grizzly Interconnect with respect to the sale of natural gas to off-system customers located downstream of MPC's system, in violation of section 2 of the Sherman Act.⁸⁶ The court determined that the plaintiffs' claims failed for several reasons, most importantly because the claim was based upon the essential facilities doctrine which was inapplicable in this situation primarily because MPC's system was not an "essential facility" with respect to the sale of gas to downstream, off-system customers and NARCO did not have control over MPC's pipeline or storage facilities.⁸⁷

Finally, the plaintiffs' count five alleged MPC conspired with Northridge to monopolize the market for the sale of natural gas to on-system, non-core customers in violation of section 2 of the Sherman Act. The court found that the evidence the plaintiffs relied upon to satisfy the concerted activity element of count five was the same evidence used to prove conspiracy for their boycott claim and, in both instances, such evidence was not sufficient to establish a conspiracy.⁸⁸

4. *Illinois Power Co. v. Illinois Commerce Commission*

On September 6, 2000, the Illinois Appellate Court ruled that the Illinois State consumer protection laws that seek to prevent the exercise of vertical market power by electric utilities do not violate the guarantee of free speech under the United States Constitution.⁸⁹ While the state consumer protection regulations make it unlawful for electric utilities to jointly advertise or otherwise coordinate their marketing activities, the regulations are based on consumer protection goals that, according to the court, surpass in importance the Constitutional protection of free commercial speech.⁹⁰

85. *Id.* at 1035-36.

86. 15 U.S.C. § 2 (1997).

87. *Paladin Associates, Inc.*, 97 F. Supp. 2d at 1038-39.

88. *Id.* at 1039.

89. *Illinois Power Co. v. Commerce Comm'n*, No. 5-98-0808 (Ill. App. Ct., Sept. 2000). Unpublished decision available at <http://www.state.il.us/court/2000/5980808.htm>.

90. *Id.*

The Illinois Commerce Commission (ICC) adopted regulations designed to foster competition in the electric utility industry by preventing a utility from using its distribution channels to discriminate against other providers of electricity in the retail market. While the regulations were fashioned and adopted pursuant to the Illinois Customer Choice Law, the final order of the ICC adopting the regulations was challenged at the appellate level by the Illinois Power Company and other Illinois utilities.⁹¹

The petitioning utilities asserted that the ICC regulations not only violate Constitutional free-speech guarantees, but that they attempted to regulate an area of commerce which had previously been deregulated. Thus placing the adoption of the regulations well outside the bounds of the ICC's authority.

In deciding the validity of the ICC regulations, the appellate court employed a four-part test which requires that: (1) the regulated speech must be protected by the First Amendment; (2) the asserted government interest must be substantial; (3) the regulations must advance the asserted interest; and (4) the regulations must be tailored to serve that interest.⁹²

While the court stated that the joint-advertising at issue was constitutionally protected free speech, it also held that "the state has a substantial interest in regulating joint advertising and marketing in order to insure [sic] the development of a competitive market for utility service."⁹³ The panel relied upon and favored the ICC's argument that joint marketing activities by affiliates would encourage retail consumers to believe that greater benefit would be had if they purchased from affiliates. The court concluded: "the provision banning joint advertising and marketing is no more extensive than necessary to achieve the state's interest in ensuring a competitive market. . . ."⁹⁴

The ICC consumer protection regulations require a utility to record each time it offers competitive services to affiliated interests or the customers of affiliated interests. They prohibit utilities from offering affiliates and non-affiliates different terms and conditions with regard to the supply of electricity. They also prevent tying arrangements by barring a utility from conditioning a customer's eligibility for supply, upon the customer's purchasing goods and services from an affiliated entity.

The petitioners argued that the effect of the ICC consumer-protection regulations is to re-regulate an industrial sector, which has already been effectively deregulated pursuant to state and federal law. The court rejected petitioner's argument, stating that:

These three sections of the [ICC's] order do not require that the utilities seek ICC approval to offer competitive service, do not increase or decrease utility prices, and do not alter the terms and conditions of the utility's competitive

91. 220 ILL. COMP. STAT. ANN. 5/16-121 (West 1998).

92. See *supra* note 89, at 3. The Court applies "Intermediate Level Scrutiny" to the regulation of commercial speech pursuant to the holding in *Florida Bar v. Went For it Inc.*, 515 U.S. 618, 623 (1995).

