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## **SUBMITTED COMMITTEE REPORTS**

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**As general policy, the Energy Bar Association does not take a position in published Committee Reports on substantive issues that are the subject of pending litigation.**



## REPORT OF THE ANTITRUST COMMITTEE

This report summarizes antitrust developments of particular interest to energy law practitioners that occurred in the year 2001.<sup>1</sup> The topics are covered in the following order: (I) Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DOJ) Consent Orders Regarding Mergers, Acquisitions, and Joint Ventures; (II) FTC Midwest Gasoline Price Investigation—Final Report; (III) Other FTC and DOJ Issuances; (IV) Speeches and Congressional Testimony; (V) Court Decisions; (VI) Federal Energy Regulatory Committee and Other Regulatory Agency Orders; and (VII) Noteworthy Non-Energy Antitrust Cases.

### I. FEDERAL TRADE COMMISSION (FTC) AND DEPARTMENT OF JUSTICE ANTITRUST DIVISION (DOJ) CONSENT ORDERS REGARDING MERGERS, ACQUISITIONS, AND JOINT VENTURES

#### A. *El Paso Energy Corporation and Coastal Corporation*

On January 29, 2001, the FTC entered into a consent decree with El Paso Energy Corporation (El Paso) and Coastal Corporation (Coastal) in settlement of a proposed complaint by the FTC arising from El Paso's acquisition of Coastal.<sup>2</sup> Under the consent decree, which became final on March 23, 2001, the FTC approved the \$16 billion El Paso/Coastal merger, but required a series of divestitures of natural gas pipelines to ensure that competition is not adversely affected for natural gas transportation in the United States. El Paso is one of the largest integrated natural gas and electric power companies in the world, and is engaged in gathering, processing, transporting, and storing natural gas throughout the United States. Coastal is a diversified energy and petroleum products company that produces, gathers, processes, transports, stores and markets natural gas. Prior to the merger with El Paso, Coastal had pipelines serving the Rocky Mountain Area, the Midwest, the south-central United States, New York State and other areas of the northeastern United States. Through this transaction, El Paso acquired all of Coastal's common stock.

The FTC's complaint alleged that El Paso's proposed acquisition of Coastal would have anticompetitive effects in the following markets: 1) Central Florida; 2) upstate New York; 3) Milwaukee, Wisconsin; 4) Evansville, Indiana; and 5) thirteen areas in the Gulf of Mexico. The complaint stated that the market for natural gas was already highly concentrated, and that this acquisition would increase that concentration. It also stated that the acquisition could threaten potential new competition. The complaint

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1. This summary of antitrust developments does not purport to represent the position or views of any of the contributors to this report or their clients or employers.

2. *El Paso Energy Corp.*, F.T.C. Docket No. C-3996 (Jan. 29, 2001), available at <http://www.ftc.gov/opa/2001/01/elpasocoastal.htm>.

alleged that the acquisition would eliminate direct competition between El Paso and Coastal leading to increased transportation prices, thereby increasing the cost of electricity and natural gas.

The consent order was designed to remedy the alleged anticompetitive effects in the markets mentioned above. Among other things, the consent order required El Paso to divest, within ten days of the date the merger is closed, the following pipelines: 1) Gulfstream Natural Gas System; 2) the Empire pipeline (which serves customers in upstate New York); and 3) three pipelines in the Gulf of Mexico. Within four months, El Paso and Coastal would be required to divest their interests in the Midwestern Gas Transmission (MGT),<sup>3</sup> Enbridge Offshore Pipeline, L.L.C., (UTOS)<sup>4</sup> (located in the Gulf of Mexico), and Iroquois<sup>5</sup> (located in the northeast) pipelines. El Paso also must provide transitional services to the buyers of the Empire, MGT, UTOS, and one of the Gulf of Mexico pipelines for a period up to nine months at a reasonable fee.

*B. Entergy Corp. and Entergy-Koch, L.P.*

On January 31, 2001, the FTC announced its acceptance of a final consent agreement with Entergy Corporation (Entergy) and Entergy-Koch, LP (EKLP), a limited partnership joint venture owned by Entergy and Koch Industries, Inc. (Koch).<sup>6</sup> Under the terms of the consent agreement, EKLP would be allowed to acquire a 50% interest in the Gulf South Pipeline Company, LP (Gulf South) from Koch. Gulf South was formerly known as the Koch Gateway Pipeline Company.

Entergy is a regulated electric and gas utility that serves customers in parts of Arkansas, Louisiana, Mississippi, and Texas. According to the FTC complaint (filed simultaneously with the issuance of the consent order), Entergy has the exclusive right to provide retail electric service to customers in parts of Louisiana and Mississippi and, through its ownership of local gas distribution utilities, the exclusive right to distribute natural gas to customers in New Orleans and Baton Rouge.<sup>7</sup> The complaint also stated that existing state and municipal regulations in Entergy's service territory allow natural gas commodity and transportation costs to be

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3. In May 2001, the Commission approved the sale of the MGT pipeline to Border Midwestern Company. FEDERAL TRADE COMM'N, *Commission Approval of Proposed Divestitures* (May 4, 2001), available at [www.ftc.gov/opa/2001/05/fyi0129.htm](http://www.ftc.gov/opa/2001/05/fyi0129.htm).

4. In April 2001, the Commission approved the sale of the UTOS pipeline to Midcoast Energy Resources, Inc. FEDERAL TRADE COMM'N, *Commission Approval of Proposed Divestitures* (April 13, 2001), available at [www.ftc.gov/opa/2001/04/fyi0122.htm](http://www.ftc.gov/opa/2001/04/fyi0122.htm).

5. In May 2001, the Commission approved the sale of the Iroquois pipeline to a number of energy companies. FEDERAL TRADE COMM'N, *Commission Approval of Proposed Divestitures* (May 4, 2001), available at [www.ftc.gov/opa/2001/05/fyi0129.htm](http://www.ftc.gov/opa/2001/05/fyi0129.htm).

6. FEDERAL TRADE COMM'N, *FTC Clears Sale of Gulf South Pipeline Co. to Entergy-Koch, LP* (Jan. 31, 2001), available at <http://www.ftc.gov/opa/2001/01/entergy.htm>.

7. FEDERAL TRADE COMM'N, *Analysis of the Complaint and Consent Order To Aid Public Comment* (Jan. 2001), available at <http://www.ftc.gov/os/2001/01/entergycorpana.htm> [hereinafter *Complaint Analysis*].

passed on to Entergy's customers.

Koch is a privately held corporation that, through subsidiaries and affiliates, provides and markets a wide variety of energy-related products and services, including natural gas, natural gas transportation, chemicals, petroleum products, minerals, and financial services. Koch Energy Trading markets natural gas, electric power, and weather derivatives, while Gulf South owns and operates the Gulf South Pipeline. Koch is headquartered in Wichita, Kansas.

Entergy and Koch agreed in May 2000 to form a joint venture called EKLP. Under the joint venture agreement, EKLP would acquire the two Entergy subsidiaries that market electricity and gas within the United States. In addition, EKLP would acquire from Koch both Koch Energy Trading and Gulf South.

The FTC's concern with the proposed transaction, as reflected in its complaint, was one of affiliate bias. The concern was that Entergy, as 50% owner of EKLP and the 50% owner of Gulf South, could benefit from inflated prices potentially charged by Gulf South because Entergy could pass costs on to consumers and also keep half of the profit from the transaction. The FTC predicted this would result in a violation of sections 5 and 7 of the Clayton Act through the substantial lessening of competition in two markets: 1) sales of electricity to consumers in those parts of Louisiana and Mississippi served by Entergy electric utility subsidiaries; and 2) distribution of natural gas to consumers in New Orleans and Baton Rouge served by Entergy subsidiaries that are natural gas distribution utilities. According to the complaint, the result would be increased prices due to the potential for price inflation and the oversight difficulties that would face regulators.

The consent order requires Entergy to implement an open, transparent process for the purchase and transportation of natural gas to make it easier for state regulators to determine whether EKLP is supplying natural gas to Entergy at appropriate price levels. From a procedural standpoint, the FTC's simultaneous issuance of a final order together with a complaint and consent agreement, before the public comment period, provided an immediate remedy for the potential anticompetitive effects of the acquisition.<sup>8</sup> In addition, failure to comply with the terms of the order could subject the respondents to civil penalties.

The consent order requires Entergy to prepare a written plan for both short and long-term purchases of natural gas and natural gas transportation. Depending on anticipated contract duration and market activity, Entergy must post certain information about its gas supply requirements on its web site. Entergy must post a request for proposals (RFPs) at least thirty days in advance of any purchase under a contract one year or more

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8. In 1999, the FTC adopted procedures allowing, in exceptional cases, immediate effectiveness of certain orders prior to a public comment period. 64 Fed. Reg. 46,267 (1999). The FTC deemed the Entergy-Koch joint venture case to be an appropriate one in which to issue a final order on this basis. See generally Complaint Analysis, *supra* note 7.

in duration. For short-term purchases, the information must be posted at least seventy-two hours before consideration of proposals for contracts one month or more in duration. Entergy must maintain a log for all short-term purchases. For both short and long-term purchases, EKLP must ensure that Gulf South posts each announcement from Entergy on its own web site before submitting a proposal, and Entergy must consider proposals from all potential suppliers.<sup>9</sup>

*C. DTE Energy Company and MCN Energy Group, Inc.*

In March 2001, the FTC received from DTE Energy Company (DTE) and MCN Energy Group, Inc. (MCN) an Agreement Containing Consent Order<sup>10</sup> in response to the FTC's earlier draft complaint challenging aspects of a proposed merger between DTE and MCN. The FTC approved the merger,<sup>11</sup> but with significant strictures. The Commission released the proposed consent order for public comment, together with an Analysis of the Proposed Consent Order and Draft Complaint to Aid Public Comment.<sup>12</sup>

MCN, the parent of Michigan Consolidated Gas Company (MichCon), originally proposed to merge with a subsidiary of DTE, and become a wholly-owned subsidiary of DTE. DTE, in turn, is the parent holding company of the Detroit Edison Company (Edison), a public utility engaged in the generation, purchase, transmission, distribution and sale of electricity in southeastern Michigan, including Detroit. MCN is a natural gas utility serving communities throughout Michigan. MichCon distributes natural gas, while Edison distributes electricity, in a portion of southeastern Michigan called the "Overlap Area."

