

REPORT OF THE ANTITRUST COMMITTEE

I. JUDICIAL DECISIONS

A. *Consolidated Edison Company of New York, Inc.*

On January 27, 1999, the Federal Energy Regulatory Commission (FERC or Commission) approved the proposed merger of Consolidated Edison Company of New York, Inc. (ConEd) and Orange and Rockland Utilities, Inc. (O&R).¹ Applying its 1996 Merger Policy Statement, which incorporates the Department of Justice/Federal Trade Commission (DOJ/FTC) Merger Guidelines (Guidelines), the FERC found that the proposed merger raised no anticompetitive concerns and met the public interest requirements of section 203(a) of the Federal Power Act.

The DOJ/FTC Guidelines use a five-step merger analysis process.² The FERC's Merger Policy Statement adopted an analytic screen process that focuses primarily on the Guideline's first step (market definition and concentration) and requires merger applicants to: "(1) identify the relevant products; (2) identify the customers who may be affected by the merger (the destination markets); (3) identify the potential suppliers who can compete to supply each identified customer; and (4) analyze market concentration before and after the merger."³ The FERC applies this analytic screen process to merger applications and will approve a merger without a hearing where the Guideline's

thresholds are not exceeded, i.e. the merger would not significantly increase concentration; there are no factors external to the screen analysis which put the screen analysis in doubt; and there are no interventions raising genuine issues of material fact that FERC cannot resolve on the basis of the written record.⁴

In finding that the proposed merger raised no competitive concerns, the FERC focused on ConEd's ongoing plan to divest most of its electric generation and O&R's ongoing plan to divest all of its electric generation. Both divestitures were to be completed during the first half of 1999. Without these divestitures the market concentration post-merger would exceed the Guidelines' thresholds. In approving the merger, the FERC relied on the applicants' divestiture commitments coupled with mitigation measures that the applicants agreed to take if the merger were consummated before O&R's divestiture was completed.⁵

While the FERC found that the divestiture of generation was sufficient to address horizontal market power issues and also sufficient to ensure that the

1. *Consolidated Edison Co. of N.Y., Inc. and Orange & Rockland Utils., Inc.*, 86 F.E.R.C. ¶ 61,064 (1999).

2. The Guidelines set out five steps for a merger analysis:

(1) define markets likely to be affected by the merger and measure the concentration and the increase in concentration in those markets; (2) evaluate whether the extent of concentration and other factors that characterize the market raise concerns about possible adverse competitive effects; (3) assess whether entry would be timely, likely, and sufficient to deter or counteract any such concern; (4) assess any efficiency gains that reasonably cannot be achieved by other means; and (5) assess whether either party to the merger would be likely to fail without the merger, causing its assets to exit the market.

86 F.E.R.C. ¶ 61,064, at 61,245 (footnote omitted).

3. 86 F.E.R.C. ¶ 61,064, at 61,245 (citing Order No. 592, *Merger Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,044, 30,119, 61 Fed. Reg. 68,595 (1996) [hereinafter *Merger Policy Statement*]).

4. *Id.* (citing *Merger Policy Statement*, *supra* note 3, at 30,118-20).

5. 86 F.E.R.C. ¶ 61,064, at 61,247.

merger would not adversely affect competition, it nevertheless went on to discuss other "moot" issues to ensure that the FERC's "silence" was not to be construed as an endorsement of all the assumptions the applicants used in their merger filing.⁶ In this "moot" analysis, the FERC found that the vertical combination of ConEd and O&R's interests in the upstream gas pipeline market with their small remaining post-divestiture downstream electric generation interests would be unlikely to enhance any incentives for them to exercise vertical market power.⁷ The FERC further discussed and decided that the merger would likely have no adverse effect on the companies rates and that the merger would not create a "regulatory gap" or an unacceptable shift of regulatory authority between the FERC and the state commissions or the Securities Exchange Commission (SEC).⁸ Finally, the FERC found that the applicants proposed use of the "purchase" method of accounting and the recording of the difference between the purchase price and the net assets (at book value) could properly be reflected as goodwill on the books of Edison.

B. Essential Facilities Doctrine

In *MidAmerican Energy Co. v. Surface Transportation Board*,⁹ decided in February 1999, the court considered the application of the "essential facilities" doctrine. Since this case involves an agency other than the FERC and a different statutory scheme than that governing the natural gas industry (and turns on the reviewing court's deference to that agency's interpretation of that statutory scheme), the case's general applicability and its significance for public utility companies is somewhat limited.

The petitioners in this case sought review of two orders of the Surface Transportation Board (the Board) dismissing their complaints against rail carriers. The first order concerned MidAmerican Energy Co. (MidAmerican). With the imminent expiration of an existing contract with Union Pacific Railroad, petitioner MidAmerican wished to explore alternative carriers that could potentially ship its coal approximately 750 miles from the point of purchase to its generating facilities. However, the only other carrier offering rail service along the general route did not service the final ninety miles.

The court found that this final rail segment is a bottleneck because it is serviced by only one carrier. To obtain a competitive rate for the remaining stretch of the route, MidAmerican requested that Union Pacific provide a rate for its service over the bottleneck. Union Pacific refused, thus precluding MidAmerican from using an alternative carrier for the greater portion of the route in question. The second order concerned Central Power & Light Company's efforts to obtain a separate rate for bottleneck transportation under similar circumstances, but involving different locations and a different rail carrier.

In considering the utilities' requests, the Board grappled with what the court described as the tension between two competing policies expressed in the Inter-

6. *Id.*

7. 86 F.E.R.C. ¶ 61,064, at 61,247.

8. *Id.* at 61,248.

9. *MidAmerican Energy Co. v. Surface Transportation Bd.*, 169 F.3d 1099 (8th Cir. 1999).

state Commerce Act as amended by the Railroad Revitalization and Regulatory Reform Act and the Staggers Rail Act. Under 49 U.S.C. § 10701, rail carriers possess broad discretion in setting rates and routes. Under §§ 10101 and 10701 of the Act, however, some rate regulation is required when carriers possess monopoly power over a section of rail. The Board held that in bottleneck situations, carriers satisfy their common carrier duties and thus comply with the Act by providing origin-to-destination service that includes the bottleneck, as in *MidAmerican's* case, or by providing joint or proportional service with other carriers that includes transportation over the bottleneck, as was offered by the carrier in the *Central Power & Light Co.* case. The court reviewed the Board's decision under the *Chevron* standard, and stated that because Congress entrusted the Board with interpreting and administering the Act, the court reviewing the Board's decisions would "ask only whether they are 'based on a permissible construction of the statute.'"¹⁰

The Board reasoned that the statutory scheme affords the carrier discretion as to how it wishes to satisfy its common carrier duty to provide rates and service, and a carrier generally may provide service in a manner that protects its "long hauls." The Board also recognized that an important part of achieving revenue adequacy is "differential pricing."¹¹ As the court explained, "[t]his is a practice by which carriers charge higher mark-up on rail segments where demand elasticity is low, such as the bottlenecks, to compensate for low mark-ups on competitive segments."¹² As differential pricing is administered by the Board, "services may be priced above their attributable costs according to observable market demand, but only to the extent necessary to cover total costs, including return on investment of an efficient carrier."¹³ In reviewing the reasonableness of bottleneck rates, "the Board allows bottleneck at carriers to charge up to stand-alone cost (SAC), a level that is significantly higher than marginal cost."¹⁴

In deferring to the Board's decisions in the matters under review, the court noted that the Board's decisions explicitly provide the utilities with potential avenues of recourse. The first bottleneck shippers may obtain contracts for service over the competitive segments of rail. If such a contract is secured, the bottleneck carrier will be required to provide local service over the bottleneck in light of its common carrier obligations. The Board's regulations allow bottleneck carriers to charge up to SAC for bottleneck service. In addition, carriers that are attempting to charge more than SAC are subject to a reasonableness review by the Board. Second, if utilities can demonstrate an absence of effective competition over the entire origin-to-destination route, they may challenge the origin-to-destination rate provided by the carrier. The utilities may request relief under the competitive access rules over the entire origin-to-destination route. To invoke these rules, the utilities are required to show that the carrier engaged in

10. *Id.* at 1106.

11. *MidAmerican*, 169 F.3d at 1106.

12. *Id.* at 1106-07.

13. *MidAmerican*, 169 F.3d at 1107 (quoting Coal Rate Guidelines).

14. *Id.* at 1107.

anticompetitive conduct.

This case is significant to energy practitioners because of the historic relationship that has existed between the Interstate Commerce Act and the statutory schemes under which the FERC regulates public utilities. The language of the amended Interstate Commerce Act and the applications of that language by the FERC to the market behavior of lightly-regulated entities possessing market power merit particular scrutiny as Congress considers amendments to the Federal Power Act.

3. *Mergers: Section 7 of the Clayton Act*

In January 1986, Northwest Airlines (Northwest) reached an agreement with Republic Airlines (Republic) to merge the two airlines.¹⁵ At the time of merger, Northwest and Republic were respectively the nation's eighth and ninth largest airlines and the two largest operators at the Minneapolis-St. Paul International Airport. The merger was approved by the Department of Transportation, the reviewing agency at the time. However, no antitrust immunity was granted for the transaction. After the merger was completed in August 1986, all of Republic's stock was turned in and extinguished, and Republic ceased to exist as a separate entity.