93. Illinois Power, No. 5-98-0808 at 3-4.

94. *Id.* at 4.

services. To the contrary, these three provisions meet the goal of insuring [sic] a competitive marketplace by protecting the unaffiliated ARES [alternative retail electrical suppliers] from unfair practices. . . .⁹⁵

The court, in reaching its conclusion, indicated that the regulation of anticompetitive conduct and the maintenance of consumer protection within the energy sector are goals with importance that is at least paramount to the protection of free commercial speech under Article 1 of the United States Constitution.⁹⁶

G. FERC AND OTHER REGULATORY AGENCY ORDERS

1. *El Paso Natural Gas Co.*⁹⁷

On January 19, 2000, the FERC accepted, subject to certain conditions, a negotiated rate transaction between El Paso Natural Gas Co. (El Paso) and Enron North America Corp. (Enron), whereby Enron acquired 1.2 Bcf per day of firm transportation rights for a one-year term.⁹⁸ The transaction reflected El Paso's effort to market the excess firm transportation capacity on its system, which became available at the expiration of a prior negotiated rate agreement between El Paso and Dynegy Marketing and Trade Inc. El Paso's transportation service agreements with Enron included a revenue sharing mechanism (RSM) that provided El Paso with a percentage of the value of associated transportation over a specified amount per year.

Several companies and the California Public Utilities Commission (CPUC) intervened in opposition to the Enron contracts. They alleged that three factors: (1) the affiliation between Enron and Transwestern Pipeline Company (Transwestern), which is owned by Enron's parent company, (2) the size of the agreement, and (3) the RSM—served to increase Enron's and El Paso's incentives and ability to withhold capacity to drive up basis differentials and the delivered price of gas in southern California. The CPUC and other interveners asserted that the RSM reduced El Paso's incentives to compete with Enron in the secondary transportation market because, under the terms of the RSM, the higher the delivered price of the gas, the more transportation revenue El Paso received from Enron. The intervenors also argued that because Enron and El Paso control a significant portion of the capacity serving the California market, they would have the ability to maintain the price for capacity above competitive levels either by not competing vigorously with each other or by withholding capacity from the market.

At the outset of its order, the Commission rejected the proposition that it must focus solely upon the competitive concerns embodied in anti-trust principles. Instead, the Commission analyzed the contracts by bal-

95. Illinois Power, No. 5-98-0808 at 7.

96. *Id.*

97. *El Paso Natural Gas Co.*, 90 F.E.R.C. ¶ 61,050 (2000).

98. *Id.*

ancing their impact on competition against the other policy goals embodied in the Natural Gas Act.⁹⁹ Thus, the Commission noted that it must assure that the rate consequences that flow from the Enron transaction do not cause undue discrimination among El Paso's customers, while also ensuring that El Paso has a reasonable opportunity to recover its costs and earn an adequate return. The Commission also noted that it is permissible for pipelines to withhold capacity so long as shippers are unwilling to pay the maximum rate set by the Commission.

The Commission rejected the interveners' arguments concerning size of the transaction and affiliation of the Enron parties, stating that "[s]ize alone has not been grounds for rejecting a transportation agreement. . . ."¹⁰⁰ The Commission noted that, despite Enron's affiliation with Transwestern, Transwestern is required to award capacity at the maximum rate and must do so on a non-discriminatory basis. Absent any showing that Transwestern discriminated in the allocation of capacity, the Commission held that the mere potential that Transwestern may withhold capacity was insufficient grounds to reject the transaction.¹⁰¹

The Commission also reviewed and approved the RSM. Under the RSM, El Paso retained all of the revenue it received from the sale of interruptible transportation service in competition with Enron and, if the price of capacity rose and Enron did not use the capacity itself, Enron was still required to pay El Paso twenty-five percent of the increased value of the capacity.¹⁰² Thus, the Commission found that there was some degree of pressure on Enron to either release the capacity, or use the capacity itself, and that this pressure lessened the likelihood of anticompetitive harm.¹⁰³ The Commission also found that numerous alternative services of capacity rights minimized the potential for anticompetitive harm.¹⁰⁴

Finally, the Commission held that, although the reduction of unsubscribed capacity by 1.2 Bcf per day under the Enron transaction would reduce the supply of available capacity and thus could be expected to lead to a higher price for released capacity from the southwest gas fields to California, there was "no specific reason to believe that any increase in the price of capacity in that secondary market will necessarily result from action that is inconsistent with current Commission policy."¹⁰⁵

2. *ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*

On November 7, 1997, ANR Pipeline Company (ANR) filed a complaint requesting that the FERC issue an order directing Transcontinental Gas Pipe Line Corporation (Transco) to install minor facilities intercon-

99. 90 F.E.R.C. at ¶ 61,216.