The Commission's order of May 18, 2001 resolved concerns that the merger of DTE and MCN would lessen competition in the local distribution of electricity and natural gas in the Overlap Area.<sup>13</sup> It permitted the merger to proceed, but required DTE/MCN, under the terms of a divestiture agreement, to divest certain assets to Exelon Energy Company (Exelon), an energy company formed from the merger of Unicom Corporation (the parent of Commonwealth Edison, the utility serving Chicago and northern Illinois), and PECO, a major utility in the Northeast.

The divestiture agreement consists of an easement agreement and an auditor agreement. The easement agreement conveyed to Exelon an easement over MichCon's natural gas distribution system, allowing Exelon

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9. See generally Gulf South Affiliated Marketer Information and Index of Customers, *available at* <http://www.gulfsouthpl.com>.

10. Agreement Containing Consent Order, *DTE Energy Co.*, F.T.C. File No. 001-0067 (Mar. 2001), *available at* <http://www.ftc.gov/os/2001/03/dtcagrec.pdf>.

11. Decision and Order, *DTE Energy Co.*, F.T.C. File No. 001-0067 (Mar. 2001), *available at* <http://www.ftc.gov/os/2001/03/dtedo.pdf>.

12. Complaint Analysis, *supra* note 7.

13. FEDERAL TRADE COMM'N, *Consent Agreements Given Final Approval* (May. 18, 2001), *available at* <http://www.ftc.gov/opa/2001/05/lyi0132.htm>.

to engage in the distribution and storage of natural gas in the overlap area. The auditor agreement requires third party oversight of the easement agreement. It also contains provisions designed to ensure Exelon's ability to be a viable competitor, including the appointment of an independent auditor to oversee and effectuate both the easement agreement and the purposes of the divestiture agreement. The easement agreement is intended to create incentives for MichCon to promptly perform customer interconnection and system expansion work at a reasonable cost.

## II. FTC MIDWEST GASOLINE PRICE INVESTIGATION—FINAL REPORT

On March 29, 2001, the Federal Trade Commission (FTC) issued its final report on the Midwest Gasoline Price Investigation.<sup>14</sup> In the spring of 2000, the retail price of gasoline spiked sharply. The FTC's report described the price increases as intense but brief and noted that by mid-July the prices had receded to pre-spike levels or even lower. In its final report, the FTC found no evidence of collusion or other antitrust violation and that the varying responses of industry participants to the price spike indicated that the firms were engaged in individual, not coordinated, conduct.

The final report identified refinery production problems, pipeline disruptions and low inventories as the primary causes of the June 2000 price spike. The FTC noted that oil refiners in the United States have been operating at close to their maximum capacity and that refining capacity utilization rose from 85% in May of 1990 to 96% in May of 2000. Because of this high capacity utilization, unexpected demand for one oil product would be difficult to meet unless the supply of another oil product is reduced. In addition, several refineries experienced unexpectedly long maintenance outages and others experienced unanticipated difficulties producing a new grade of reformulated gasoline required by EPA regulations for sale in Chicago and Milwaukee. In addition, two pipelines serving the Midwest experienced service disruptions in the year 2000. Further, gasoline inventories were at or near minimum operating levels in May and June 2000. The FTC also identified a number of secondary factors that may have affected Midwest gasoline prices.

The FTC noted that the individual decisions of certain industry participants contributed to the intensity of the price spikes. Several firms delayed shipments of products into the Midwest because they were uncertain how long the price differentials would last and, accordingly, could not estimate whether rushing new supplies into the Midwest market would be profitable. They were concerned that if other firms also reacted by increasing supplies, prices might quickly fall and the increased supply would lower rather than raise their profits. In addition, several firms had decided to reduce the amount of summer-grade RFG that they produced in 2000, upgrading their refineries only to the extent needed to supply their own gas stations and their contractual obligations. Nevertheless, when the

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14. FEDERAL TRADE COMM'N, Final Report, *Midwest Gasoline Price Investigation* (Mar. 29, 2001), available at <http://www.ftc.gov/os/2001/03/mwgasrpt.htm>.

price spike occurred, some firms increased production and shipped additional gasoline to the Midwest, moderating the severity of the price spike.

The FTC concluded that the damage caused by the price spike was limited because industry participants responded within three to four weeks with an increased supply of products. Nevertheless, "if the problem was short-term, so too was the resolution, and similar price spikes are capable of replication." The FTC warned that unless demand for gasoline is reduced or refining capacity grows, price spikes are likely to occur in the Midwest and other areas of the country in the future. The final report concluded that market participants responded separately to the price spike.

### III. OTHER FTC AND DOJ ISSUANCES

#### *A. FTC Comments Concerning Expansions of Confidential Treatment of Data*

On May 14, 2001, the staff of the Bureau of Economics and Policy Planning (BEPP) of the Federal Trade Commission (FTC) submitted a comment to the DOE concerning the proposals of the Energy Information Administration (EIA) to expand confidential treatment of data collected pursuant to its statutory mandate to manage a centralized, comprehensive, and unified energy information program.<sup>15</sup>

The comment specifically addressed the EIA's proposal to treat as confidential certain operational data that it collects, on a plant-specific basis, from fossil-fueled steam-electric power plants. That information included fuel consumption, quantity, quality, and cost; sales at retail and wholesale; retail sales revenue and number of customers; financial data; thermal output; and cost of purchased power.

The EIA proposal to expand its confidential treatment of collected data was prompted because of the increase in competition in wholesale markets, which has increased the need for protection from disclosure of commercially sensitive information. The EIA expressed its concern that incentives to innovate and invest may be blunted if competitors learn about and emulate the innovations and investments of owners of other electric generating facilities. The EIA was also concerned that an additional social cost of detailed plant-level disclosures might increase likelihood of anticompetitive coordinated interaction among electric power generators.

The BEPP's basic concern (which it described as its own views, and not necessarily the views of the FTC or any individual Commissioner) was that the EIA proposal could reduce the effectiveness of regulatory reform planning and market monitoring of state and federal regulatory and law enforcement agencies during the critical, early stages of the transition from

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15. Comment of the Staff of the Bureau of Econ. & Pol'y. Planning and the Fed. Trade Comm'n, *Agency Information Collection Activities: Proposed Revision and Extension of EIA Form 767 and Other Electric Power Surveys* (May 14, 2001), available at <http://www.ftc.gov/bc/v010007.htm>.



regulation to competition. The BEPP recognized the importance of the innovation and investment incentives identified by EIA, and its potential coordinated interaction concerns, if data were not protected, but encouraged DOE to consider alternative approaches to allay those concerns, so as to preserve the ability of federal and state agencies to design and monitor regulatory reform programs.

The EIA considered the FTC Staff Comment, and over 130 others, on the issue of confidentiality, and revised six of its electricity survey forms as a result.<sup>16</sup> A discussion of the current EIA provisions for confidentiality of information collected by it, and a summary of the comments on confidentiality received in response to EIA's Federal Register notice of March 13, 2001,<sup>17</sup> are contained in OMB's Supporting Statement for the Electric Power Surveys (OMB No. 1905-0129).<sup>18</sup>

### *B. Closing of Western States Gasoline Investigation*

On May 7, 2001, the FTC closed its investigation of various marketing and distribution practices employed by the major oil refiners in Arizona, California, Nevada, Oregon and Washington (the Western States).<sup>19</sup>

The investigation was initiated some three years earlier to investigate the differences in the price of gasoline between Los Angeles, San Francisco and San Diego. The sole question investigated was whether there was a violation of the antitrust laws. The Western States have several unique characteristics that set them apart from much of the rest of the U.S. gasoline market. These characteristics include relative isolation from the Gulf Coast, which has the largest pool of refined petroleum products in the United States, and unique product requirements (i.e., for gasoline satisfying California clean air standards). There are also a limited number of gasoline refiners in the Western States, many of which do not compete in all metropolitan areas. Thus, markets at the refining level are moderately or highly concentrated, as are markets at the wholesale level, which includes both refiner-controlled and independent gasoline distributors. The Commissioners found no evidence of horizontal agreements on price output at any level of supply. While zone pricing exists in the Western States, the investigation found no evidence of collusion between oil companies in furtherance of this practice.

The Commission also looked at the practice of "redlining," i.e., the refiner's practice of preventing independent gasoline distributors, known as "jobbers," from competing with them to supply branded gasoline to inde-

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16. Those revised forms were published in the Federal Register on September 11, 2001, 66 Fed. Reg. 47,192 (2001), and were subsequently approved by OMB. For information regarding the revised forms, see generally Energy Info. Admin., *Confidentiality of Information on EIA Electric Power Surveys*, available at <http://www.eia.doe.gov/cneaf/electricity/forms/ssclecpower98.html> (last visited Mar. 18, 2002).

17. 66 Fed. Reg. 14,564 (2001).

18. Available at [www.eia.doe.gov/cneaf/electricity/elec2002/omb.pdf](http://www.eia.doe.gov/cneaf/electricity/elec2002/omb.pdf).