The plaintiffs, all frequent travelers on Northwest since the merger, brought an action in June 1997, alleging in essence that the merger resulted in Northwest holding and using Republic's stock and assets in violation of the section 7 of the Clayton Act,¹⁶ which prohibits acquisitions that substantially lessen competition. The plaintiffs argued that Northwest's disproportionate increases in fares, market dominance, and use of entry barriers for new competitors illustrate the substantial lessening of competition following the merger.

The district court found that, although a post-acquisition claim can exist for holding and using stock and assets in violation of section 7 of the Clayton Act, a completed merger precludes such a claim. The Court of Appeals for the Eighth Circuit reviewed the district court's dismissal under Fed. R. Civ. P. 12(b)(6) *de novo*. Guided "by the plain language of section 7 of the Clayton Act which prohibits acquisitions of the 'whole or any part of the stock' or assets of a company, where the effect may be to substantially lessen competition or tend to create a monopoly," the Eighth Circuit reversed.¹⁷ Resting on the Supreme Court's decision in *United States v. E. I. Du Pont De Nemours & Co.*,¹⁸ the court said:

If extinguishing stock eliminated section 7 claims, corporations could seek to use this approach as an antitrust shelter and the speed at which it is accomplished would control the existence of a claim. The plain language of section 7 does not support such a result. The district court's concern that it could not "conceive" of how Republic's stock or assets could be used to substantially lessen competition and thereby violate section 7 centers around the fact that the two corporate entities are no longer distinct, and, therefore, the use of Republic's stock or assets is unclear and difficult to trace. However, this is a matter for discovery, proof, summary

15. *Midwestern Machinery, Inc. v. Northwest Airlines*, 167 F.3d 439 (8th Cir. 1999).

16. 15 U.S.C. § 18 (1999).

17. *Midwestern Machinery*, 167 F.3d at 441.

18. 353 U.S. 586, 588 (1957).

judgment or trial and not a matter for decision on a motion to dismiss. [Plaintiff's] complaint should not be dismissed simply because Northwest acquired all of the assets of Republic and then Republic's stock was turned in and extinguished.¹⁹

The court explained that the underlying rationale for extending section 7 liability beyond completion of the acquisition or merger is that "as a practical matter it often may be difficult to foresee and evaluate the real impact and effect of an acquisition until the transaction has been completed and the aggregate combine is operating."²⁰ Therefore, "while the primary thrust of § 7 is to prohibit and thus to forestall anti-competitive and monopolistic acquisitions, completed acquisitions and post-acquisition conduct may amount to a violation of § 7."²¹ The court concluded that "[c]ase law is clear that 'holding as well as obtaining assets' is potentially violative of section 7."²²

D. Predatory Pricing Allegations

In orders issued in 1997²³ and 1998,²⁴ the FERC authorized Southern Natural Gas Co. (Southern Natural) to construct and operate the North Alabama Pipeline Project. In these orders, the FERC decided, over the objections of Midcoast Interstate Transmission, Inc. (Midcoast), (which cited *Farmer's Union*²⁵), that Southern Natural's twenty-year contracts with two Alabama cities, Huntsville and Decatur, were not by their length anticompetitive because the cities were free to contract with others for incremental loads. Midcoast claimed that Southern Natural could provide the natural gas service required by the cities under the FERC's open access rules without the need for the construction of new facilities and pointed to the FERC's policy of avoiding the construction of duplicative facilities. The FERC responded that Southern Natural's pipeline proposal was certified to introduce a competitive pipeline into a market for the first time in fifty years.

Midcoast also charged that the FERC's pricing policy, which allowed rolled-in pricing for projects like the North Alabama Pipeline Project that do not result in rate increases to other suppliers greater than 5%, favors large pipelines over small ones. Midwest argued that, on a percentage basis, a large pipeline can always construct a more expensive project than a small one and meet the FERC's 5% test. Large projects therefore enjoy the pricing subsidies that rolled-in pricing allows. Midcoast further charged that such rolled-in pricing under the circumstances presented amounted to predatory pricing. The FERC responded that Midcoast ignored the fact that the FERC's rolled-in pricing policy is focused on protecting a pipeline's existing ratepayers from unreasonable rate increases as a result of an expansion, and whether a pipeline was large or small to begin with

19. *Midwestern Machinery*, 167 F.3d at 442.

20. *Id.* at 442-43 (quoting *Carlson Co. v. Sperry & Hutchinson Co.*, 507 F.2d 959, 962 (8th Cir. 1974)).

21. *Midwestern Machinery*, 167 F.3d at 443 (quoting *Federal Trade Comm'n v. Consolidated Foods*, 380 U.S. 592, 598 (1965)).

22. *Id.*

23. *Southern Natural Gas Co.*, 79 F.E.R.C. ¶ 61,280 (1997).

24. *Southern Natural Gas Co.*, 85 F.E.R.C. ¶ 61,134 (1998).

25. *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984).

was irrelevant to that focus.

E. Market Power Issues

In *Southern California Edison Co. v. FERC*,²⁶ the D.C. Circuit Court of Appeals remanded the FERC's decision to dismiss a complaint concerning Southern California Gas Company's (SoCal) control of interstate pipeline capacity released into the secondary market. Although this case does not address antitrust issues per se, it is directly relevant to the FERC's consideration of anti-trust claims, and competitive issues generally, and the FERC's review of conduct by regulated entities.

In the underlying complaint, Southern California Edison Company (Edison), an electric utility that relies on El Paso Natural Gas Company (El Paso) and other pipelines for interstate gas transportation service, and on SoCal for intra-state gas transportation service, alleged that SoCal had abused its position as a major holder of firm capacity rights on the El Paso and Transwestern Pipeline Company systems that extend from the San Juan Basin to the California border.²⁷ Specifically, Edison claimed that SoCal had withheld capacity from the capacity release market and established a high minimum bid price for capacity rather than permitting the market to set the price.²⁸ For example, Edison argued that SoCal released capacity at below-market rates to one of its subdivisions while offering additional release capacity to others only at an above-market minimum price.²⁹

Edison also asserted that SoCal was insulated from any adverse financial impact of its pricing strategy because of the Interstate Transportation Cost Surcharge (ITCS) established by the California Public Utility Commission. Under the ITCS, SoCal recovers the difference between the cost it paid for the capacity and the amount it recovers by releasing the capacity in the secondary market.³⁰ Edison argued that SoCal's actions were anticompetitive and should be addressed and remedied by the Commission in the complaint proceeding.³¹

The FERC, however, dismissed the complaint. Relying primarily on the fact that SoCal's released capacity was priced below the "just and reasonable" maximum rate, the FERC reasoned that there was no violation of its capacity release regulations, and therefore, no basis for the complaint.³² In addition, the FERC rejected the contention that "the agency had to evaluate alleged abuses of market power even absent a violation of [the capacity release regulations]."³³

The D.C. Circuit reversed, holding that the FERC's decision not to examine the market power issues in the complaint was arbitrary and capricious. The court

26. *Southern Cal. Edison Co. v. FERC*, 172 F.3d 74 (D.C. Cir. 1999).

27. *Southern Cal. Edison Co. v. Southern Cal. Gas Co.*, 79 F.E.R.C. ¶ 61,157, 61,660-61, *reh'g denied*, 80 F.E.R.C. ¶ 61,390 (1997).

28. 79 F.E.R.C. ¶ 61,157, at 61,661-62.

29. *Id.* at 61,663; 80 F.E.R.C. ¶ 61,390, at 62,300.

30. 79 F.E.R.C. ¶ 61,157, at 61,661.

31. *Id.*

32. 79 F.E.R.C. ¶ 61,157, at 61,662. *See also* 18 C.F.R. § 284.243(e), (h)(1) (1999) (stating that released capacity cannot be priced higher than the maximum tariff rate).

33. *Edison*, 172 F.3d at 75 (citing 80 F.E.R.C. ¶ 61,390, at 62,302).

recognized the FERC's duty to examine alleged anticompetitive conduct.³⁴ According to the court, the Commission's authority to undertake investigations under section 5 of the Natural Gas Act is not limited to just the review of "rates," but also extends to the examination of unjust and unreasonable, unduly discriminatory or preferential "practices."³⁵ Recognizing that the ITCS apparently allowed SoCal to exercise market power by charging above-market prices for released capacity with no sacrifice of transportation revenues, the court directed the FERC on remand to consider the competitive issues raised by the complaint despite the fact that the rate charged did not exceed the maximum tariff rate.

The court's opinion can be read to extend beyond the specific factual situation presented by the ITCS mechanism. Specifically, the mere fact that a rate charged is below the maximum just and reasonable level does not foreclose a possible FERC investigation concerning whether a regulated entity has exercised market power. In other words, in situations where the "market" rate is less than the maximum tariff rate, section 5 provides the FERC with a basis to conduct an investigation where a dominant capacity seller (or multiple sellers) engages in an effort to exercise market power and thereby raises prices above the competitive level.