100. *Id.* at 61,216.

101. 90 F.E.R.C. at ¶ 61,216.

102. *Id.* at ¶ 61,217.

103. 90 F.E.R.C. at ¶ 61,217.

104. *Id.* at 61,217.

105. 90 F.E.R.C. at ¶ 61,217.

necting Transco's mainline facilities with those of ANR in Evangeline Parish, Louisiana (the Evangeline Interconnect). The interconnect would allow ANR to deliver gas on a firm basis to Transco's mainline facilities, near an active sales market, bypassing the need to utilize Transco's interruptible feeder service. The Commission set for an evidentiary hearing, issues relating to the competitive impact of Transco's denial of the interconnect.¹⁰⁶

In its April 14, 2000 order issued after the hearing and subsequent orders by an Administrative Law Judge (ALJ) and the Commission, the Commission denied Transco's rehearing request and directed Transco to allow the construction and operation of the Evangeline Interconnect.¹⁰⁷ The Commission found that the evidence showed specific competitive harm to the operations of sales markets on Transco's mainline. It was persuaded that ANR could not "offer a pipeline transportation service reasonably competitive with those provided by Transco and other interstate pipelines . . . because the Evangeline Interconnect does not exist, and . . . buyers are precluded from access to competitively priced gas supplies that ANR's shippers seek to offer," essentially because ANR's shippers would have to include the interruptible feeder rate in the rates for their services.¹⁰⁸ The Commission also found that Transco provided no reasonable justification for denying ANR's request given Transco's history of granting similar requests for similarly-situated parties. This would "assure non-discriminatory treatment of ANR and its shippers and also protect the efficient operations of involved markets, consistent with the principles of antitrust."¹⁰⁹ Finally, the Commission found that the interconnection satisfied the factors established in its new interconnection policy that it announced in *Panhandle Eastern Pipeline Co.*¹¹⁰

3. NYSEG/Central Maine Merger

On April 3, 2000, the FERC approved the merger of Energy East Corporation, the parent company of New York State Electric and Gas Corporation (NYSEG), and the CMP Group, the parent company of Central Maine Power Company.¹¹¹ The Commission concluded that the transaction would have no adverse impact on competition. Specifically, the Commission determined that any potential anticompetitive impact of the merger as a result of the consolidation of generation was moot after March 1, 2000, the date by which Central Maine was required to divest its generation assets pursuant to Maine law.¹¹² The Commission also found that the proposed merger raised no vertical competitive concerns related to the

106. *ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 84 F.E.R.C. ¶ 61,106 (1998).

107. *ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 91 F.E.R.C. ¶ 61,066 (2000).

108. *Id.* at 61,237-38.

109. 91 F.E.R.C. at 61,242.

110. *Panhandle Eastern Pipeline Co.*, 91 F.E.R.C. ¶ 61,037, at 61,140-43 (2000).

111. *Energy East Corp.*, 91 F.E.R.C. ¶ 61,001 (2000).

112. *Id.* at 61,004.

consolidation of the applicants' electric generation and gas pipeline facilities. The applicants argued that the merged company would not benefit from a strategy of foreclosure or raising the cost of rival gas-fired generation in the ISO New England market because most of Energy East's generating capacity is located in western New York and that peak time transmission constraints would exclude such capacity from the relevant market.¹¹³ At off-peak times, although all of the generation could reach the relevant market, most of the capacity is excluded from the relevant market because it is not economic.¹¹⁴ The Commission agreed, finding that the merged company would lack the incentive to adversely effect prices in upstream delivered gas and downstream electricity markets.