19. FEDERAL TRADE COMM'N, *FTC Closes Western States Gasoline Investigation* (May 7, 2001), available at <http://www.ftc.gov/opa/2001/05/westernmgas.htm> [hereinafter *Closed Investigation*].

pendent dealers in metropolitan areas. The Commission found no evidence of conspiracy or coordination of these practices by vertically integrated West Coast refiners.<sup>20</sup>

*C. U.S. Department of Justice Announcement – New Program for Conducting Merger Investigations*

On August 7, 2001, U.S. Assistant Attorney General Charles A. James announced a new DOJ Antitrust Division program for conducting Hart-Scott-Rodino merger investigations.<sup>21</sup> The program was described as a way to more quickly identify “critical legal and economic issues regarding transactions, facilitate more efficient and more focused investigative discovery and provide for an orderly process for the evaluation of evidence.” Under the program, Antitrust Division chiefs, in consultation with the relevant Deputy Assistant Attorney General will “be authorized to commit the Division to procedural agreements, subject to the parties fulfilling their obligations,” including time tables for “reaching interim investigative conclusions, articulating specific competitive concerns or making final enforcement decisions.” Parties in turn will be asked to commit to specific undertakings with regard to making information available and complying with investigative requests. Mr. James indicated that in matters where the Division has “considerable industry experience” it may be willing to focus almost exclusively on one or two key issues, subject to timing and procedural protection agreements in the event of a challenge. Furthermore, it may be willing to agree to a detailed schedule culminating in an enforcement decision date certain and it may be receptive to alternative schedules offered by parties. Alternatively, parties may choose to simply comply with the traditional second request process, and the Division will rely on statutory waiting periods.

*D. Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition*

On October 3, the Federal Trade Commission released a lengthy report prepared by its staff.<sup>22</sup> The report reviews progress by the states to-

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20. While concurring in the closing of the investigation, Commissioner Mozelle W. Thompson stated that he remained “somewhat troubled by the practice of site-specific redlining,” in which the contract includes financial disincentives for the jobber to sell in locations directly supplied by the refiner and prevents the jobber from shipping low-priced gasoline to stations in high-priced zones. *Id.* Believing that “such vertical restraints” could lead to “higher-than-otherwise wholesale prices,” he stated that the Commission should challenge the practice if a future investigation found evidence that site-specific redlining has resulted in anticompetitive effects without generating countervailing consumer benefits. *Closed Investigation*, *supra* note 19.

21. Department of Justice, Assistant Attorney General Charles A. James Announces New Program for Conducting Merger Investigations, available at <http://www.usdoj.gov/opa/pr/2001/August/383at.htm>; see also Charles James, Assistant Att’y Gen., Antitrust Div., Dept. of Justice, Be Careful What You Wish For: Some Thoughts on the Merger Review Process, Address before the Am. Bar Ass’n, Antitrust Section (Aug. 7, 2001), available at <http://www.usdoj.gov/atr/public/speeches/8764.htm>.

22. FEDERAL TRADE COMM’N, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform* (Sept. 2001), available at <http://www.ftc.gov/reports/elec/electricityreport.pdf>.

ward introducing competition within retail electricity markets and evaluates benefits to consumers. The report found that each of the states that has implemented retail competition remains in a transition period in which rate freezes or other forms of rate regulation are used to protect consumers. The report concludes that few retail suppliers compete with the incumbent distribution utility so many of the expected benefits of competition are not yet available to most retail customers.

The FTC concluded that competition in the wholesale electric markets will enhance the benefits of retail competition. Second, the FTC stated that both retail and wholesale market policies should encourage greater demand-side responsiveness, for example, through the use of real time meters and time-of-use rates. This would allow electric consumers to adjust their electric consumption in response to price changes. Third, the Commission found that consumers would benefit from the elimination of barriers to entry into the retail energy market. Finally, the Commission found that consumer protection measures will lead to a healthier and more competitive market because consumers make the most efficient decisions when they possess accurate and timely information regarding retail electric suppliers, products, and services.

#### IV. SPEECHES AND CONGRESSIONAL TESTIMONY

##### *A. FTC Chairman Testimony Before Senate Committee on Merger Enforcement in the Gasoline Industry*

FTC Chairman Robert Pitofsky presented the FTC's testimony before the Senate Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Committee on Commerce, Science, and Transportation concerning FTC merger review in the gasoline industry.<sup>23</sup> According to the Chairman, the FTC asks the specific question, "whether the result of a merger 'may be' – i.e. it would be reasonably likely – that the remaining firms in the industry could reduce output and raise prices to the detriment of consumers anywhere in the United States." If a merger poses anticompetitive effects, the FTC considers whether the merger may yield efficiencies which cannot be achieved without the merger and which counteract the merger's anticompetitive effect.

Chairman Pitofsky stated that the FTC spent nearly one-third of its total budget for the Bureau on Competition on energy industry investigations in 1999, 2000, and YTD 2001. Several of the proposed mergers in the energy industry, including the Exxon/Mobil merger, the BP/Amoco, BP/ARCO mergers, and the Shell/Texaco joint venture posed anticompetitive concerns with respect to local and regional markets. The FTC allowed such mergers only after demanding significant divestitures to restore competition that would have been lost as a result of the merger.

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23. FEDERAL TRADE COMM'N, *FTC Chairman Testifies Before Senate Committee on Merger Enforcement in the Gasoline Industry* (Apr. 25, 2001), available at [http://www.ftc.gov/opa/2001/04/gasoline\\_testimony.htm](http://www.ftc.gov/opa/2001/04/gasoline_testimony.htm).

*B. FERC General Counsel Testifies Before Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs*

On August 2, 2001, Kevin P. Madden, then FERC General Counsel, testified before the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs of the Committee on Government Reform on competitive wholesale market regulatory issues.<sup>24</sup> Mr. Madden testified that FERC's fundamental premise in regulating electric markets over the past decade has been that competitive bulk power markets are the best way to ensure that consumers pay the lowest cost for reliable electric service. Besides market monitoring, Mr. Madden stated that the most needed structural reform is the creation of RTOs that are independent of market participants. Mr. Madden discussed FERC's efforts to improve its market monitoring processes as well as the role of RTOs with respect to market monitoring.<sup>25</sup>

*C. FTC Chairman Timothy J. Muris Discusses Future Policy Directions in Antitrust Enforcement*

On August 7, 2001, FTC Chairman Timothy J. Muris addressed the Antitrust Section of the American Bar Association, discussing future policy initiatives.<sup>26</sup> He indicated that those observers who expected substantially reduced merger enforcement after the departure of former FTC Chairman Robert Pitofsky will be disappointed. Chairman Muris declared that "[p]roblematic mergers will face the same hurdles they did during the 1990s."<sup>27</sup> Possible areas of change, however, may lie in the FTC application of "unilateral competitive effects" theory.<sup>28</sup> He noted that the "coordinated interaction" theory is also still evolving,<sup>29</sup> and that increased emphasis likely would be placed on merger efficiencies analysis supported by an adequate factual foundation. With regard to remedies, Chairman Muris indicated that the technique of requiring an up-front buyer of divested assets will include an emphasis that such an acquisition should "create a viable business entity."

Chairman Muris also reviewed enforcement issues, commenting that he would encourage the industry to refer problematic mergers, whether or not below the automatic Hart-Scott-Rodino threshold. He also noted that

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24. Summary of Testimony of Kevin P. Madden, Gen. Couns., & Shelton Cannon, Deputy Director, Office of Mkts, Tariffs and Rates, Federal Energy Reg. Comm'n, Before the Subcomm. on Energy Policy, Natural Resources and Reg. Affairs of the Comm. on Govt. Reform (Aug. 2, 2001), *available at* <http://www.ferc.gov/news/congressionaltestimony/km-sc8-2.pdf>.

25. *Id.*

26. Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity, Prepared Remarks before the Am. Bar Ass'n, Antitrust Div. (Aug. 7, 2001), *available at* <http://www.ftc.gov/speeches/muris/murisaba.htm>.

27. DEPARTMENT OF JUSTICE, Merger Guidelines (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102 (1982).

28. DEPARTMENT OF JUSTICE AND FED. TRADE COMM'N, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, at 41,559 (1992).

29. *Id.* at 41,558.

the FTC would work to reduce merger review delays through expedited review procedures intended to reduce paperwork and improve investigative focus on relevant materials. Finally, he stated that there would be an increased interest in non-merger enforcement issues such as price fixing, advertising restrictions, and other horizontal activities as well as attempted monopolization issues.

*D. FTC Chairman Timothy J. Muris Identifies Energy As Area of Special Focus for FTC.*

In testimony before the Subcommittee on Commerce, Trade and Consumer Protection of the House Committee on Energy and Commerce, November 7, 2001, FTC Chairman Timothy J. Muris highlighted energy as one of five areas of special focus for 2002.<sup>30</sup> The Chairman noted that a second set of conferences and hearings was planned on the issue of "factors that affect the price of refined petroleum products."<sup>31</sup> The Chairman also noted that the Commission will investigate pricing behavior, where appropriate, and will continue to educate consumers on energy issues.

## V. COURT DECISIONS

*A. Den Norske Stats Oljeselskap As v. Heeremac Vof*

In *Den Norske Stats Oljeselskap As v. Heeremac Vof*, the Fifth Circuit interpreted the scope of federal antitrust laws and their applicability to foreign conduct and found that the plaintiff lacked antitrust standing to bring its claims in U.S. federal court.<sup>32</sup>

In 1997, the U.S. Department of Justice filed a criminal complaint against defendants Heeremac and Jan Meek, one of Heeremac's managing directors. They pled guilty to charges of conspiring to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barges and related marine construction services in the United States and elsewhere. (Only six or seven heavy lift barges exist in the world and they are used to hoist and transport offshore oil platforms.)<sup>33</sup>

The present case arose from one of the many civil suits that followed the criminal guilty plea. The plaintiff, Den Norske Stats Oljeselskap As (Statoil), is a Norwegian oil company that owns and operates oil and gas drilling platforms exclusively in the North Sea and purchased heavy lift barge services from the defendants in the North Sea. The plaintiff alleged that it paid defendants Heeremac, et al., inflated prices as a result of bid rigging and market allocation conspiracy, and therefore was forced to

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30. FEDERAL TRADE COMM'N, *Aggressive Law Enforcement, Consumer and Business Education Will Characterize FTC Efforts* (Nov. 7, 2001), available at <http://www.ftc.gov/opa/2001/11/17testimony.htm>.