The *Edison* decision already has had an impact on the FERC's review of allegations of anticompetitive conduct. In *El Paso Natural Gas Company*, the FERC examined El Paso's remarketing of turned-back capacity to Dynegy Marketing and Trade.³⁶ In protesting the transaction, several parties argued that *Edison* required the FERC to analyze the competitive implications of the deal. On rehearing, the Commission agreed. The FERC, however, stated that it would not apply antitrust and competitive principles to the exclusion of other relevant considerations. Instead, the FERC stated that it would "balance the impact of any anticompetitive elements" of a transaction against other public policy goals and objectives under the NGA.³⁷

F. Antitrust Review of BP/Amoco Merger (Antitrust Review of Mergers)

In April 1999, the Federal Trade Commission (FTC) issued a decision and order approving the proposed merger between The British Petroleum Company (BP) and Amoco Corporation (Amoco). The order focused on the wholesale sale of gasoline in thirty cities or metropolitan areas in the eastern United States³⁸ and

34. *Id.*

35. 15 U.S.C. § 717d(a) (1999).

36. *El Paso Natural Gas Co.*, 83 F.E.R.C. ¶ 61,286 (1998), *order on reh'g*, 88 F.E.R.C. ¶ 61,139, *order on reh'g*, 89 F.E.R.C. ¶ 61,073 (1999), *appeal docketed*, *Public Utils. Comm'n of the State of Cal. v. FERC*, Case No. 99-1390 *et al.* (D.C. Cir.).

37. 88 F.E.R.C. ¶ 61,139, at 61,407-08; 89 F.E.R.C. ¶ 61,073, at 61,226.

38. The 30 markets are: Albany, Georgia; Athens, Georgia; Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee; Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama; Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Meridian, Mississippi; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio; and Youngstown, Ohio.

the terminaling of gasoline and other light petroleum products³⁹ in nine cities.⁴⁰ The FTC complaint alleged that, in the affected geographic markets, the merger between BP and Amoco would lessen competition in the wholesale sale of gasoline and increase the likelihood that BP and Amoco could influence the price of gasoline to company owned and operated gasoline stations, leased gasoline stations, independently owned gasoline stations, and jobbers. In addition, the complaint stated that the BP-Amoco merger would result in a significant increase in concentration in terminaling gasoline and other light petroleum products.

In both the wholesale gasoline and terminaling markets, the FTC complaint also concluded that entry would be difficult. In order to resolve the FTC's concerns regarding wholesale markets, the consent decree requires BP and Amoco to divest approximately 130 gas stations in eight markets⁴¹ where the companies' ownership of retail outlets overlap. In the thirty markets identified under the complaint, BP and Amoco also agreed to give their independent wholesale customers, who control approximately 1,600 gas stations, the option to cancel their franchise and supply agreements and switch to other brands. Finally, Amoco agreed to divest its terminaling assets in nine markets where both BP and Amoco operate terminals that supply each of these areas with gasoline and other light petroleum products.

G. Exclusive Dealing: Essential Facilities/State-Action Doctrine

Indeck Energy Services, Inc. and Indeck Limited Partnership (collectively Indeck), developers of independent power facilities, entered into a cogeneration development contract with General Motors (GM) for the Saginaw Project.⁴² These companies believed that GM had selected Indeck to supply cogeneration for the Flint Project as well. Consumers Energy Company (Consumers), an electric and gas utility, entered into five-to-ten-year exclusive dealing contracts with GM for nineteen of its facilities. GM exercised its option under the existing contracts to add the Saginaw facility as an exclusive user of Consumers' services.

As a result, Indeck filed a complaint alleging that Consumers implemented an anticompetitive scheme to lock up over 80% of its "at-risk" industrial/commercial customers with unlawful long-term exclusive dealing contracts. Indeck also claimed that Consumers frustrated the efforts of Indeck and other independent power producers to enter the market by denying them access to essential facilities, including standby power supply agreements, power purchase

39. Terminaling involves the temporary storage of gasoline or other petroleum products received from a pipeline or marine vessel, and the redelivery of these products from the terminal's storage tanks into tank trucks for ultimate delivery to retail gasoline stations or other buyers.

40. The nine areas are: Cleveland, Ohio; Chattanooga and Knoxville, Tennessee; Jacksonville, Florida; Meridian, Mississippi; Mobile and Montgomery, Alabama; and North Augusta and Spartanburg, South Carolina.

41. The eight markets are: Tallahassee, Florida; Pittsburgh, Pennsylvania; Charleston, South Carolina; Charlotte, North Carolina; Columbia, South Carolina; Jackson, Tennessee; Memphis, Tennessee; and Savannah, Georgia.

42. *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, No. 97-CV-10366-BC, 1999 U.S. Dist. LEXIS 7251, at *1 (E.D. Mich. Mar. 31, 1999).

agreements, and meaningful access to Consumers' transmission system.

Based on the "state-action doctrine", the court granted summary judgment in favor of Consumers on all antitrust claims, holding that the Supreme Court's two-pronged test for determining whether actions are shielded from the federal antitrust laws had been satisfied.⁴³

First, the challenged behavior was taken pursuant to clearly articulated state policy. The court explained that the Michigan Public Service Commission (MPSC) is empowered to and does regulate competition among electricity suppliers. Through its past orders the MPSC had established a policy for slowly opening up competition among electric suppliers over a specified period of time. According to the court's opinion, the MPSC stated that allowing Consumers to compete with other generators may benefit utility customers other than large industrial customers by reducing the risk that the utility's biggest customers would leave its system. The court explained that exclusive contracts, such as the ones complained of by Indeck, were one of the many instruments the MPSC was using to make a smooth transition to an open market.

Second, the allegedly anticompetitive behavior was actively supervised by the state. The court found that the MPSC had to approve all rates, charges, and terms of service before electricity could be transmitted or supplied. The court rejected Indeck's claim that the MPSC's treatment of the challenged contracts was indicative of agency rubber-stamping, noting that the MPSC had approved Consumers' contract with GM and, on re-hearing, had rejected the argument that the GM contract was anticompetitive.

In addition to its "state-action" doctrine holding, the Court found that because Indeck had not succeeded in demonstrating an actual antitrust injury, it did not have standing to bring an antitrust claim. The Court explained that while Indeck might have been injured when Consumers entered into exclusive contracts with large customers, Indeck had not shown how customer contracts at discounted rates injured competition in general. In addition, the Court held that Indeck had not provided evidence to support its allegations that Consumers had denied access to essential facilities, much less its allegations that such activities constituted an injury to competition.

H. State-Action Doctrine

Columbia River People's Utility District (CRPUD) sought a declaratory judgment invalidating on antitrust grounds a contract provision under which Portland General Electric Co. (PGE) had the right to serve a specific customer (Boise Cascade).⁴⁴ Boise Cascade was located in an area formerly allocated to PGE under the 1961 Oregon territory allocation statutes. In 1981, CRPUD initiated condemnation of PGE's facilities in the area pursuant to state law.

The case was settled by stipulation and judgment which transferred certain territory and facilities to CRPUD in exchange for \$13 million but provided that PGE could continue to serve Boise Cascade. The stipulation also provided that

43. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

44. *Columbia River People's Util. Dist. v. Portland General Elec. Co.*, 40 F. Supp.2d 1152 (D. Or. Mar. 23, 1999).

if CRPUD attempted to serve Boise Cascade or to condemn PGE's facilities serving Boise Cascade, CRPUD was required to pay PGE the appraised value of such facilities (in excess of \$31 million). CRPUD claimed that it could now serve Boise Cascade by building its own facilities for only \$2 million, describing the payment of \$31 million as a penalty and the stipulation with PGE as an agreement in restraint of competition.

The court granted summary judgment in favor of PGE holding that the "state-action" doctrine provided PGE with an absolute defense to the antitrust claim. The court distinguished *Columbia Steel Casting v. Portland General Electric Co.*,⁴⁵ which held that the division of a territory by two utilities was a *per se* antitrust violation. In *Columbia Steel*, the Court held that the division of the territory was undertaken without the approval of the Oregon Public Utility Commission (OPUC), thus making the "state-action" doctrine inapplicable. In contrast, in the instant case, where the OPUC was empowered to and did allocate the territory including Boise Cascade to PGE. The court found that the only remaining issue was a state law question concerning the extent of the OPUC transfer of such territory to CRPUD, *i.e.*, whether it included Boise Cascade. The court held that CRPUD's remedies, if any, lie within the jurisdiction of the state court and the OPUC.

I. Alleged Lessening of Competition

On March 19, 1999,⁴⁶ the FTC entered into a settlement agreement containing a proposed consent order (Consent Order) with CMS Energy Corporation (CMS) in settlement of a proposed complaint (Complaint) concerning an agreement whereby CMS proposed to acquire from Duke Energy Company (Duke) the voting securities of Panhandle Eastern Pipe Line Company (Panhandle), Panhandle Storage Company, and Trunkline LNG Company (Trunkline). CMS is a holding company that owns Consumers, an electric and gas utility. Both Panhandle and Trunkline are natural gas pipelines regulated by the FERC that interconnect with Consumers.