4. *Commonwealth Edison/Peco Merger*

On April 12, 2000, the FERC unconditionally approved the merger of Commonwealth Edison Company (ComEd) and PECO Energy Company (PECO).¹¹⁵ Although acknowledging that the merger could result in increased concentration of electric generation assets, the Commission determined that the applicants would not be able to exercise market power because almost all of the merged company's economic capacity was low-cost nuclear, and thus, market prices would respond insignificantly to a withholding strategy. Therefore, it would not be profitable for the merged company to withhold output in an attempt to drive up prices.¹¹⁶ The Commission also found that because ComEd has agreed to turn over its transmission system and control area operations to an independent transmission company that would join the Midwest Independent Transmission System Operator and because PECO had already turned over control of its transmission assets to the PJM Interconnection, the merged company would not be able to use its transmission system to frustrate competition, nor would it be able to strategically dispatch generation to frustrate competition.¹¹⁷

5. *TE Products Pipeline Co., L.P.*

On July 31, 2000, the FERC issued its *Order On Application For Market Power Determination And Establishing A Hearing And A Conference*.¹¹⁸ In *TE Products Pipeline Company, L.P. (TEPPCO)*, in its regulation of oil pipelines, the FERC allowed market-based rates to be charged whenever an origin-destination market "pair" is found to be "workably competitive."¹¹⁹ TEPPCO had sought permission to charge market-based rates for deliveries of refined petroleum products from origin points on its

113. 91 F.E.R.C. at 61,003.

114. *Id.*

115. *Commonwealth Edison Co.*, 91 F.E.R.C. ¶ 61,036 (2000).

116. *Id.* at 61,133.

117. 91 F.E.R.C. at 61,134-35.

118. 92 F.E.R.C. ¶ 61,121(2000).

119. *Id.*

system on the Western Gulf Coast; near Shreveport, Louisiana; Indianapolis, Indiana; and Chicago, Illinois; to destination points on its system near Houston and Beaumont, Texas; Shreveport, Louisiana; Little Rock, Arkansas; Memphis, Tennessee; St. Louis, Missouri; Indianapolis and Evansville, Indiana; Chicago, Illinois; and Cincinnati, Dayton, and Toledo, Ohio.

The FERC permitted TEPPCO to implement market-based rates in the Indianapolis and Chicago origin markets and in the Houston, Beaumont, St. Louis, Evansville, Indianapolis, Chicago, and Toledo destination markets, but it also established a hearing to determine whether TEPPCO has the ability to exercise significant market power in the Shreveport origin market, as well as in the Little Rock, Shreveport, Cincinnati/Dayton, and Memphis destination markets. The FERC further directed its staff to convene a conference to explore the facts and issues regarding the Western Gulf Coast origin market.¹²⁰

6. *Colonial Pipeline Company*

On August 1, 2000, in *Colonial Pipeline Company*, the FERC issued its *Order on Application for Market Power Determination and Establishing a Conference*.¹²¹ On March 26, 1999, Colonial had filed an application for a market power determination pursuant to Part 348 of the Commission's regulations seeking permission to charge market-based rates in its Gulf Coast origin and destination markets. Colonial operates a lengthy products pipeline system stretching from the Gulf Coast to New York Harbor over some 2,886 miles of mainline, along with stub lines and delivery lines also exceeding in total 2,000 miles. The FERC found that the competitiveness of certain markets (the Lafayette, Louisiana, and the Beaumont-Port Arthur, Texas destination markets) were uncontested. The FERC further found that Colonial lacked significant market power in the Jackson, Mississippi and the Baton Rouge-New Orleans destination markets and, therefore, permitted Colonial to implement market-based rates in those markets. Finally, the FERC directed its staff to convene a conference to explore the facts and issues regarding the Western Gulf Coast and Baton Rouge-New Orleans Origin markets.

7. *Nuclear Regulatory Commission Antitrust Review Authority*

On July 19, 2000, the Nuclear Regulatory Commission (NRC or Commission) issued a final rule which states that it lacks authority to conduct antitrust reviews of *post*-operating license transfer applications.¹²² The rule further provides that the NRC, if it is found to have such authority, is not required to conduct such reviews and exercises its discretion not to do

120. On January 9, 2001, the presiding judge in *TE Products Pipeline Company, Ltd.*, 94 F.E.R.C. ¶ 63,004 (2001), recommended an Offer of Settlement, which was filed jointly by TEPPCO and the three protestants in the matter for the Commission's approval as a contested settlement pursuant to Rule 602 of the Commission's Regulations.

121. *Colonial Pipeline Co.*, 92 F.E.R.C. ¶ 61,144 (2000).