31. *Id.*

32. *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

33. *Id.* at 423-4.

charge higher prices for the crude oil it exported to the United States.<sup>34</sup> The plaintiff also alleged that the conspiracy forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices.<sup>35</sup> Importantly, this foreign plaintiff alleged it was injured by defendants' North Sea conduct but did not show it was injured by the impact of that conduct within the United States (plaintiff operated solely in the North Sea).

In this case, the court interpreted the two-prong requirement of the Foreign Trade Antitrust Improvements Act of 1982<sup>36</sup> that the foreign conduct have "a direct, substantial, and reasonably foreseeable effect"<sup>37</sup> and that "such effect gives rise to a claim. . ." under sections 1 through 7 of the Sherman and FTC Acts.<sup>38</sup> In finding for the defendants and upholding the dismissal of the claim for lack of subject matter jurisdiction, the court found that the plaintiffs met the first prong but not the second.<sup>39</sup> The court interpreted this second prong to require that a foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce "gives rise" to the antitrust claim.<sup>40</sup> It was necessary, but not sufficient, that the complaint alleged injury to U.S. consumers.<sup>41</sup> The injury had to arise from a domestic anticompetitive effect.

*B. Lycon, Inc. v. Juenke*<sup>42</sup>

Lycon, Inc. (Lycon), a wholesale distributor that sold gas lift equipment used in oil production, sued Michael S. Juenke, individually and as corporate officer of EVI Oil Tools Inc. and EVI Oil Tools Inc. (hereinafter collectively EVI), alleging that EVI had violated federal antitrust laws by engaging in price discrimination in violation of the Robinson-Patman Act.<sup>43</sup> EVI manufactured gas lift equipment and sold it to Lycon at wholesale for retail distribution. EVI also began to sell the gas lift equipment directly to consumers. EVI then raised its wholesale prices and lowered retail prices, to the extent that retail customers paid less for the gas lift equipment than Lycon. The court affirmed summary judgment dismissal of Lycon's lawsuit on the basis that Lycon was not in direct competition with the end user customers of EVI.

To prove a price discrimination claim under the Robinson-Patman Act, Lycon faced a four-part standard: (1) sales were made in interstate commerce; (2) the commodities sold to Lycon were of the same grade and quality as those sold to the other end-user purchasers; (3) that EVI dis-

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34. *Den Norske*, 241 F.3d at 422.

35. *Id.* at 426.

36. 15 U.S.C. § 6a (2000).

37. *Id.*

38. 15 U.S.C. § 6(a)(2) (2000).

39. *Den Norske* at 426-27.

40. *Id.* at 428-29.

41. *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 426-27 (5th Cir. 2001).

42. 250 F.3d 285 (5th Cir. 2001).

43. 15 U.S.C. § 13 (2000).

criminated in price between Lycon and the other purchasers; and (4) that the price discrimination had a prohibited effect on competition.<sup>44</sup> The parties agreed that Lycon submitted sufficient evidence to survive summary judgment on the first three factors. As to the fourth factor, the court found insufficient evidence of the price discrimination having a prohibited effect on competition. Price discrimination under the Robinson-Patman Act did not include situations where, as here, end users were offered lower prices than wholesale distributors from manufacturers such as EVI. The benefit provided by Lycon's price discrimination to end-users favored only those retail purchasers that did not compete with Lycon, and such price discrimination was not actionable.

*C. Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.*<sup>45</sup>

Trigen-Oklahoma City Energy Corp. (Trigen-Oklahoma) operated central heating and cooling plants, from which it pumped steam and chilled water through underground pipelines to customers who bought the steam and chilled water at unregulated rates. Oklahoma Gas & Electric Co. (OG&E), an electric utility, persuaded Trigen-Oklahoma's customers to purchase and install electric cooling equipment (chillers) to replace the cooling services offered by Trigen-Oklahoma. OG&E did not manufacture or sell the chillers, and the electricity needed to operate the chillers was provided by OG&E at regulated rates. Trigen-Oklahoma brought federal and state antitrust claims as well as state tort claims against OG&E. In its defense, OG&E argued state action immunity, as well as other defenses. Following a jury trial on a variety of antitrust claims, the lower court awarded Trigen-Oklahoma \$20 million in damages from OG&E.

The appellate court reversed the judgment and held that, under the state action doctrine, Oklahoma's policy of substituting regulation of retail electric service for competition immunized OG&E's conduct from federal antitrust scrutiny.<sup>46</sup> The court further rejected Trigen-Oklahoma's charge that the state regulatory process was tainted because "OG&E used improper payments, undue influence and lavish entertainment to gain business . . . [because] there is no conspiracy or bribery exception to state action immunity."<sup>47</sup>

*D. Hendricks v. Dynegy Power Marketing, Inc.*

In *Hendricks v. Dynegy Power Marketing, Inc.*,<sup>48</sup> the court addressed claims that the Federal Power Act provided a basis for removing to federal

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44. See generally *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990).

45. 244 F.3d 1220 (10<sup>th</sup> Cir. 2001).

46. *Id.* at 1225-26 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (for two-pronged test for determining when private parties regulated by the state are shielded from the federal antitrust laws)).

47. *Trigen-Oklahoma*, 244 F.3d at 1227.

48. *Hendricks v. Dynegy Power Marketing, Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001).

court plaintiffs' state antitrust law claims. Plaintiffs originally sued in California state court alleging that defendants Dynegy, Reliant Energy and PG&E Energy Trading violated the Cartwright Act and other sections of the California Business and Professions Code prohibiting unfair or unlawful business practices.<sup>49</sup> After defendants removed the cases to federal court, the plaintiffs moved to have their claims sent back to California state court. Defendants argued that the plaintiffs' claims challenging the rates the defendants' charged for wholesale power were properly construed as claims under the Federal Power Act,<sup>50</sup> and should be heard in federal court. In considering plaintiffs' motion and defendants' response, the court examined the limits of federal court jurisdiction and the federal interest in energy production, marketing and distribution and concluded that removal was not appropriate.

The first ground for the court's decision was that the Federal Power Act did not preempt and supplant the plaintiffs' state law claims, because Congress did not intend the federal government to occupy the entire field of energy production, marketing and distribution with the Federal Power Act.<sup>51</sup> Stating that in the Ninth Circuit "removal is only proper where a state cause of action is both *preempted* and *supplanted* with a federal cause of action,"<sup>52</sup> the court concluded that the "Federal Power Act does not completely preempt Plaintiffs' claims since there is no private right of action under the Federal Power Act to seek a 'just and reasonable' rate."<sup>53</sup>

The second ground for the court's decision was that the plaintiffs' claims should not be recast as federal claims under the "artful pleading doctrine," because they were not "necessarily federal in character" or claims "where the right to relief depends on the resolution of a substantial, disputed federal question."<sup>54</sup> The court said the question turned on whether the plaintiffs' were required to prove that the defendants' rates were not "just and reasonable" under section 205 of the Federal Power Act.<sup>55</sup> It concluded that "Plaintiffs can establish a violation of the Cartwright Act without reference to the 'just and reasonable' standard of the Federal Power Act."<sup>56</sup> The court noted that even if the defendants' rates were deemed just and reasonable under the Federal Power Act, the defendants' actions may nonetheless violate the Cartwright Act.<sup>57</sup>

The third basis for the court's decision was that the filed rate doctrine, which the defendants' might plead as a defense, did not permit removal to federal court.<sup>58</sup> According to the court, under the filed rate doctrine "a

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49. *Id.* at 1156.

50. 16 U.S.C. §§ 792 – 828(c) (2001).

51. *Hendricks*, 160 F. Supp. 2d at 1169-70.

52. *Id.* at 1159 (emphasis in original).

53. *Hendricks v. Dynegy Power Marketing, Inc.*, 160 F. Supp. 2d 1155, 1160 (S.D. Cal. 2001).

54. *Id.* at 1161.

55. *Hendricks*, 160 F. Supp. 2d at 1163.

56. *Id.*

57. *Hendricks*, 160 F. Supp. 2d at 1164-65.

58. *Id.* at 1165.



plaintiff may not recover damages on a theory that anticompetitive activity artificially inflated the rates charged for a good or commodity when the rates charged were submitted to and approved by the appropriate federal agency.”<sup>59</sup> Even if the federal defense were dispositive, the court said a federal court could not assert jurisdiction “unless a federal right or immunity is ‘an element, and an essential one, of the plaintiff’s cause of action.’”<sup>60</sup>

*E. California CNG, Inc. v. Southern California Gas Co.*

In *California CNG, Inc. v. Southern California Gas Co.*,<sup>61</sup> the Ninth Circuit affirmed dismissal of Clayton and Sherman Act claims against Southern California Gas Co. (SoCalGas) by a natural gas vehicle fueling station marketer. The unreported opinion held that the plaintiff failed to establish that the defendant’s alleged anticompetitive behavior caused the plaintiff’s business to fail because the record did not establish that the plaintiff was ever a viable competitor in the market. Also dismissed for lack of evidence were pendant fraud and negligent misrepresentation claims that CalCNG had entered the market based upon SoCalGas’s representation that it would compete in a fair way and that its rate structure would allow competition.