The Complaint alleged that the acquisition would lessen competition in the transportation of natural gas into Consumers' gas service area (the Service Area), which includes all or portions of fifty-four counties in the lower peninsula of Michigan. Consumers receives natural gas through interconnections with Panhandle and Trunkline as well as other unaffiliated pipelines. According to the Complaint, after the acquisition, Consumers could, and would have an incentive to, close or reduce its interconnection capacity with the non-CMS pipelines. The complaint alleged that such action would be likely to increase demand for transportation service on Panhandle and Trunkline, enabling these pipelines to increase their rates, thereby raising natural gas prices in Consumers' gas service area and prices of electricity produced by gas-fueled self-generators in Consumers' electric service area.

Among other provisions, the Consent Order would allow a shipper whose

45. *Columbia Steel Casting v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996), *cert. denied*, 523 U.S. 1112 (1998).

46. *In the Matter of CMS Energy Corp.*, No. 991-0046, 1999 FTC LEXIS 44 (Mar. 19, 1999).

nomination of natural gas into Consumers' system was denied, because of lack of available interconnection capacity to use another interconnect to Consumers' system and would require Consumers to accept the gas. If the shipper would incur increased costs by using another interconnect, the Proposed Consent Order requires Consumers to supply gas from its own system to the shipper. The shipper would be entitled to replace such gas by the end of the next calendar month without incurring a charge for unauthorized gas usage.

The Consent Order, which would be effective for a period of ten years, requires Consumers to incorporate these obligations into the tariffs it has filed with the Michigan Public Service Commission and into its contracts with shippers. On June 2, 1999, the FTC issued the Complaint and entered into an agreement containing a final consent order with CMS.⁴⁷

K. Antitrust Immunity and Essential Facilities

In *Thomas v. Network Solutions, Inc.*,⁴⁸ the court discussed two issues: (1) whether a contractor for the federal government shares the antitrust immunity available to the federal government; and (2) how to apply the "essential facilities" doctrine enumerated in *Caribbean Broadcasting System Ltd. v. Cable & Wireless PLC*.⁴⁹

In this case, the National Science Foundation (NSF) issued a contract to Network Solutions to provide a variety of services related to the Internet. Specially Network Solutions became the exclusive registry and exclusive registrar for the ".com," ".org," ".net," and ".edu" top level domains for the period January 1, 1993, through September 30, 2000. Under a September 14, 1995, amendment, Network Solutions was allowed to charge a one-time registration fee of \$100 and \$50 thereafter for registering domains. The plaintiffs were the individuals and companies registering their domain names. The plaintiffs charged that Network Solutions abused its alleged monopoly power in the domain registration market, in violation of section 2 of the Sherman Act. The plaintiffs alleged that Network Solutions refused to allow potential competitors to introduce additional names, the so-called, top-level domains (.com; .org; .edu; .gov; etc.) "into the 'Configuration File'—the 'A' root server—the Essential Facility controlled by [Network Solutions]."⁵⁰

The district court dismissed the action, finding that the "federal instrumentality doctrine" gave Network Solutions the same immunity from antitrust liability as that enjoyed by the NSF. The court of appeals agreed that NSF, as a federal agency, was excluded from liability under the Sherman Act.⁵¹ Network Solutions argued that it had immunity so long as its alleged anticompetitive actions were taken pursuant to the contract with the NSF. The Justice Department, representing NSF, took no position on the issue. However, the appeals court

47. *In the Matter of CMS Energy Corp.*, No. C-3877, 1999 FTC LEXIS 118 (June 2, 1999).

48. *Thomas v. Network Solutions Inc.*, 176 F.3d 500 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3263 (U.S. Oct. 6, 1999) (No. 99-605).

49. *Caribbean Broadcasting Sys. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998).

50. *Thomas*, 176 F.3d at 508.

51. *United States v. Cooper Corp.*, 312 U.S. 600 (1941).

specifically declined to decide the case on the basis of this issue. At the same time the court seriously questioned whether the immunity existed:

It is not obvious to us, particularly in view of *Otter Tail Power Co. v. United States*, 410 U.S. 366; *reh'g denied*, 411 U.S. 910 (1973), that a private contractor automatically shares the federal agency's immunity simply because the contractor's allegedly anti-competitive conduct—as Network Solutions put it and some courts suggest — is “pursuant” to a government contract. A contractor might be free to perform the contract in any number of ways, only one of which is anticompetitive.⁵²

Rather, the appeals court dismissed the case for failure to state a claim under the essential facilities doctrine, citing *Caribbean Broadcasting System v. Cable & Wireless PLC*.⁵³ Four elements must be met for an antitrust claim for denial of access to an essential facility: (1) a monopolist who competes with the plaintiff and controls an essential facility; (2) the plaintiff cannot duplicate that facility; (3) the monopolist denied the plaintiffs use of that facility; and (4) the monopolist could feasibly have granted the plaintiff use of the facility. Here, the plaintiffs failed to meet the first and third elements, since they were not competitors of Network Solutions.

L. Market Power Issues

In *Process Gas Consumers Group v. FERC*, the court, in what could not be classified as a typical antitrust case, addressed the FERC's response to market power issues in a less regulated market.⁵⁴ The issue addressed was whether allowing a twenty-year cap in evaluating bids on a net present value (NPV) basis is appropriate when an interstate pipeline is a monopoly. The answer was no. The court reiterated its previous position that the natural gas transportation industry is a natural monopoly and that pipelines maintain an economically powerful position in relation to their customers.⁵⁵ Indeed, the FERC itself acknowledged that the market served by the pipeline, Tennessee, has monopolistic characteristics.

Having found these monopolistic characteristics, the question then for the court was whether the FERC adequately justified its conclusion that a twenty-year cap will assure that the NPV method of awarding available capacity results in “just and reasonable” rates, *i.e.* whether the cap will prevent the NPV method from compelling shippers to offer the pipeline longer contracts than they would under a competitive market. As the court reasoned: “[o]nce the Commission acknowledged that there is a monopoly problem, it was obligated to take the problem seriously and confront it with a forthright explanation of why a twenty-year cap would not augment that power.”⁵⁶

Previously, the court had found that a twenty-year cap for matching bids under the right of first refusal was not appropriate. Here, the court also found that FERC's justification was insufficient to support a twenty-year cap to evalu-

52. *Thomas*, 176 F.3d at 508-09.

53. *Caribbean Broadcasting*, 148 F.3d 1080.

54. *Process Gas Consumers Group v. FERC*, 177 F.3d 995 (D.C. Cir. 1999).

55. *Id.* at 998 (citing *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996)).

56. *Process Gas Consumers Group*, 177 F.3d at 1005.

ate bids under a net present value. The court evaluated data on the length of current contracts in the industry and on the Tennessee pipeline system and questioned why the length of these contracts should not track the length of bids of the net present value. Based on this evaluation, the court surmised that the FERC approved the twenty-year cap, because the twenty years would be no cap at all—hardly amounting to rational decision making.

Moreover, the court called into question the fundamental policy objectives of the FERC's order, specifically the desire to maximize the amount of revenue generated by Tennessee. Elsewhere, in discussing the application of the net present value methodology to changes in primary receipt and delivery points, the court reasoned:

At the end of the day, FERC's position is that regardless of the ability of existing shippers to compete on the basis of NPV or to meet their needs by using secondary points, it is best to award primary point capacity on the basis of the amount of additional revenue generated for Tennessee. If existing shippers are injured, so be it. The orders under review suggest this bottom line and at oral argument FERC counsel appeared to endorse it. While awarding capacity to the party who will increase the pipeline's revenues the most is certainly one proper consideration in establishing a new price regime, we think it was unreasonable for FERC to ignore the serious potential problems for existing shippers highlighted by petitioners. Existing shippers entered into their contracts with Tennessee with an expectation of a certain amount of primary point flexibility. When the pipeline proposes to take away that flexibility altogether or reduce it substantially, FERC is obligated to provide a better explanation of why the shippers' resultant loss cannot be taken into account in a more balanced application of the NPV pricing system. This includes explaining why an alternative approach suggested by petitioners—crediting to a bid some portion of the payments already obligated instead of incremental revenue only—is not preferable to the approach FERC approved.⁵⁷

M. Mergers

On May 7, 1999, the Department of Justice (DOJ) filed a proposed consent decree in the Bell Atlantic-GTE merger.⁵⁸ The proposed consent decree requires either company to divest their wireless business in sixty-five markets in nine states in order to prevent the loss in those markets of head to head competition between the companies in wireless mobile telephone services. In four of the sixty-five markets, Bell Atlantic has an ownership interest in one cellular system, and GTE has ownership in the other. In forty-six of the sixty-five markets, GTE has an ownership in one of the cellular systems, and Prime Co., in which Bell Atlantic owns a 50% interest, competes by providing personal communications services (PCS). In fifteen of the sixty-five markets, GTE will own cellular systems through an acquisition from Ameritech, and Prime Co. provides competing PCS.

In its complaint, the DOJ found that in the markets where the two companies overlap, the concentration among firms providing wireless mobile telephone services, which is already high, would be significantly increased and competition lessened by the merger. The complaint found there is not a cost-effective alter-

57. *Id.* at 1006.

58. *U. S. v. Bell Atlantic Corp.*, No 1:99CV01119 (D.D.C. filed May 7, 1999).

native to wireless mobile telephone services. As such, if the price of the wireless mobile telephone service were to increase by a small, but significant amount, there would not be a sufficient number of customers that would switch away from wireless mobile telephone service to make that price increase unprofitable.