122. Antitrust Review Authority, 65 Fed. Reg. 44,649 (July 19, 2000).

so.¹²³ The NRC, therefore, indicated it will no longer collect antitrust review information from *post*-operating license transfer applicants.¹²⁴

The rule further provides, however, that direct transfers of nuclear facility licenses which are proposed *prior* to the issuance of the initial operating license for the facility continue to be subject to the NRC's antitrust review authority.¹²⁵ The NRC also stated that at a *post*-operating license transfer, it continues to have responsibility to decide how to dispose of existing antitrust license conditions imposed as a result of the construction permit (or initial operating license) review. The NRC further stated that it needs to collect information to exercise proper disposition of existing antitrust conditions. The Commission indicated that it will entertain proposals by the parties as to the appropriate treatment of existing conditions and will exercise its authority to require additional information, if necessary.¹²⁶

The final rule was issued to reflect the NRC's earlier decision in *Kansas Gas and Electric Co.* (Wolf Creek) that it need not collect antitrust information for *post*-operating license transfers.¹²⁷

8. Revised FERC Filing Requirements For Mergers and Dispositions Under the Federal Power Act.¹²⁸

On November 15, 2000, the FERC issued a Final Rule in Order No. 642, revising Part 33 of its regulations, to update the filing requirements and criteria for evaluating applications for the merger and disposition of public utilities under section 203 of the Federal Power Act.¹²⁹ The Final Rule codified the horizontal competitive analysis screen contained in Appendix A of the Commission's 1996 *Merger Policy Statement*, established guidelines and filing requirements for a competitive analysis of vertical market power issues, streamlined filing requirements for transactions that raise no competitive concerns, and eliminated outdated and unnecessary filing requirements. The changes implemented by the Final Rule became effective on January 29, 2001.

Regarding some of the specific filing requirements, the Final Rule revised the basic information needed for section 203 applications. These changes included adding requirements for applicants to file organizational charts, list and describe all energy subsidiaries and affiliates, disclose business arrangements, and identify both current and planned membership in Commission-approved RTOs. The Final Rule stated that all merger applications would be given a notice period of less than sixty days, unless either a horizontal or vertical competitive analysis screen was required. The Final Rule also stated a goal to issue an order within 150 days of receiving a

123. *Id.*

124. 65 Fed. Reg. 44,649, at 44,658. The final rule became effective Aug. 18, 2000.

125. *Id.*

126. 65 Fed. Reg. 44,649, at 44,656.

127. 49 N.R.C. 441 (1999).

128. *See generally* [Regs. Preambles] III FERC STATS. & REGS. ¶ 31,111 (2000).

129. *Revised Filing Requirements*, 18 C.F.R. pt. 33 (2000).

completed application.

In addition, the Final Rule established both a horizontal and a vertical competitive analysis screen to analyze the competitive effects of a merger. For the horizontal screen analysis, applicants must: (1) define all relevant products; (2) identify all customers likely to be affected by the merger (destination markets); (3) identify suppliers of the relevant products by means of the "delivered price test;" and (4) assess market concentration through the use of the Herfindahl-Hirschman Index (HHI).¹³⁰ The Final Rule dismissed concerns about the use of the "delivered price test" and HHI statistics, and held that both were helpful screening tools. The Final Rule emphasized that the purpose of the competitive analysis screen was to quickly identify mergers that may present competitive problems, rather than provide a definitive test on the competitive effects of a proposed merger.

With respect to the vertical competitive analysis, the Final Rule established similar filing requirements. Under the vertical screen analysis, applicants must: (1) define the relevant upstream and downstream products, and geographic markets; (2) calculate the market concentration in both the upstream and downstream geographic markets; and (3) assess the potential adverse effects of the proposed merger.¹³¹ The Final Rule stated that the data from these requirements would help determine whether the conditions in upstream and downstream markets are such that the merger could potentially harm competition by foreclosing access to input supply for suppliers competing with the downstream merging entity, raising the costs of supply for rival downstream suppliers, or facilitating anticompetitive coordination.