*F. Wabash Valley Power Ass’n v. FERC*<sup>62</sup>

The D.C. Circuit rejected a challenge by Wabash Valley Power Association, Inc. to a FERC decision approving the merger of American Electric Power Co., Inc. (AEP) and Central and South West Corp. (CSW).

AEP and CSW applied to the FERC for merger approval under Section 203 of the Federal Power Act on April 30, 1998. At the time, AEP and its subsidiaries provided power to three million customers in Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia. CSW provided power to 1.7 million customers in Arkansas, Louisiana, Oklahoma, and Texas. Together the two companies owned over 37,000 MW of generating capacity and over 38,000 miles of transmission lines. The combined company was referred to in court and administrative proceedings as “New AEP.”

After a hearing in July 1999, a FERC Administrative Law Judge (ALJ) issued an initial order approving the merger and imposing no conditions on the parties other than those to which the parties had already stipulated.<sup>63</sup> The FERC approved the merger in May 2000, but imposed addi-

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59. *Hendricks v. Dynegy Power Marketing, Inc.*, 160 F. Supp. 2d 1155, 1165 (S.D. Cal. 2001) (citations omitted).

60. *Id.* (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9<sup>th</sup> Cir. 2001) (further case quotes omitted)).

61. 2001 U.S. App. LEXIS 1857 (9<sup>th</sup> Cir. Aug. 9, 2001), 2001-2 Trade Cas. (CCH) ¶ 73,382.

62. 268 F.3d 1105 (D.C. Cir. 2001).

63. *Wabash Valley*, 268 F.3d at 1111 (citing *American Elec. Power Co.*, 90 F.E.R.C. ¶ 61,242, at 61,776).

tional conditions on the parties.<sup>64</sup> Among those, the FERC required New AEP to (i) divest its entire ownership in certain generating facilities; (ii) to make interim power sales, equivalent to the to-be-divested capacity, until the divestment of these facilities was complete; (iii) to transfer operational control of New AEP's transmission facilities to a FERC-approved RTO; and (iv) to obtain a calculation of New AEP's available transmission capacity from an independent third party.

On petition for review, the D.C. Circuit rejected several claims advanced by Wabash. First, Wabash claimed that the FERC improperly conditioned the merger on New AEP's future participation in an RTO. The D.C. Circuit held, however, that the FERC had also imposed adequate interim measures upon New AEP to emulate the information-sharing features of an RTO until such time as New AEP's participation in the RTO was secured. Second, Wabash claimed the FERC ignored crucial evidence of New AEP's ability to manipulate imperfections in the relevant markets to its advantage. The D.C. Circuit found the FERC had explicitly addressed that evidence by imposing conditions upon the merger. Third, Wabash claimed the FERC decision did not eliminate rate pancaking. The D.C. Circuit stated, however, that the elimination of rate pancaking was not a mandatory part of the merger approval process, and that the participation of New AEP in an RTO would in any event significantly reduce rate pancaking. Finally, the D.C. Circuit found irrelevant Wabash's contention that an inconsistent staff report relating to the merger was produced by the FERC after the issuance of its order, noting that the issuance of the report did not constitute a formal alteration of FERC policy. The D.C. Circuit declined to hear several additional Wabash claims that were not presented to the FERC in the first instance.

*G. Todd v. Exxon Corp.*

The issue in *Todd v. Exxon Corp.* was whether the plaintiff adequately alleged a violation of section 1 of the Sherman Act when she accused fourteen major companies in the oil and petrochemical industry of unlawfully exchanging detailed information on compensation paid to non-union managerial, professional, and technical (MPT) personnel in order to set salaries of MPT employees at artificially low levels.<sup>65</sup> A panel of the Second Circuit Court of Appeals unanimously concluded that the Plaintiff had stated a proper cause of action. As a result, the court vacated the dismissal of her class action complaint and remanded the matter back to the district court for the Southern District of New York. In its decision, the court of appeals presented a comprehensive review of the "rule of reason" analysis under section 1 of the Sherman Act to determine if the facts the plaintiff alleged adequately stated a claim that the information exchanged among the defendants stabilized prices in violation of the Act's proscriptions against anti-competitive conduct.

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64. *Id.* (citing *American Elec. Power Co.*, 90 F.E.R.C. ¶ 61,242, at 61,799-800).

65. *Todd v. Exxon Corp.*, 275 F.3d 191 (2nd Cir. 2001).

The defendants are fourteen major companies in the oil and petrochemical industry that account for 80% to 90% of the industry's revenues and employ 80% to 90% of the industry's work force. These companies regularly shared and exchanged detailed information on the compensation paid to MPT employees. Specifically, the companies conducted surveys of past and current salaries of their MPT personnel and assured each other that the information exchanged would be used to set salaries.

To facilitate the process and the comparison of salary information, the companies created a "Job Match Survey." The Job Match Survey contained a common denominator used in conjunction with "benchmark jobs" to adjust the compensation for similar employment positions with differing job responsibilities. Chevron and Unocal coordinated the "benchmark jobs" and used a third party consultant, Towers Perrin, to calculate percentage offsets to facilitate the salary comparisons. The Job Match Survey was published every two years with interim updates, known as "Grade Average Updates," provided in the off years.

The defendants also exchanged a "Job Family Survey," which provided current information on the compensation each of the fourteen companies paid in thirty different categories of jobs. The survey was updated and distributed several times a year. Each company was entitled to receive a subset of the Jobs Family Survey, which could include salary comparison information on as few as three of the fourteen companies. Indeed, Exxon used the subset option to compare the salaries it paid with salaries paid by six specific competitors, known as the "Six Majors."

In addition to the salary information exchanged, the companies also exchanged information on advancement measures, on non-cash benefits, including an economic assessment of the value of such benefits, and on starting salaries offered to college graduates. Finally, the human resource personnel from each of the fourteen companies attended regular meetings, at least three a year, to discuss and exchange compensation information.

Because the plaintiff was appealing the district court's dismissal of her complaint pursuant to a Rule 12(b)(6) motion to dismiss, the court of appeals assumed the alleged facts to be true. It then applied the "rule of reason" analysis to these facts.

The first step in the court's analysis was to address the issue of the market power of the the defendants. To evaluate the defendants' market power, the court had to determine if the alleged market could be legitimately limited to "the services of experienced, salaried, non-union [MPT] employees in the oil and petrochemical industry, in the continental United States and various submarkets thereof."<sup>66</sup> If the market could be so defined, the defendants would have a substantial share of the market. The court applied an "interchangeability of use/cross-elasticity of demand"<sup>67</sup> criteria to the proposed market and concluded the plaintiff had defined a

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66. *Id.* at 199.

67. *Todd*, 275 F.3d at 200 (*citing* *Giana Enters. v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982)).

potentially viable market, subject to a fact-intensive inquiry at trial.

The court focused on the alleged commonality and interchangeability of buyers of MPT services in evaluating the proposed market. The plaintiff contended that little, if any, interchangeability existed for MPT personnel among industry categories. For example, the plaintiff asserted that a trained and experienced MPT employee in the oil and petrochemical industry could not easily sell his or her services to potential buyers in the pharmaceutical industry. Such a "seller" of services faced a significant barrier to entry based on the learning curve required to assimilate and understand the operations, marketing strategies, customers, and competitors of the new industry. At the same time, the oil and petrochemical companies, according to the plaintiff, should find trained and experienced MPT personnel from the oil and petrochemical industry more attractive as job applicants than MPT personnel from other industries. The court concluded that plaintiff should have been allowed to proceed to introduce her evidence in support of these contentions to define the market as she did: the market for MPT personnel in the oil and petrochemical industry.

The defendants' own actions supported the court's conclusion. Specifically, the court found persuasive, the defendants' apparent perception that the viable market for MPT personnel was found only within their own industry. The defendants' surveys and information exchanges focused exclusively on the MPT personnel of the oil and petrochemical industry. The court found this exclusive focus of the defendants significant "because 'we assume that the economic actors usually have accurate perceptions of economic realities.'"<sup>68</sup>

The second element of the court's analysis on market power addressed the issue of whether the defendants had sufficient power over the identified market so that their conduct had a measurable anti-competitive impact on that market. The court explained that although Plaintiff alleged the defendants employed 80% to 90% of the identified MPT personnel market in the oil and petrochemical industry, a threshold demonstration of market share "is not a prerequisite to bring a section 1 claim."<sup>69</sup> The court reminded the parties that if the plaintiff could demonstrate that the defendants regularly exchanged information in a manner deemed anti-competitive under section 1, and that the conduct, in fact, resulted in an anti-competitive impact on the identified market, the court "would not deny relief on the basis of market share figures." Accordingly, the court directed the district court to determine, on the evidence, whether the plaintiff has shown anti-competitive impacts as part of an evaluation of the defendants' market power.

The court next turned its attention to the issue of the "Susceptibility of the Market." In performing its analysis of this element of the "rule of reason," the court addressed the: (1) concentration of the industry in the

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68. *Id.* at 205 n.11 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 219 n.4 (D.C. Cir. 1986)).