In the areas where GTE and Bell Atlantic compete in providing wireless mobile telephone services, the combined market share measured by the number of subscribers is in the range of 75 to 95%. The Herfindahl-Hirschman Index (HHI) in these markets is already high, in excess of 2800. After the merger, the HHI in these markets would be in excess of 5500. In certain markets Prime Co. offers PCS services and competes with cellular service GTE offers. In those markets, the combined market share of the Prime Co and GTE is in the range of 35 to 40%, and the HHI exceeds 2000. Moreover, the DOJ found that competition between PCS and cellular has not yet occurred to any great extent but that Prime Co has been one of the few PCS firms to vigorously compete against cellular and take market share. Assistant Attorney General Joel Klein stated that absent the divestitures required, "competition in 65 markets would likely have been reduced, causing higher prices or lower quality wireless telephone services for potentially millions of subscribers." Bell Atlantic or GTE will be required to complete the divestitures within at least 180 days of closing. If they fail to meet the deadline, they must transfer the assets to a trustee approved by the Antitrust Division, which would own and control the assets until they are sold to a final purchaser. Provisions are included to prevent GTE and Bell Atlantic from influencing the operations of the business during this time, particularly in the area of pricing.

N. Attempted Monopolization of Air Service

On May 13, 1999,⁵⁹ the DOJ filed suit against American Airlines for monopolizing and attempting to monopolize airline service to and from Dallas/Fort Worth International Airport in violation of section 2 of the Sherman Act. The DOJ alleged that American engaged in predatory pricing by setting prices below average variable costs in order to eliminate competitors in the short run while maintaining the probability of recoupment by raising prices in the long run.⁶⁰

The DOJ alleged that when small airlines tried to compete against American on these routes, American responded by increasing capacity and reducing fares. Moreover, the DOJ alleged that American's actions were well beyond what makes business sense, except as a means of driving the new entrant out of the market. Once the entrant was forced out, American promptly raised its fares and usually reduced service. The DOJ complaint focused on several factors: (1) meetings of American executives where the business plan was discussed, specifically the comments of one executive regarding removing the small carriers from the Dallas/Forth Worth Airport; (2) the fact that American did not implement the plan against a more established carrier such as Southwest; (3) the fact that American deliberately departed from its usual standard for evaluating route performance in implementing the plan; and (4) the actual actions taken against

59. United States v. AMR Corp., CIV. A. No. 99-1180-JTM (D.D.C. filed May 13, 1999).

60. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.9, 588-589 (1986).

the small carriers.

O. "State-Action Immunity" Collateral Estoppel

In *North Star Steel Co. v. MidAmerican Energy Holdings Co.*,⁶¹ the U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Iowa granting summary judgment in favor of MidAmerican Energy and its parent corporation MidAmerican Energy Holdings (collectively MidAmerican). The district court held as a matter of law that MidAmerican was immune from federal antitrust liability under the "state action" immunity doctrine. In affirming the decision of the district court, the Court of Appeals held that: (1) a determination by the Iowa District Court for Polk County that the Iowa Utilities Board's assignment of exclusive service territories included the generation of electricity collaterally estopped the federal court from re-examining the same issue; and (2) MidAmerican was protected by "state action" immunity.

Plaintiff North Star Steel Company (North Star), a wholly-owned subsidiary of Cargill, Inc., operates a steel mill near Wilton, Iowa.⁶² North Star's mill is located in the area designated under the Iowa Code⁶³ as the exclusive service territory of MidAmerican, the largest electric utility in Iowa.⁶⁴ MidAmerican owns the only transmission lines capable of supplying electricity to the North Star mill.⁶⁵

North Star has a peak electric load of approximately forty-eight megawatts (MW), and wanted either to purchase competitively-priced electric energy directly from third-party suppliers, or to have MidAmerican itself purchase electric energy directly from a third party for transmission to North Star's mill.⁶⁶ When MidAmerican rejected North Star's request, North Star brought suit in federal district court alleging that MidAmerican's refusal to allow North Star to access alternative sources of electricity over MidAmerican's transmission lines constituted a refusal to deal, monopolization, and an illegal tie-in, in violation of the Sherman Act and the Clayton Act.⁶⁷

MidAmerican filed a motion to dismiss that later became a motion for summary judgment.⁶⁸ Before the federal district court ruled on the motion, however, MidAmerican asked for and received from the Iowa Utilities Board (Board) a declaratory ruling that "Iowa's exclusive territory laws apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission."⁶⁹

61. *North Star Steel Co. v. MidAmerican Energy Holdings Co.*, 184 F.3d 732 (8th Cir. 1999).

62. *Id.* at 734.

63. IOWA CODE §§ 476.22-26 (1997).

64. *North Star*, 184 F.3d at 734.

65. *Id.*

66. *North Star*, 184 F.3d at 734.

67. *Id.*

68. *North Star*, 184 F.3d at 734-35.

69. *North Star*, 184 F.3d at 735 (quoting *In re MidAmerican Energy Co.*, No. DRU-98-1, slip op. at 5, 1998 WL 352662 (Iowa U. B. May 29, 1998), *aff'd sub nom.* *North Star Steel Co. v. Iowa Utils. Bd.*, No. AA3127 (Iowa Dist. Ct. Polk County Jan. 29, 1999), *appeal docketed*, No. 99-342 (Iowa Feb. 25, 1999)).

In granting summary judgment in favor of MidAmerican, the federal district court found that "Iowa has clearly articulated a state policy to prevent electricity suppliers from competing for retail customers," and that the Board has actively implemented the regulatory scheme enunciated by the Iowa General Assembly. Consequently, MidAmerican satisfied both requirements for the "state action" immunity doctrine and was, therefore, immune from North Star's claim of anti-trust violations.⁷⁰

The day after the federal district court granted summary judgment in favor of MidAmerican, North Star filed a petition for judicial review of the Board's declaratory ruling in the Iowa District Court for Polk County.⁷¹ The state court held that the Board has the authority to issue the declaratory ruling on the questions presented by MidAmerican, and that the Iowa state exclusive territory law and regulations include the generation of electricity, thus affirming the Board's interpretation.⁷²

After the decisions of the federal district court and the state court were issued, the Board approved a pilot program that allowed MidAmerican to sell electricity it purchased from third party generators directly to retail customers.⁷³ The pilot program was unavailable to North Star, however, because the program's 10 MW limit per customer made the program uneconomic for MidAmerican's large-load customers like North Star.⁷⁴ In part based upon these recent developments, North Star appealed the district court's order granting summary judgment.⁷⁵

On appeal to the Court of Appeals for the Eighth Circuit, North Star advanced three principal arguments: (1) that the Iowa statutory provisions concerning assigned exclusive service territories applied only to the distribution of electricity, and not to the generation of electricity; (2) that even if Iowa clearly articulated a policy displacing competition in the generation of electricity, that the district court erred in finding that policy to be actively supervised by the state; and (3) that because three distinct markets (including generation, transmission, and distribution) comprise the electricity industry, summary judgment was inappropriate because there were disputed issues of material fact that required resolution before MidAmerican's "state-action" immunity claim could be decided.⁷⁶

The court of appeals rejected North Star's arguments and affirmed the judgment of the district court.⁷⁷ The court explained that before it could reach the issue of "state-action" immunity, it must first determine the effect of the state

70. *North Star*, 184 F.3d at 735 (quoting *North Star Steel Co. v. MidAmerican Energy Holdings Co.*, No. 4-97-CV-80782, slip op. at 4 (S.D. Iowa June 23, 1998) (*North Star I*)). The district court further held that there was no genuine issue of material fact and that MidAmerican was entitled to judgment as a matter of law. *North Star*, 184 F.3d at 735; *North Star I*, slip op. at 3.

71. *North Star*, 184 F.3d at 735.

72. *Id.* See also *North Star Steel Co. v. Iowa Utils. Bd.*, slip op. at 8-9.

73. *North Star*, 184 F.3d at 736.

74. *Id.*

75. *North Star*, 184 F.3d at 736.

76. *North Star*, 184 F.3d at 736-37.

77. *Id.* at 736-40.

court's decision affirming the Board's ruling, as that decision raised the issue of collateral estoppel, or issue preclusion.⁷⁸ Issue preclusion prevents a party to a prior action in which a judgment has been entered from relitigating issues that were raised and resolved in that prior action.⁷⁹

Because the Full Faith and Credit Statute⁸⁰ requires a federal court to give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered, the court of appeals applied Iowa law relating to issue preclusion to North Star's claim that the Iowa statutory provisions concerning assigned exclusive service territories did not apply to the generation of electricity.⁸¹ The court of appeals held that under Iowa law, the prior determination by the state court collaterally estopped the court of appeals and North Star from re-examining that same issue.⁸² The court, therefore, assumed for purposes of the appeal that under Iowa law the exclusive service territory provisions include the generation of electricity for retail sales.⁸³

The court of appeals next examined whether the district court erred when it concluded that Iowa's exclusive service territory policy satisfied the requirements of "state-action" immunity.⁸⁴ "The 'state action doctrine' immunizes a private party from antitrust liability if (1) the private party acts pursuant to a 'clearly articulated' and 'affirmatively expressed' state policy to allow the anti-competitive conduct, and (2) the regulatory policy is 'actively supervised' by the state itself."⁸⁵

To satisfy the first prong of the *Midcal* test, the state as the sovereign must clearly intend to displace competition in a particular field with a regulatory structure.⁸⁶ The court of appeals concluded that the district court did not err in finding that Iowa law "clearly articulated" and "affirmatively expressed" a policy displacing competition in the market for retail electric service, and that Mid-American's retail wheeling pilot program supported the district court's finding on that issue.⁸⁷

The second prong of the *Midcal* test requires the state to exercise sufficient independent judgment and control over the regulated activity to prevent private parties from engaging in unsupervised anti-competitive behavior.⁸⁸ The court of appeals held that the second prong of the *Midcal* test was also satisfied, upholding the district court's finding that the Board actively supervises the exclusive service territories of utilities in Iowa.⁸⁹

78. *North Star*, 184 F.3d at 737.