Next, the Final Rule provided that if a proposed merger failed either the horizontal or vertical screen analysis, then an applicant must either propose mitigation measures or provide additional analysis to show the merger does not have an adverse competitive impact.¹³² The Final Rule clarified that for entry to be considered an effective mitigation factor, the entry must occur no later than two years after the date the merger is consummated.¹³³

The Final Rule stated that neither a horizontal nor a vertical analysis screen would be required if, for example, the merging entities are actual or potential competitors in the same geographic markets, or if they are actual competitors, the extent of such competition is *de minimis*.¹³⁴ Further, the Final Rule determined that no competitive analysis screen was needed for RTO applications filed pursuant to Order No. 2000, purely internal corporate reorganizations, and transactions only for the disposition of transmis-

130. *Id.*

131. 18 C.F.R. pt. 33.

132. *Id.*

133. 18 C.F.R. pt. 33.

134. *Id.*

sion facilities.¹³⁵

In addition, the Final Rule considered the use of computer-based simulation models to compliment the current analysis, but set the matter for further consideration at a future technical conference. The Final Rule also declined to extend the scope of the Commission's review of merger cases to include retail markets. The Final Rule clarified that the Commission would only evaluate the effect on retail competition if a state lacked authority over the merger and asked the Commission to step in. Finally, the Commission declined a request to put a temporary moratorium on public utility mergers.¹³⁶

H. NOTEWORTHY NON-ENERGY ANTITRUST CASES

Included below are three cases, which, although not dealing with the energy industry, are included because they deal significantly with antitrust issues or fact patterns that have direct applicability to energy companies. The AOL/Time Warner case is instructive regarding the antitrust authorities' views of vertical market power issues and the need for "open access" remedies to address the same. The Microsoft case is instructive because it addresses issues regarding a monopolist's efforts to compete against smaller rivals. Finally, the Worldcom/Sprint case involves a merger in a network industry (telecommunications) with characteristics similar to one or more segments of the electric and natural gas industries.

1. AOL – Time Warner Merger

On December 14, 2000, the FTC issued a proposed consent order (consent order) regarding the merger between America Online, Inc. (AOL) and Time Warner, Inc. (Time Warner).¹³⁷ AOL is the nation's largest Internet service provider (ISP). Time Warner owns the nation's second largest cable television system and is one of the leading cable television network providers, serving about twenty percent of the nation's households.

The FTC complaint alleged that the proposed merger between AOL and Time Warner would lessen competition in the emerging residential broadband Internet access service market. Currently, Time Warner, through its majority interest in Road Runner, is the second largest cable broadband ISP in the United States through its extensive cable television system. AOL, on the other hand, provides broadband Internet access through telephone networks that use digital subscriber line (DSL) technology. According to the complaint, the proposed merger would eliminate the competition between AOL and Time Warner, and increase AOL/Time Warner's ability to limit access into the broadband market. Further, the complaint stated that the merger would lessen competition in broadband

135. 18 C.F.R. pt. 33.

136. *Id.*

137. *In the Matter of America Online, Inc.*, No. 001-0105, 2000 F.T.C. LEXIS 170 (Dec. 14, 2000).

Internet transportation service by reducing AOL's incentive to promote DSL service as an alternative to Time Warner's cable broadband service. Finally, the complaint determined that the merger could constrain competition in the growing market for interactive television (ITV) service.

In order to resolve the FTC's anticompetitive concerns, the consent order requires AOL/Time Warner to open up its cable system to competition. Under the consent order's access provisions, AOL/Time Warner cannot make available or promote any affiliated cable broadband ISP service to any subscriber in twenty of Time Warner's largest cable divisions identified in the FTC's order until Earthlink, a competing non-affiliated cable broadband ISP service provider, is available or promotes its service to subscribers in that area. Once AOL/Time Warner makes an affiliated cable broadband ISP service available in these areas, AOL/Time Warner has ninety days to make additional non-affiliated services available to subscribers by entering into an alternative cable broadband ISP service agreement with at least two non-affiliated ISPs. These agreements must receive the Commission's prior approval. In Time Warner's smaller cable divisions not identified by the order, AOL/Time Warner only needs to enter into an alternative cable broadband ISP service agreement to carry at least three non-affiliated ISPs within ninety days after making available an affiliated cable broadband ISP service to any subscriber in that area.