69. *Todd*, 275 F.3d at 206.

identified market; (2) the “fungibility” of the services the defendants purchased, and (3) the inelasticity of the “sellers” of services to the defendants. With respect to the issue of “concentration,” the court noted that in light of the plaintiff’s contention that defendants possessed 80% to 90% of the relevant market, this industry was sufficiently concentrated to foster anti-competitive collusive practices. On the issue of “fungibility,” the court focused on the defendants’ sophisticated efforts to make the comparison of similar job categories with the use of “common denominators” and “benchmark jobs” meaningful and useful for each defendant. In short, the court agreed with the plaintiff when she argued “that [d]efendants ‘made their own employees’ positions ‘fungible’ for comparison purposes with those of their competition.”<sup>70</sup> Finally, the court, after reminding the parties that the plaintiff was alleging the defendants were exercising market power as buyers, explained that the evaluation of elasticity had to consider “the elasticity of sellers’ supply.”<sup>71</sup> In this regard, since “labor is a classic example of inelastic supply flow,”<sup>72</sup> the court could not suggest any additional facts the plaintiff would have to allege on the element of “inelasticity” to proceed with her cause of action.<sup>73</sup>

The next element of the “rule of reason” the court reviewed was the “nature of the information exchanged.”<sup>74</sup> The court, in the context of a motion to dismiss, reviewed the facts plaintiff alleged pertaining to this issue. The court noted that the salary and compensation information the defendants exchanged was not only current and timely, but with respect to the proposed compensation budgets that were shared, the information included anticipated future salary levels. Moreover, the defendants could request, and did receive, the specific salary information of their perceived closest competitors. Such specific information, when shared by competitors, facilitates anti-competitive conduct. The court also found important that the defendants did not make the information they were exchanging publicly available. It believed dissemination of the information to the MPT employees may have mitigated any possible anti-competitive impact.<sup>75</sup> Finally, the court was troubled by the defendants’ participation in frequent and regular meetings on MPT salaries and compensation. Such meetings, in the court’s view, offered the defendants opportunities to police the alleged price conspiracy.

Finally, the court considered the alleged information exchanges’ effect on competition and the resulting antitrust injury. The court found that the even with regular salary increases, the evidence showed the difference in salaries the defendants awarded grew smaller over time—a classic manifestation of market stabilization. The plaintiff also alleged that the “Ad-

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70. *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2nd Cir. 2001).

71. *Id.* at 211. (emphasis in original).

72. *Todd*, 275 F.3d at 211.

73. *Id.*

74. *Todd*, 275 F.3d at 199.

75. *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2nd Cir. 2001).

vancement Guides" the defendants exchanged were used, at a minimum, by Exxon to reduce employee advancement rates.<sup>76</sup> As a result, the portion of Exxon's total salary budget of \$800 million that was devoted to MPT personnel dropped by \$20 million a year. At the same time, however, the court acknowledged that Plaintiff would have a "substantial" burden to meet to support her claim that salaries would have been higher but for the exchange of information.<sup>77</sup> Nevertheless, the court held that Plaintiff had alleged sufficient facts to survive a motion to dismiss and that she should be allowed to proceed with discovery.

## VI. FERC AND OTHER REGULATORY AGENCY ORDERS

### A. *New England Power Pool*

The FERC issued an order in *New England Power Pool*<sup>78</sup> which requests for clarification and/or rehearing of an April 20, 1998 order which approved, subject to modifications, the New England Power Pool (NEPOOL)'s comprehensive restructuring proposal for the 130-plus constituent entities in the New England region. The 1998 order provided for the operation of an independent system operator (ISO) in New England and conditionally accepted the NEPOOL's proposed market rules and request for market-based rates as sufficient to restrain the exercise of market power. The Commission rejected the request for rehearing of its decision to grant the NEPOOL market-based rate authority, notwithstanding the existence of the NEPOOL market shares over 20% in many time periods.

As to the existence of viable competition, the FERC stated that it did not consider a 20% market share an absolute bright line signifying excessive market power. Factors which mitigated against the NEPOOL's ability to exercise market power included: effect of obligations to serve native loads at regulated prices (which could reduce the profitability of price increases); the price-reducing effects of firm imports into New England; alternatives to buying the NEPOOL's product; the potential for entry by new generators to impose competitive discipline; other suppliers with higher marginal costs would have available electric energy if the market price rose; divestitures (reducing market shares) had already occurred in NEPOOL markets; and the ISO would monitor the markets and could ask the Commission to revisit the matter if it discovered any exercise of market power. After considering these factors, the FERC rejected the request for rehearing.

In finding the existence of viable competition, the FERC accepted the NEPOOL's geographic market definition as including all of New England, rather than smaller geographic markets within New England. The FERC further denied rehearing on the basis that the NEPOOL participants could avail themselves of private enforcement actions under antitrust laws or

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76. Id. at 214.

77. *Todd*, 275 F.3d. at 214.

78. Order Denying Rehearing, *New England Power Pool*, 95 F.E.R.C. ¶ 61,074 (2001).

complaint procedures under section 206 of the Federal Power Act.

*B. AES Southland, Inc.*

In *AES Southland Inc.*, the FERC issued an order approving a Stipulation and Consent Agreement, after investigating whether AES Southland, Inc. (AES) and Williams Energy Marketing & Trading Co. (Williams) had violated contracts and tariffs on file with the FERC when two generation units located in Southern California were unavailable to be dispatched by the California Independent System Operator (ISO).<sup>79</sup> Williams is a wholesale seller of electricity in California with authority to charge market-based rates. Under contracts filed with the FERC in connection with the ISO's authority to require reliability must run (RMR) sales to California power markets, the ISO may dispatch Williams' designated RMR units to provide energy and ancillary service essential to the reliability of the California transmission system.

Williams is the exclusive marketer of power from two plants owned and operated by AES, the Alamitos and Huntington Beach plants. The ISO was unable to dispatch power from two units in these plants from April 25 through May 5, 2000, and from one unit from May 6 through May 11, 2000. The only replacement units available for dispatch to the ISO were not covered by the payment terms of the RMR contract. Instead, Williams charged higher prices for the energy provided by the replacement units, resulting in Williams' receipt of approximately \$10.85 million in additional revenue after costs.

The FERC investigation addressed two issues: the extent to which AES and Williams coordinated the timing and length of the outages; and, whether AES failed to maintain the generation units according to standards set forth in agreements filed with the FERC. Actions inconsistent with the RMR agreements, or any rate agreements filed with the FERC, constitute violations of section 205 of the Federal Power Act (FPA). Under the consent agreement entered into by AES, Williams and the Market Oversight and Enforcement section (Office of General Counsel), and without a ruling on the merits, Williams agreed to refund \$8 million to the ISO and to bear the financial risk of RMR outages for one year. The FERC approved the consent agreement as fair, reasonable and in the public interest because it resolved "complex issues with respect to the operation of generation units in an environment where financial incentives existed for the withholding of capacity."<sup>80</sup>

The FERC rejected the argument of intervenor, California Public Utilities Commission, that refunds for abuse of market power should include a penalty, akin to treble damages in antitrust, to deter market power abuse. The FERC lacked a basis to impose such a penalty, since it made no findings as to abuse of market power by AES or Williams. The FERC

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79. Order Approving Stipulation and Consent Agreement, 95 F.E.R.C. ¶ 61,167, at 61,170 (2001).

80. *Id.* at 61,170.

further noted that while it can order equitable remedies, such as disgorgement of unjust enrichment, it does not have legal authority to order treble damages.

*C. Walton Electric Membership Corp.*<sup>81</sup>

On March 5, 2001, Walton Electric Membership Corp. (Walton) submitted a Power Supply and Energy Call Agreement (Agreement) by and between Williams Energy Marketing & Trading Co, (Williams) and Walton, with attached rate schedules. The FERC accepted the Agreement subject to certain modifications, which involved partial application of the antitrust laws. Specifically, section 2.9 of the agreement contained a "Non-Competition" clause.<sup>82</sup> Under this clause, Williams agreed that neither Williams nor any of its affiliates would engage in any "competitive business activity" within Walton's service territory. The FERC, pursuant to its "responsibility to consider the objectives of the antitrust laws in exercising regulatory authority," concluded that the clause conflicted with the objectives of antitrust laws, as well as with the FERC's "efforts to promote competition." The FERC directed Walton to remove section 2.9 from the agreement within thirty days of its order.

*D. Transmission Companies: Neptune Regional Transmission System, L.L.C. and National Grid U.S.A.*

The FERC issued two orders in July that relate to a new category of electricity market entrants—companies that exclusively or primarily own or operate transmission systems. One order involved Neptune Regional Transmission System,<sup>83</sup> a limited liability corporation with no electric utility affiliates. The other involved National Grid USA,<sup>84</sup> which owned electric utilities in New York (Niagara Mohawk Power Company) and New England (New England Power) and sought a declaration that it was not a "market participant," as defined by the Commission's Regional Transmission Organization rules,<sup>85</sup> so that it could be a Managing Member of the Alliance RTO.<sup>86</sup>

Neptune proposed to construct merchant transmission facilities that would connect, through undersea high-voltage, direct current lines, Maine, New Brunswick and Nova Scotia with Boston, New York City, Long Island and Connecticut.<sup>87</sup> The former areas have excess generation capacity, and the latter are capacity short. Neptune sought approval from the FERC of

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81. *Walton Electric Membership Corp.*, 95 F.E.R.C. ¶ 61,106 (2001).

82. *Id.* at 61,108.

83. *Neptune Regional Transmission Sys., L.L.C.*, 96 F.E.R.C. ¶ 61,147(2001).

84. *National Grid USA*, 96 FERC ¶ 61,121 (2001).

85. 18 C.F.R. § 35.34(b)(2)(i) (2001).

86. The Alliance RTO consisted of a number of Midwestern and Mid-Atlantic transmission owning electric utilities, and National Grid sought to manage the transmission assets in the RTO, though it would not own any such assets in the geographic area served by the Alliance RTO.