79. *Id.* (citation omitted).

80. 28 U.S.C. § 1738 (1999).

81. *North Star*, 184 F.3d at 737.

82. *Id.* at 737, 739.

83. *North Star*, 184 F.3d at 737-38.

84. *Id.* at 738-39.

85. *North Star*, 184 F.3d at 738; *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 997, 105 (1980).

86. *North Star*, 184 F.3d at 738 (citation omitted).

87. *Id.*

88. *North Star*, 184 F.3d at 738, 739 (citations omitted).

89. *Id.* at 739.

North Star's third assignment of error was that the district court erred in granting summary judgment because there were disputed issues of material fact concerning the nature of the electric industry, including the deregulation that had recently taken place.⁹⁰ The court of appeals disposed of this claim by concluding that North Star was collaterally estopped from disputing the nature of the electricity industry with respect to Iowa's exclusive service territory statute.⁹¹ Having thus disposed of North Star's claims of error, the court of appeals affirmed the judgment of the district court.⁹²

P. Section 1 of the Sherman Act: "Noerr-Pennington" Doctrine

The Modesto Irrigation District (MID) filed an antitrust, tortious interference, and breach of contract complaint against Pacific Gas & Electric Company (PG&E) and Dynegy Power Services, Inc.⁹³ (Dynegy), based on PG&E's refusal to deliver wholesale electric power.⁹⁴

MID is a public agency with electricity generation, transmission, and distribution facilities. It has the authority to sell electricity at retail to several California counties and sells electricity at wholesale throughout the western United States.⁹⁵ Dynegy is a power marketer with a transmission agreement with PG&E that allows Dynegy a limited right to use PG&E's transmission facilities for the delivery of wholesale energy.⁹⁶

In order to expand the number of wholesale customers that it could supply, Dynegy concluded that it could sell power to a utility (with authority to sell power at retail) as long as PG&E agreed to delivery under the transmission agreement between PG&E and Dynegy, and the utility owned the substation to which the power was being wheeled.⁹⁷ Pursuant to this plan, Dynegy approached MID with a proposal to purchase a substation near Pittsburgh, California, that would allow MID to sell power at retail in that area. At that time all of the retail customers in Pittsburgh were supplied by PG&E.⁹⁸ Consummation of this plan required the approval of PG&E.

PG&E refused Dynegy's and MID's request for transmission service.⁹⁹ Subsequently, Dynegy sought to resolve the transmission issue through arbitration. However, prior to a decision being issued in the arbitration, Dynegy and PG&E reached a settlement agreement. Dynegy agreed to a prohibition on supplying energy to substations as it was attempting to do with MID. In return for that agreement, PG&E assigned certain favorable power sales agreements to

90. *North Star*, 184 F.3d at 739.

91. *Id.*

92. *North Star*, 184 F.3d at 740.

93. *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp.2d 1058, 1999-2 Trade Cas. (CCH) ¶ 72,654 (N.D. Cal. 1999). Although the opinion lists the defendant as "Dynegy Power Services, Inc.," the true name is "Dynegy Power Services, Inc."

94. *Id.* at 1060.

95. *Modesto*, 61 F. Supp.2d at 1061.

96. *Id.*

97. *Modesto*, 61 F. Supp.2d at 1062.

98. *Modesto*, 61 F. Supp.2d at 1062.

99. *Id.*

Dynegy.¹⁰⁰

Based on that agreement, MID filed a section 1 claim against PG&E and Dynegy claiming they engaged in a contract, combination, and/or conspiracy to unreasonably restrain competition in the wholesale and retail sale of electric power in PG&E's service area.¹⁰¹ MID also filed a section 2 claim against PG&E arguing that PG&E has attempted to monopolize the market for retail distribution of electric power to customers located near Pittsburgh. MID also claimed that PG&E and Dynegy conspired to monopolize the retail electric market near Pittsburgh.¹⁰²

The court dismissed the section 1 claim finding the agreement between PG&E and Dynegy to be at most "a unilateral effort by PG&E to deny [Dynegy's] request that PG&E provide wholesale electric power to the . . . substation." Consequently, the MID claim did not constitute a contract, combination, or conspiracy in restraint of trade necessary to support a section 1 claim. The court dismissed the section 2 conspiracy claim as being too vague to sustain a complaint and failing to describe the antitrust injury suffered by MID. The court agreed with PG&E's defense that its refusal to supply energy to Dynegy and MID at the substation was incidental to its petition at the FERC requesting a determination that PG&E is not obligated to provide transmission service to Dynegy and MID. In so holding, the court found that MID's section 2 monopolization falls within the scope of the "Noerr-Pennington" doctrine and dismissed that claim as well.¹⁰³

Q. Merger Analysis

The U.S. Court of Appeals for the Seventh Circuit in *South Austin Coalition Community Council v. SBC Communications, Inc.*,¹⁰⁴ affirmed a decision dismissing a suit challenging the proposed merger of SBC Communications Inc. and Ameritech Corporation as premature because all required state and federal approvals had not been obtained.¹⁰⁵ Although the Seventh Circuit agreed with the plaintiffs that the Federal Communications Commission's decision on the merger is not dispositive of the antitrust issues, "[u]ntil the agencies have had their say, it is impossible to perform the sort of antitrust analysis that is integral to a potential competition cases, and it, therefore, would be a waste of everyone's time to proceed" and "an expensive challenge to a moving target is worse than pointless."¹⁰⁶ Because the delay would not harm the plaintiffs, and the defendants had waived any laches defense if a new suit was filed within thirty days after the final administrative decision, the Seventh Circuit concluded that the most appropriate remedy was a dismissal without prejudice.¹⁰⁷

100. *Modesto*, 61 F. Supp.2d at 1063.

101. *Id.* at 1067.

102. *Modesto*, 61 F. Supp.2d at 1063.

103. *Id.* at 1073.

104. *South Austin Coalition Community Council v. SBC Communications Inc.*, 191 F.3d 842 (7th Cir. 1999).

105. *Id.* at 842-43.

106. *South Austin*, 191 F.3d at 845.

107. *Id.*

R. Trade Associations/Price Fixing

In this case,¹⁰⁸ the Ninth Circuit affirmed a decision granting summary judgment for one producer of citric acid and held that circumstantial evidence did not support the inference that the producer had conspired to fix prices. Relying upon the Supreme Court's decision in *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*,¹⁰⁹ and its own prior cases, the Ninth Circuit held that in such cases, the plaintiff must also produce evidence tending to exclude the possibility that the producer was not engaging in permissible competitive behavior.¹¹⁰ The court rejected claims that the producer and other defendants had used a trade association as a mechanism to fix prices. The court concluded that the trade association had engaged in legitimate functions of: (1) providing information to industry members; (2) conducting research to further the goals of the industry; and (3) promoting demand for its products and services as it had rejected a suggestion of one member to contact non-members to stabilize prices as contrary to the spirit of the antitrust laws.¹¹¹ The court noted that a trade association could use an independent agent to collect and audit production and sales data from its members and release to its members such data aggregated by country.¹¹²

S. State-Action Immunity Doctrine

The Ninth Circuit reversed a decision enjoining the County of Sonoma's establishment of exclusive operating areas for non-emergency ambulance services at basic life support level of service.¹¹³ A California statute authorized counties to develop emergency medical services programs, including ambulance and paramedic services, within one or more exclusive operating areas.¹¹⁴ The statute stated that it intended to confer "state action" immunity from federal antitrust laws.¹¹⁵ Relying upon a state court decision interpreting the statute, its own prior decisions and decisions of the Supreme Court, the Ninth Circuit concluded that California had clearly intended to grant "state action" immunity to local governments implementing emergency medical services plans consistent with the statute and expressed state policy to create exclusive operating areas for ambulance services.¹¹⁶ The court also distinguished its decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*¹¹⁷ In that case, the court had held that a state utility commission had failed to confer "state action" immunity on two utilities attempting to allocate service territories¹¹⁸ because it "did not clearly express its intent to create exclusive operating areas or to displace com-

108. *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999).

109. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

110. *Citric Acid Litigation*, 191 F.3d at 1093-97.

111. *Id.* at 1097-1100.

112. *Citric Acid Litigation*, 191 F.3d at 1098-99.

113. *Redwood Empire Life Support v. County of Sonoma*, 190 F.3d 949, 951 (9th Cir. 1999).