The consent order also imposes certain requirements on AOL/Time Warner to ensure the non-discriminatory treatment of non-affiliated ISPs. For example, AOL/Time Warner's negotiations and agreements with non-affiliated ISPs seeking to provide alternative cable broadband ISP service on Time Warner's cable system must be at arms' length. Accordingly, AOL/Time Warner can restrict access to its system based on cable broadband capacity constraints, cable broadband technical limitations, or cable broadband business considerations, but AOL/Time Warner cannot refuse access based on affiliation and the impact or potential impact to AOL/Time Warner's affiliated ISPs. Next, the consent order requires AOL/Time Warner to include a "most favored nation" clause in all alternative cable broadband ISP service agreements. As a result, if AOL/Time Warner enters into a cable broadband ISP service agreement with a cable company, other than Time Warner, then AOL/Time Warner has five days to give notice of the agreement to each non-affiliated ISP that is a party to an alternate cable broadband ISP service agreement with AOL/Time Warner. The non-affiliated ISP then has thirty days to convert to the same rates and terms secured by AOL/Time Warner in the agreement with the other cable company. Furthermore, to the extent AOL/Time Warner makes certain levels of service (i.e., quality of service guarantees, maximum and minimum throughput capacity) and data or accounting (i.e., network flow monitoring) available to affiliated ISPs, the consent order requires the same to be made available to non-affiliated ISPs. Finally, Time Warner must provide non-affiliated ISPs with the same point of connection within Time Warner's cable divisions that Time Warner provides to affiliated ISPs.

In addition to the access provisions, the consent order places other conditions on AOL/Time Warner's proposed merger to ensure competition. The Consent Order requires AOL/Time Warner to market and offer DSL services to subscribers in Time Warner's cable divisions where affiliated cable broadband ISP service is available at the same prices and terms as AOL/Time Warner does in areas where no affiliated cable broadband ISP service is available. The consent order also prohibits AOL/Time Warner from interfering with the content on the bandwidth contracted by non-affiliated ISPs. Finally, the consent order states that AOL/Time Warner cannot interfere with a subscriber's use of interactive signals, triggers, or other content in conjunction with ITV services provided by non-affiliated ISPs.

2. *United States v. Microsoft Corp.*

In 1995, the United States government, nineteen states, and the District of Columbia, filed suit against Microsoft Corporation alleging that Microsoft illegally defended and leveraged its monopoly position in the market for PC operating systems in violation of sections 1 and 2 of the Sherman Act.¹³⁸ In an opinion issued on April 3, 2000, by United States District Judge Thomas Penfield Jackson, the court held that Microsoft violated the Sherman Act by maintaining its monopoly power through anti-competitive means, attempting to monopolize the Web browser market, and tying its Web browser to its operating system.¹³⁹

Judge Jackson explained that an offense under section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."¹⁴⁰ The court defined the "relevant market" as the licensing of all Intel-compatible PC operating systems worldwide. The court also concluded that Microsoft had a ninety percent market share and that the presence of significant barriers to entry "create[d] the presumption that Microsoft enjoys monopoly power," which, according to the court, Microsoft failed to rebut.¹⁴¹

The court then framed the issue as whether the defendant "has restricted significantly, or threatens to restrict significantly, the ability of other firms to compete in the relevant market on the merits of what they offer customers."¹⁴² If so, the defendant's conduct is "anticompetitive," unless the defendant has evidence of "specific, procompetitive business

138. *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995).

139. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *order entered*, 97 F. Supp. 2d 59 (D.D.C. 2000), *appeal denied and remanded*, 121 S. Ct. 25 (2000) (appeal pending before the United States Court of Appeals for the District of Columbia Circuit).

140. *Microsoft Corp.*, 87 F. Supp. 2d at 36.

141. *Id.*

142. *Microsoft Corp.*, 87 F. Supp. 2d at 37.

motivations that explain the full extent of its exclusionary conduct."¹⁴³

The court found that Microsoft engaged in years of anticompetitive behavior without justification in violation of section 2. According to the court, the company took various steps to prevent the entry of competitors, including punitive measures against companies that refused to abandon their own efforts to develop competing products, specifically Netscape's Navigator browser and Sun's Java technology. A review of four years of Microsoft's activities revealed, the court concluded, that "Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into the market for Intel-compatible PC operating systems."¹⁴⁴

Next, the court addressed the plaintiffs' section 2 claim that Microsoft was liable for attempted monopolization of the browser market, which required proof: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize, and (3) that there is a 'dangerous probability' that the defendant will succeed in achieving monopoly power."¹⁴⁵ The court found that: (1) Microsoft's efforts to overwhelm Navigator's browser by "inextricably" attaching its own browser to the Windows operating system constituted predatory or anti-competitive conduct; (2) evidence that Microsoft protected its own browser while reducing Navigator's share satisfied the element of specific intent; and (3) Microsoft's potential to obtain monopoly power in a second market had Navigator accepted Microsoft's offer to stop developing its own browser was sufficient for the third element.¹⁴⁶ Therefore, the court held that Microsoft was liable for attempted monopolization.