87. *Neptune*, 96 F.E.R.C. ¶ 61,147.



its proposed transmission tariff, which would provide for rates for transmission of electricity determined through negotiations and open seasons.<sup>88</sup> Neptune also sought waivers of a number of Commission regulations.<sup>89</sup>

To evaluate the Neptune application, the FERC applied criteria first announced in another merchant transmission case.<sup>90</sup> These criteria were:

that the merchant transmission facility should assume full market risk; that the merchant transmission facility should create tradable transmission rights; that an open-season process should be employed to initially allocate transmission rights; that the merchant transmission facility should not preclude access to essential facilities by competitors; that the merchant transmission facilities should be subject to market monitoring for market power abuse; that physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTOs; and that merchant transmission facilities should not impair pre-existing property rights to use the transmission grids or inter-connected RTOs or utilities.<sup>91</sup>

The Commission found that Neptune largely satisfied these criteria but conditioned the Neptune application in a number of respects.<sup>92</sup> It rejected Neptune's proposed tariff and its request for a waiver of the requirement to provide service under the Order No. 888 pro-forma tariff.<sup>93</sup> The Commission conditioned approval of the Neptune proposal on the company joining an RTO adjacent to, or containing, the geographic area of its proposed facilities and placing operational control of those facilities under the RTO.<sup>94</sup> The Commission further directed Neptune to work with the Northeastern RTO to ensure that the RTO's tariff accommodated Neptune's financing needs, and in particular, Neptune's proposed open seasons which would be used to secure financing.<sup>95</sup> The Commission also advised Neptune that "any of its proposed facilities that connect with existing transmission grids must conform to the protocols approved by this Commission for that system."<sup>96</sup>

Several intervenors in the case were concerned that Neptune would seek to shift the risks of the merchant transmission project onto existing stakeholders through the assessment of charges for benefits the Neptune system might provide to existing systems.<sup>97</sup> In response, the Commission said:

As a merchant project with the authority to determine the project's size and to negotiate rates, Neptune must be prepared to bear 100

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88. *Id.*

89. *Neptune Regional Transmission Sys., L.L.C.*, 96 F.E.R.C. ¶ 61,147, at 61,632 (2001).

90. *TransEnergie U.S., Ltd.* 91 FERC ¶ 61,230 (2000).

91. *Neptune*, 96 F.E.R.C. ¶ 61, 147, at 61,633.

92. *Id.*

93. *Neptune*, 96 F.E.R.C. ¶ 61, 147, at 61,631.

94. *Id.*

95. *Neptune Regional Transmission Sys., L.L.C.*, 96 F.E.R.C. ¶ 61,147, at 61,631 (2001).

96. *Id.*

97. 96 F.E.R.C. ¶ 61,147, at 61,631.

percent of the risks of constructing the project. If Neptune believes that its project provides measurable benefits on the systems to which it connects, Neptune is free to negotiate with the various grid operators to obtain financial support for the project. However, if those negotiations are unsuccessful, Neptune may not rely on this Commission to compel payment for any claimed benefits. Neptune's decision to proceed with its plans should be based solely on the value of its private market negotiations.<sup>98</sup>

In the other transmission company case, the Commission provided guidance to National Grid, which sought to manage the transmission assets of the transmission owners in the Alliance RTO.<sup>99</sup> National Grid owned transmission, distribution, and generation facilities and sold transmission, distribution services, retail generation, and wholesale generation services in New York and New England. It sought a declaration that it was not a "Market Participant" in the region proposed to be served by the Alliance RTO so that it could manage the Alliance RTO transmission system and the RTO could still satisfy the independence requirements of the Commission's RTO rules.<sup>100</sup> In Order No. 2000, which set forth the RTO rules, the Commission said that the term "Market Participant" means:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organizations' actions or decisions; and (ii) any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions.<sup>101</sup>

In *National Grid*, intervenors raised concerns about National Grid's status as Market Participant because its sales of distribution and transmission services and retail generation and wholesale generation services in New York and New England were geographically proximate and similar to the activities of the Alliance RTO and its members.<sup>102</sup>

The Commission determined that it did not have sufficient information about National Grid's request and instead provided guidance to National Grid on how it could satisfy the Commission, based upon the Market Participant definition, that National Grid was a independent, viable,

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98. *Id.* at ¶ 61,634.

99. *National Grid USA*, 96 FERC ¶ 61,121, at 61,523 (2001).

100. *Id.* In Order No. 2000, the Commission stated that:

[A]n RTO must be independent of any entity whose economic or commercial interests could be significantly affected by the RTO's actions or decisions. Without such independence, it will be difficult for an RTO to act in a non-discriminatory manner. Therefore, the definition [of Market Participant] focuses on those entities whose economic and commercial interests can be significantly affected by the RTO's behavior.

*National Grid*, 96 F.E.R.C. ¶ 61,121, at 61,525 (citations omitted).

101. *Id.* at 61,524 (quoting 18 C.F.R. §35.34(b)(2)(2001)).

102. 96 F.E.R.C. ¶ 61,121, at 61,524-5.

stand-alone, transmission business.<sup>103</sup> The Commission said that in any subsequent filing National Grid must address:

1. How the generation resources it or its affiliates own or control are committed to its provider-of-last-resort function or otherwise consistent with the definition of "Market Participant." Further, it should update the information provided in its Petition regarding changes in the generation resources that National Grid or its affiliates own or control.
2. How it will ensure that, if it or its affiliates own or control Niagara Mohawk's marketers, that relationship will not create economic or commercial interests that would be significantly affected by the RTO's actions or decisions.
3. How its responsibilities as supplier of last resort fulfill the criteria of Order Nos. 2000 and 2000-A, not to be considered a Market Participant.
4. National Grid must undertake efforts to reduce the extent of the retail market it serves in Western New York, or to separate its retail interests in that market from the business of Managing Member of the Alliance Transco.<sup>104</sup>

*E. The FERC and Gas and Electricity Prices in the Western United States*

In July, the FERC issued one of a series of orders addressing the prices of natural gas and electricity in the Western United States, and especially in California. In *Reporting of Natural Gas Sales to the California Market*,<sup>105</sup> the Commission imposed reporting requirements on natural gas sellers and transporters serving the California market in order to determine why there was a disparity between natural gas prices in California as compared to the rest of the country.<sup>106</sup>

The Commission also addressed higher electricity prices that result when gas-fired generators, which might burn the higher-priced gas, set the market clearing price under prices set by the bidding system used by the California Independent System Operator.<sup>107</sup>

The order covered at least a six-month period, August 1, 2001 through January 31, 2002. However, the Commission stated an intention to seek approval from the Office of Management and Budget to extend the requirement until September 30, 2002, which would coincide with the end date of the Commission's mitigation plan for the wholesale electricity market in California and the West.<sup>108</sup> Covered entities included interstate natural gas pipelines, sellers of natural gas into the California market and

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103. *Id.* at 61,523-5.

104. *National Grid USA*, 96 F.E.R.C. ¶ 61,121, at 61,525 (2001).

105. Order Imposing Reporting Requirement on Natural Gas Sales to California Market, 96 FERC ¶ 61,119 (2001) [hereinafter Reporting Requirement Order].

106. *Id.* at 61,462.

107. Reporting Requirement Order, *supra* note 105, at 61,463.

108. *Id.* at 61,664.

local distribution companies (LDCs) in California.<sup>109</sup> The type of information to be reported included: (i) volumes, rates and delivery and receipt points for transportation contracts; (ii) data on capacity release transactions; (iii) capacity and actual deliveries on interstate pipelines; (iv) volumes and prices of natural gas sales; (v) commodity and transportation components of each natural gas sale; (vi) delivery and receipt points for the sales; (vii) transportation requirements of LDCs by customer type; (viii) data on LDCs' transportation, sales contracts and storage contracts; (ix) LDCs' sourcing from intrastate production; and (x) LDCs' purchases such as daily spot, monthly, short-term and long-term purchases.<sup>110</sup>

The Commission indicated that the goal of the reporting requirements was to better understand the California natural gas market and "not to investigate the conduct of particular participants in that market."<sup>111</sup>

#### F. Definition of Geographic Markets for Electricity Products

In *Wisvest-Connecticut, LLC*,<sup>112</sup> the Commission convened a technical conference to explore the competitive effects of Wisvest-Connecticut, LLC's proposed divestiture of generation facilities in Connecticut to NRG Connecticut Power, LLC.<sup>113</sup> NRG, a merchant generator,<sup>114</sup> already owned generation in Connecticut and sought to purchase generation owned by Wisvest, another merchant generator, and sought authorization to charge market-based rates for sales from the Wisvest assets.<sup>115</sup> The applicants claimed that the relevant geographic market for analyzing the competitive effects was the New England Power Pool (NEPOOL).<sup>116</sup> However, responding to intervenor concerns, the Commission required the applicants to submit a revised application that analyzed smaller geographic markets, including the State of Connecticut (which is in NEPOOL) and parts thereof.<sup>117</sup>

Assessing the applicants' revised filing, the Commission concluded that the transaction should be analyzed using Connecticut and southwest Connecticut (SWCT) as relevant geographic markets.<sup>118</sup> Quoting its Merger Policy Statement, the Commission said:

Once the suppliers that might economically supply the product to a market or customer are identified . . . the extent of transmission capability determines the extent of a supplier's ability to physically reach a market . . . . The flows on a transmission system can be very different under different supply and demand conditions. . . . If this is

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109. Reporting Requirement Order, *supra* note 105, at Appendix.

110. *Id.*

111. Reporting Requirement Order, *supra* note 105, at 61,455.

112. *Wisvest-Connecticut, LLC*, 96 F.E.R.C. ¶ 61,101 (2001).

113. *Id.* at 61,400.

114. NRG's parent was Xcel Energy, Inc. 96 F.E.R.C. ¶ 61,101, at 61,397.

115. *Id.*

116. 96 F.E.R.C. ¶ 61,101, at 61,398.

117. *Wisvest-Connecticut, LLC*, 96 F.E.R.C. ¶ 61,101, at 61,399 (2001).