114. *Id.*

115. *Redwood*, 190 F.3d at 951.

116. *Id.* at 953-55.

117. *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997).

118. *Id.*

petition between the companies.”¹¹⁹ Through the statute, however, California had “clearly expressed state policy to create exclusive operating areas for emergency ambulance services.”¹²⁰

T. El Paso - Sonat Merger

The FTC has accepted a proposed consent agreement that would permit, under specific circumstances, the \$6 billion merger of El Paso Energy Corporation (El Paso Energy) and Sonat Inc. (Sonat).¹²¹ The proposed consent agreement would settle the alleged violations by El Paso of the Clayton Act¹²² and the Federal Trade Commission Act¹²³ in connection with its combination with Sonat. As part of this consent agreement, the FTC would require that El Paso divest significant assets held by El Paso and Sonat in order to protect competition among natural gas transporters in certain areas of the country.

1. Background

El Paso Energy owns and operates natural gas transmission, gathering and processing, energy marketing, power generation, and international infrastructure development companies. El Paso operates through the following six business units: Tennessee Gas Pipeline Company (Tennessee Gas), East Tennessee Natural Gas Company (East Tennessee), El Paso Natural Gas Company, El Paso Field Services Company, El Paso Energy Marketing Company, and El Paso Energy International Company.

In addition to the above-listed interests, El Paso holds a 34.5% ownership interest in, and is a general partner of, Leviathan Gas Pipeline Partners, L.P. (Leviathan). El Paso controls offshore pipelines through Leviathan's interests in pipelines across the Gulf of Mexico. These pipelines include Stingray and Viosca Knoll Gathering Company (VKGCC), both of which are operated by El Paso Energy.

Sonat engages in the exploration and production of oil and natural gas, interstate transmission of natural gas, and energy services. Sonat owns interests in more than 14,000 miles of natural gas pipelines through its natural gas transmission operations. Sonat owns and operates Southern Natural Gas Company (Southern Natural), which is the major pipeline in the Southeast. Sonat also has a 50% ownership interest in Florida Gas Transmission Company, which is the principal pipeline serving Florida. Additionally, Sonat owns and operates Sea Robin Pipeline Company (Sea Robin), which gathers gas from various areas in the Gulf of Mexico and owns a one-third interest in Destin Pipeline Company, L.L.C.

El Paso Energy intends to acquire 100% of the voting securities of Sonat pursuant to the Agreement and Plan of Merger dated March 13, 1999, by and between El Paso and Sonat.

119. *Columbia Steel*, 111 F.3d at 1427.

120. *Id.*

121. *El Paso Energy Corp.*, 64 Fed. Reg. 59,179 (Nov. 2, 1999).

122. 15 U.S.C. § 18 (2000).

123. 15 U.S.C. § 45 (2000).

2. Proposed Consent Agreement

The proposed consent agreement is intended to address the areas of concern identified by the FTC where El Paso and Sonat are direct competitors. For example, both El Paso and Sonat are involved in the transportation of natural gas in the same regions of the Gulf of Mexico, and both have substantial pipeline interests in this area. Stingray, partially owned by El Paso, and Sea Robin, owned by Sonat, compete in the eastern Louisiana Gulf. In addition, Southern Natural, Destin, Tennessee Gas, and VKGC all directly compete in the east-central area of the Gulf of Mexico. Furthermore, El Paso and Sonat are direct competitors in transporting natural gas into eastern Tennessee and northern Georgia as well as transporting gas for local distribution companies serving Atlanta, Chattanooga, and Knoxville.

To resolve the issues related to the combination of entities with affiliates or subsidiaries that directly compete in certain markets, the consent order would require El Paso to divest the following assets: (1) Sea Robin Pipeline Company (wholly-owned subsidiary of Sonat); (2) Destin Pipeline (one-third owned by Sonat); and (3) East Tennessee Natural Gas Company (wholly-owned by El Paso). Under the proposed consent order, El Paso would have six months from the date the consent is signed to complete the divestiture of these assets.

In addition, the consent order would contain additional ancillary provisions that would provide additional protection for competition. For example, many customers of Eastern Tennessee have contracts with Eastern Tennessee or Tennessee Gas that have renewal election deadlines that would occur before the divestiture of East Tennessee would be complete. As a result, the consent order would extend the renewal deadline for these contracts so that the identity of the entity that acquires East Tennessee would be known at the time the customers decide whether or not to renew their contracts.

A summary of the proposed consent agreement was published on November 2, 1999, in the Federal Register and was subject to public comment for thirty days. The FTC must now decide whether to make the consent order final.

U. Dominion Resource's Acquisition of Consolidated Natural Gas

The FTC issued a final order on December 9, 1999, approving Dominion Resources, Inc.'s (Dominion) acquisition of Consolidated Natural Gas Company (CNG).¹²⁴ The FERC approved a consent agreement which Dominion and CNG entered into in November, 1999, under which Dominion must either divest or spin-off to its shareholders CNG's subsidiary, Virginia Natural Gas, Inc. (VNG). VNG provides local gas distribution service in southeastern Virginia, within the retail electric service area of Dominion's principal subsidiary, Virginia Power. The FTC consent agreement mirrors a stipulation that Dominion and CNG entered into with the staff of the Virginia State Corporation Commission (VSCC).¹²⁵ The FTC issued its Complaint and Order to Hold Separate regarding

124. *In re Dominion Resources, Inc. & Consolidated Natural Gas Co.*, No. C-3901, (Dec. 9, 1999) <<http://www.ftc.gov/os/1999/9912/dominiond&o.htm>>.

125. The VSCC approved the stipulation, with minor modifications, in an order dated September 17, 1999. See Joint Petition of Dominion Resources, Inc. & Consolidated Natural Gas Co., No. PUA990020

the merger on November 4, 1999, alleging that the proposed merger would violate section 7 of the Clayton Act,¹²⁶ and section 5 of the FTC Act.¹²⁷ The FERC asserted that the merger would increase barriers to entry for independent power generators and could force consumers to pay higher prices for electricity and gas in southeastern Virginia.

V. Merger of Southern Indiana Gas and Electric and Indiana Energy, Inc.

By order dated December 20, 1999, the FERC approved the proposed merger of Southern Indiana Gas and Electric Company and Indiana Energy, Inc., two exempt public utility holding companies, and their respective affiliates.¹²⁸ The combined companies will form a new company called Vectren Corporation.

Southern Indiana, a wholly-owned subsidiary of SIGCORP, generates, transmits, and distributes electricity to approximately 124,000 customers, and transports and distributes natural gas to approximately 108,000 retail customers in southwestern Indiana. Southern Indiana also owns and operates three natural gas storage fields.¹²⁹

Indiana Energy owns two local gas distribution companies in Indiana that together do business as Indiana Gas Company, Inc. Through another subsidiary, Indiana Energy also owns 50% of ProLiance Energy, a natural gas marketer that sells gas to Indiana Gas and which has authority to do business as a power marketer.¹³⁰

The FERC agreed with the merging companies that their merger raised no issues of adverse horizontal effects on competition because Indiana Energy owns no electric generation or transmission facilities. The Commission also agreed that the merged company's combination of natural gas delivery and electric generation assets "will not create or enhance the ability of the merged company to adversely affect prices or output in downstream electricity markets and, as a result, the proposed merger will not adversely affect competition in electricity markets."¹³¹

Southern Indiana's gas facilities serve only its own gas-fired electric generation plants, and Indiana Gas's gas systems serve only about 240 MW of competing gas-fired generation capacity. In addition, the applicants presented data showing that natural gas-fired generation is a very small portion of all electric generation capacity in the affected regional reliability areas.¹³²

(Sept. 17 1999) <<http://dit1.state.va.us/scc/orders/case/a990020g.pdf>>.

126. 15 U.S.C. § 18.

127. 15 U.S.C. § 45.

128. *Southern Ind. Gas & Elec. Co.*, 89 F.E.R.C. ¶ 61,288 (1999).

129. *Id.* at 61,899.

130. 89 F.E.R.C. ¶ 61,288, at 61,899.

131. *Id.* at 61,902.

132. 89 F.E.R.C. ¶ 61,288, at 61,902 (stating that the merging companies provided data showing that less than 6% of the generation capacity in both Eastern Central Area Reliability region (ECAR) and Southwest ECAR is gas-fired generation; that natural gas accounts for less than 1% of total consumption of fossil fuels in ECAR, Southwest ECAR and Indiana; that gas-fired generation is on the margin during less than 2% of the hours in ECAR and during less than 1.5% of the hours in Southwest ECAR; and that the average capacity factor of gas-fired generation units is less than 2% in ECAR and less than 1.5% in Southwest ECAR).