With regard to the plaintiffs' section 1 claims, which were based on theories of unlawful tying and exclusive dealing, the court concluded that "Microsoft's combination of Windows and Internet Explorer by contractual and technological artifices constitute unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take Internet Explorer as a condition of obtaining Windows."¹⁴⁷ On the other hand, because alternative, albeit less efficient, means of distribution were available for Navigator, the court refused to impose liability on an exclusive dealing theory.¹⁴⁸

Finally, the court addressed the state law claims, holding simply that the same evidence supporting findings of Sherman Act sections 1 and 2 violations supported similar findings for violations of analogous state laws. Even where some states had added the element of intrastate impact to their antitrust laws, the court found that such an element would be satisfied by evidence demonstrating the significant impact of Microsoft's anti-

143. *Id.* at 38.

144. *Microsoft Corp.*, 87 F. Supp. 2d at 44.

145. *Id.* at 45.

146. *Microsoft Corp.*, 87 F. Supp. 2d at 47.

147. *Id.*

148. *Microsoft Corp.*, 87 F. Supp. 2d at 53-54.

competitive conduct on competition.¹⁴⁹ The Court also rejected Microsoft's Copyright Act-based defenses to the state law claims.¹⁵⁰

On June 7, 2000, to remedy the violations described above, Judge Jackson ordered that Microsoft be broken up into two separate companies, despite Microsoft's arguments that such a remedy would be "draconian" and "unprecedented."¹⁵¹

3. *United States v. Worldcom Inc. and Sprint Corp.*

On June 27, 2000, the DOJ, Antitrust Division, filed a civil antitrust complaint in the United States District Court for the District of Columbia against Sprint Corp. and Worldcom Inc.¹⁵² The complaint alleged that the proposed merger of Worldcom and Sprint, respectively the nation's second and third largest long-distance telephone carriers, would violate section 7 of the Clayton Act. Specifically, the DOJ asserted that the proposed merger would substantially lessen actual and potential competition between Sprint and Worldcom, and between both of them and AT&T in several relevant telecommunications markets, leading to increased prices, less innovation and quality of service, and greater barriers to entry in those markets.

The DOJ's complaint defined several relevant product markets in which the proposed merger allegedly would have anticompetitive effects. These included Tier 1 Internet backbone service;¹⁵³ "[d]omestic wireline interLATA telecommunications services provided on a dial-1 or dial-around basis to mass market residential and small/home office consumers ('mass market long distance services');"¹⁵⁴ "[i]nternational wireline long distance telecommunications services provided between the United States and each of" a variety of foreign countries to mass market consumers;¹⁵⁵ "interLATA data network services by means of private lines and by means of X.25, ATM, and frame relay networks, respectively, to high-end business customers;"¹⁵⁶ and "interLATA data network services, consisting of all the particular data network services, plus IP/VPNs, for those high-end customers whose needs may be satisfied by two or more types of data network services."¹⁵⁷ The DOJ alleged that the relevant geographic market for each of the relevant products was the entire United States.

149. *Id.* at 55.

150. *Microsoft Corp.*, 87 F. Supp. 2d at 55.

151. *Id.* at 59.

152. *United States v. Worldcom Inc.*, No. 1:00cv1526 (D.D.C. filed June 27, 2000).

153. *United States v. Worldcom Inc.*, No. 1:00cv1526 (D.D.C. filed June 27, 2000), Complaint available at <http://www.usdoj.gov/atr/cases/f5000/5051.htm>.

154. *Id.* at ¶ 59.

155. *Worldcom Inc.*, No. 1:00cv1526 at ¶ 86.

156. *Id.* at ¶ 123.

157. *Worldcom Inc.*, No. 1:00cv1526 at ¶ 142.

Shortly after the DOJ filed its complaint, Worldcom and Sprint announced their decision to abandon their proposed merger.

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