The FERC held that the merger presented no vertical competition problems. It found that the

[a]pplicants have demonstrated that the proposed merger involves a relevant upstream product (delivered natural gas) that is used to produce only a de minimus amount of electricity in reasonably defined downstream geographic markets [and] properly conclude that it would be difficult for the merged firm to adversely affect prices and output in relevant downstream geographic markets.¹³³

The FERC noted that this approach is consistent with its proposed rulemaking on revised filing requirements for merger applications,¹³⁴ "which describes certain instances when, based on certain limited information, the Commission may conclude that a merger clearly presents no vertical competitive concerns."¹³⁵

W. Joint Ventures: Violation of Consent Decrees

In *United States v. Smith International, Inc.*, the United States District Court for the District of Columbia entered a judgment holding Smith International Inc. (Smith) and Schlumberger Ltd. (Schlumberger) each guilty of criminal contempt of court, in violation of 18 U.S.C. § 401(3). District Judge Stanley Sporkin ordered each company to pay a fine of \$750,000 and placed both companies, as well as their respective affiliates, subsidiaries, and/or joint ventures, on probation for five years, "with the express condition that they shall be required to obtain a written opinion from experienced antitrust counsel on the propriety and legality of any contemplated transaction that implicates the United States antitrust laws."¹³⁶

The proceeding is rooted in a civil antitrust suit that the DOJ's Antitrust Division brought in 1993 to block the merger of Dresser Industries, Inc., and Baroid Corporation.¹³⁷ The DOJ alleged that the merger of the two largest producers of oil and gas drilling fluids in the United States would stifle competition in the U.S. market for such fluids. As a condition of a Final Judgment entered in *Baroid* on April 12, 1994, Dresser was required to sell either its drilling fluids affiliate, M-I Drilling Fluids, or Baroid's drilling fluids subsidiary. Dresser later sold M-I to Smith International, and Smith agreed to be bound by the Final Judgment. The Final Judgment prohibited the purchaser of M-I from selling it to, or from combining its business with, certain other producers of drilling fluids, including Schlumberger.

On February 5, 1999, Smith and Schlumberger entered into an agreement to create a joint venture that would include M-I and Schlumberger's global drilling fluids operations. The joint venture agreement included a provision that ac-

133. 89 F.E.R.C. ¶ 61,288, at 61,902.

134. Notice of Proposed Rulemaking, *Revised Filing Requirements*, F.E.R.C. STATS. & REGS. ¶ 32,528, at 33,375-76, 63 Fed. Reg. 20,340 (1998) (to be codified at 18 C.F.R. pt. 33).

135. 89 F.E.R.C. ¶ 61,288, at 61,902 (footnote omitted).

136. The following description of the facts is based on the DOJ's petition to the District Court for an order to show cause. See *United States v. Smith Int'l, Inc.*, No. 93-2621, *Petition By The United States For An Order To Show Cause Why Respondents Smith International Inc. and Schlumberger Ltd. Should Not Be Found In Criminal Contempt*, (filed July 27, 1999) <<http://www.usdoj.gov/atr/cases/f2500/2592.htm>>.

137. *United States v. Baroid Corp.*, 1994-1 Trade Cas. (CCH) ¶ 70,572 (Apr. 12, 1994).

knowledgeed the need for the parties to obtain an amendment to the *Baroid* Final Judgment. Nevertheless, in July 1999, while the DOJ was still considering whether to object to such an amendment, Schlumberger and Smith wrote several letters to the DOJ in which they stated that: (1) Schlumberger had decided to discontinue its drilling fluids business in the United States; (2) in their view, because of Schlumberger's termination of its U.S. drilling fluids business, the *Baroid* judgment did not apply to their transaction; and (3) they intended to close their deal on July 14. On July 13, the Antitrust Division delivered a letter to Smith and Schlumberger advising them of the DOJ's view that closing the transaction would be a violation of the *Baroid* decree. Smith and Schlumberger closed their transaction as scheduled on the following day. The DOJ responded on July 22 with its petition seeking to hold Smith and Schlumberger in criminal contempt.¹³⁸

X. Federal Electric Restructuring

In Order No. 2000,¹³⁹ on December 20, 1999, the FERC promulgated new rules requiring all electric utilities under its jurisdiction to file a proposal to establish a regional transmission organization (RTO) by no later than October 15, 2000, to be operational by December 15, 2001. Alternatively, the utility must report on their efforts to join an RTO and the issues that prevent their participation which remain unresolved. The FERC also prescribed minimum criteria that RTOs must meet to obtain the Commission's approval.

Order No. 2000 discusses issues regarding the state of competition and the potential for utilities that own electric transmission facilities to exercise market power. The FERC found that the requirement in its Order No. 888¹⁴⁰ (promulgated in 1996) that all public utilities functionally separate their transmission business and operations from their power generation operations had led to a much more competitive marketplace. It also concluded, however, that significant structural obstacles to the full development of competition remain to be overcome: "opportunities for undue discrimination continue to exist that may not be remedied adequately by functional unbundling. We further conclude that per-

138. On July 27, 1999, the DOJ filed another petition in the same action, seeking to hold Smith and Schlumberger in civil contempt. The DOJ and the respondents jointly filed a proposed "Settlement Agreement and Order" regarding the civil contempt petition on December 22, 1999. The settlement requires the respondents to pay the United States Treasury \$13.1 million, "which represents a disgorgement of the total net income of the joint venture from July 14, 1999, through December 8, 1999." Settlement Agreement and Order, No. 93-2621 at 2 (filed Dec. 22, 1999). The agreement forbids the companies and their affiliates and subsidiaries from claiming the payment as a deductible expense on any federal, state, or foreign tax return. It also requires them to seek an amendment to remove Schlumberger from the *Baroid* Final Judgment's list of companies that are forbidden from acquiring, or from combining their drilling fluids businesses with, M-I. Subject to considering information received during a period for public comment on the amendment, the DOJ has agreed not to oppose it. *Id.* The court had not acted on the civil contempt settlement by the end of the year covered by this report.

139. Order No. 2000, *Regional Transmission Organizations*, 89 F.E.R.C. ¶ 61,285, 65 Fed. Reg. 810 (1999) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2000].

140. Order No. 888, *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Services By Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, III F.E.R.C. STATS. & REGS. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *reh'g denied*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *petition for review filed sub nom. Transmission Access Policy Study Group v. FERC*, No. 97-1715 (D.C. Cir. Dec. 5, 1997).

ceptions of undue discrimination can also impede the development of efficient and competitive electric markets.”¹⁴¹

The FERC observed that whether functional unbundling has effectively minimized or eliminated abuse of market power and other forms of undue discrimination was the subject of heated controversy in the comments on its proposed rules. It emphasized that Order No. 2000 makes no findings “that particular utilities, or individuals within those utilities, are acting in bad faith or deliberately violating our open access requirements or standards of conduct.”¹⁴² Nevertheless, the FERC stated, when combined with “economic and engineering impediments affecting reliability, operational efficiency and competition,” the continuing perceptions of, and apparent potential for, undue discrimination justify the “measured and appropriate response” of promulgating “a voluntary approach to the formation of RTOs.”¹⁴³

The FERC noted that most of the discussion of the scope of its legal authority in comments on its proposed rules centered on whether it has the power to require utilities to join RTOs.¹⁴⁴ The FERC determined that its choice of a voluntary program to encourage participation in RTOs made it unnecessary for it to decide the extent of its authority generally to mandate RTO membership.¹⁴⁵

It did, however, hold that it has “authority to order RTO participation on a case-by-case basis, if necessary, to remedy undue discrimination or anticompetitive effects where supported by the record.”¹⁴⁶ The FERC provided an overview of the statutory provisions that it apparently thinks provide such authority, though it did not present a detailed analysis of precedent to support its view.¹⁴⁷ It reiterated, however, that while it would condition utilities’ receipt or retention of authority to charge market-based rates for commodity sales, it “adhere[s] to our precedent that market-based rates can be just and reasonable only where transmission market power has been mitigated and there are no other barriers to entry.”¹⁴⁸ Similarly, the FERC declined to find that “no [proposed] merger could be consistent with the public interest in the absence of RTO participation.”¹⁴⁹ Nevertheless, it observed that “our processing of merger application can be facilitated to the extent the merging parties have resolved potential anticompetitive issues through means such as RTO participation.”¹⁵⁰

One of the required elements of each RTO is a plan for monitoring the performance of the markets in which the RTO has a role.¹⁵¹ The monitoring may be done by the RTO itself or by an independent monitor created or retained by the

141. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 824.

142. *Id.*

143. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 824.

144. *Id.* at 839-40.

145. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 840 n.162.

146. *Id.* at 840.

147. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 840-41.

148. *Id.* at 840.

149. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 841.

150. *Id.*

151. Order No. 2000, *supra* note 138, 65 Fed. Reg. at 904.

RTO's participants.¹⁵² The Commission declined to establish specific requirements for market monitoring, but provided that RTOs must propose a monitoring plan that meets or exceeds the following criteria: (1) it must include monitoring the behavior of market participants in the region of the RTO's operation, including transmission owners other than the RTO, to determine if their actions impede the RTO's efforts to provide reliable, efficient and not unduly discriminatory transmission service; (2) it must provide for periodic assessment of how behavior in markets other than those that the RTO operates (such as, for example, unaffiliated power exchanges) affect the RTO's operations and how the RTO's operations affect the efficiency of those other markets; and (3) it must provide for reports to the FERC "and affected regulatory authorities" regarding opportunities for improvements in market efficiency, abuses of market power and flaws in the design of markets.¹⁵³

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152. *Id.*

153. Order No. 2000, *supra* note 138, 65 Fed. Reg. 956 (to be codified at 18 C.F.R. § 35.34 (k)(6)(i)-(iii)).