118. *Id.* at 61,399.

the case, the analysis should treat these narrower periods separately and separate geographic markets should be defined for each period.” Moreover, the Commission noted in Order No. 642 that transmission allocation is a key issue in defining relevant geographic markets in the analysis of constrained markets. Clearly, during periods when transmission becomes so constrained such that no additional imports from outside the region are possible and generators located inside the region are the only suppliers that can sell inside the region (i.e., the region is a “load pocket”), the region should be defined as a separate relevant geographic market.<sup>119</sup>

The Commission defined Connecticut and southwest Connecticut as relevant geographic markets and found that NRG’s acquisition of the Wisvest assets would further burden an already concentrated electricity market.<sup>120</sup>

In addition to addressing geographic market definition and concentration, the Commission questioned whether new market entries in the area would be sufficient to diminish the competitive problems it had identified.<sup>121</sup> The Commission also accepted intervenor claims that market rules established by the New England Independent System Operator would be inadequate to mitigate or safeguard against the exercise of market power in the context of this transaction.<sup>122</sup>

*G. California Public Utilities Commission (CPUC) v. El Paso Natural Gas Co.*

*CPUC v. El Paso Natural Gas Co.* was an important “supply-side” case in the FERC’s investigation of the California energy markets. In that case, the CPUC filed a complaint against El Paso Natural Gas Company (El Paso Pipeline) and its affiliates El Paso Merchant Energy-Gas, L.P. and El Paso Merchant Energy Company (jointly El Paso Merchant). El Paso Merchant had been the successful bidder in an open season for three contracts conveying rights to a large volume of transportation capacity on the El Paso Pipeline into California from March 1, 2000 through May 31, 2001. The CPUC alleged that El Paso Pipeline and/or El Paso Merchant exercised market power acquired through these contracts to drive up the price of delivered gas in Southern California and that they had violated the Commission’s Standards of Conduct governing the relationship between pipelines and their affiliated marketers.<sup>123</sup> In March 2001, the Commission dismissed the CPUC’s motion for summary disposition and set the market power issues for hearing, but found no evidence of affiliate abuse.<sup>124</sup> In an order on rehearing issued in June 2001, the Commission set the affiliate

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119. 96 F.E.R.C. ¶ 61,101, at 61,399 (citations omitted).

120. *Id.*

121. 96 F.E.R.C. ¶ 61,101, at 61,399.

122. *Wisvest-Connecticut, LLC*, 96 F.E.R.C. ¶ 61,101, at 61,399 (2001).

123. Standards of Conduct for Interstate Pipelines with Marketing Affiliates, 18 C.F.R. Part 161 (2001).

124. *California Pub. Util. Comm’n (CPUC) v. El Paso Natural Gas Co.*, 94 F.E.R.C. ¶ 61,338 (2001).

abuse issues for hearing.<sup>125</sup>

The ALJ first ruled that the antitrust principles and analytical framework of the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines (Merger Guidelines), rather than section 2 of the Sherman Act, would be used to evaluate the market power issues. The Commission generally employs the Merger Guidelines to analyze market power issues arising in mergers or other contexts; El Paso argued that section 2 of the Sherman Act was a more appropriate analytical framework. A significant difference, the ALJ explained, is that the Merger Guidelines framework suggests that a market share of 35% indicates that a seller is likely to exercise market power acting alone, while section 2 of the Sherman Act, as construed and applied by the courts, generally requires market share in excess of 50% as evidence of monopolization. Second, the ALJ ruled that the relevant geographic market is Southern California, rather than the entire state, as El Paso Pipeline and El Paso Merchant argued, because alternative supplies to Southern California are not available due to very high load factors on alternative pipelines and because the price differential between northern and southern areas of the state was substantial and in excess of the cost of transportation.<sup>126</sup> Third, the ALJ ruled that all three contracts comprised the relevant product market. Based on these rulings, the ALJ found that the Hirfindahl-Hirschman Index (HHI) of market share was higher than 1800 and that El Paso Merchant's share of maximum daily quantity of gas transported for all market participants was not less than 35%. Consequently, the ALJ concluded that El Paso Pipeline and El Paso Merchant had the ability to exercise market power.

Turning to whether El Paso Merchant and/or El Paso Pipeline had in fact exercised market power, the ALJ found that El Paso Pipeline's system was full, or virtually full, during the entire period that the price of natural gas at the California border increased. The ALJ also found that there could not have been artificial withholding of gas to Southern California during this period because California was receiving all of the gas that was physically possible. In addition, the ALJ held that El Paso nominated essentially all of its available capacity and that it, as well as other shippers, experienced capacity-related cuts in their noninations during the relevant period. Noting the Commission's statements in Order No. 637-A that "high prices during peak periods are a legitimate reaction to supply and demand forces"<sup>127</sup> and that, "[b]ecause no capacity can be withheld from the market above the regulated maximum rate and buyers can always obtain capacity from the pipeline on a non-discriminatory basis, market

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125. *California Pub. Util. Comm'n v. El Paso Natural Gas Co.*, 95 F.E.R.C. ¶ 61,368 (2001).

126. In reaching this conclusion, the ALJ explicitly rejected the argument by El Paso that correlation in gas prices between northern and southern regions of California showed that they were part of a single market.

127. Order No. 637-A, *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, [Reg. Preambles] F.E.R.C. STATS. & REGS. ¶ 31,099, at 31,567 (2000), 65 Fed. Reg. 35,705 (2000) (codified at 18 C.F.R. pts. 154, 161, 250, & 284).

power cannot be exercised when rates exceed the cost-of-service price ceiling,<sup>128</sup> the ALJ found that high gas prices in California during the relevant period were a legitimate reaction to the dramatic increase in the demand for gas and the limited supply of gas to California during the relevant period. Based on the foregoing, the ALJ concluded that it was not clear from the record that El Paso Pipeline or El Paso Merchant had in fact exercised market power and therefore dismissed the CPUC's complaint as to the use of market power to raise natural gas prices in the Southern California market.<sup>129</sup>

The initial decision found that El Paso was guilty of affiliate abuse and had violated the provisions of the Standards of Conduct which require pipelines providing transportation information to its affiliates to simultaneously provide this information to all other potential shippers and require a pipeline to operate independently from its marketing affiliates. The ALJ's decision on this issue relied on transcripts of telephone conversations between El Paso Merchant and El Paso Pipeline personnel before the open season bids were due regarding a discount which would apply if El Paso Merchant were the successful bidder. The discussion of the discount was not immediately posted or otherwise disclosed to other potential shippers or open season bidders.

#### *H. E.ON AG and Powergen plc*

In its Order Authorizing Merger and Granting Waiver in *E.ON AG and Powergen plc*,<sup>130</sup> the Commission approved German power group E.ON AG's acquisition of the U.K.'s Powergen and its American subsidiary LG&E Energy Corporation (LG&E Energy). LG&E Energy is the parent company of Louisville Gas and Electric Company and Kentucky Utilities Company. E.ON AG supplies gas and electricity in Germany and also owns 37% of the shares in RAG AG, which through a subsidiary holds interests in certain coal mines in Appalachian, Midwestern and western regions of the United States. Powergen also holds certain assets in the United Kingdom and is a registered public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA).

In determining whether a merger or acquisition is consistent with the public interest under section 203 of the Federal Power Act, the Commission applies a three prong test to evaluate whether the transaction will have an adverse effect on competition, rates or regulation. Applying the

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128. *Id.* at ¶ 31,564 (2000).

129. On December 27, 2001, the Commission directed the ALJ to conduct a supplementary hearing to determine whether El Paso Pipeline made all of its capacity available to shippers at its California delivery points and provided non-discriminatory access to such capacity from November 2000 through March 2001. *California Pub. Util. Comm'n v. El Paso Natural Gas Co.*, 97 F.E.R.C. ¶ 61,380 (2001). The Commission's Market Oversight and Enforcement Section of the Office of the General Counsel filed comments in the proceeding asserting that the record suggests possible violations by El Paso Pipeline of its obligation under the Commission's regulations to make unused capacity available on an interruptible basis.

130. 97 F.E.R.C. ¶ 61,049 (2001).

Merger Policy Statement analysis, the Commission first found that the merger did not raise horizontal competition concerns because the applicants do not operate in the same geographic markets.

With respect to vertical market power issues, the applicants argued that EON does not own, control or operate any entity that provides inputs to electricity products in the United States and is unable to exercise control over RAG's coal interests. Applicants also provided an analysis of the competitive effects of combining LG&E's generation with RAG's coal interests as required by Order No. 642.<sup>131</sup> The downstream analysis attributed the capacity of coal-fired electric generators to the coal supplier to determine market shares and concentration in the market for wholesale electric energy in the relevant geographic markets.<sup>132</sup> Only one of the relevant markets was found to be highly concentrated, and the applicants do not own significant amounts of capacity in that market. The upstream market comprised of all actual suppliers of coal used in electric power generation in the relevant geographic markets was found to have low levels of concentration. Accordingly, the Commission also concluded that the transaction did not present vertical market power issues.

The Commission deemed the commitment of Powergen's subsidiaries to turn over operational control of their transmission system to the Midwest Independent System Operator and join a Commission-approved RTO adequate to demonstrate their inability to exploit their transmission assets to harm competition in wholesale energy markets. The Commission also found that the applicants had made appropriate commitments to prevent an adverse impact on rates.

The third prong of the public interest test considers whether a transaction will have regulatory consequences that may deprive the Commission of authority over certain activities of the merged company. This most commonly occurs when a transaction results in the formation of a registered holding company, and E.ON would become a registered holding company. Under PUHCA, affiliate transactions within a registered system are subject to regulation by the Securities and Exchange Commission. The Commission routinely conditions its approval of a transaction resulting the formation of a registered holding company upon the commitment by the applicants to comply with the Commission's policies on intra-corporate transactions involving the sale of non-power goods and services and to provide the Commission with access to books and records under section 301(c) of the Federal Power Act necessary to enable the Commission to protect ratepayers against inappropriate cross-subsidies.

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131. Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,111 (2000), *reh'g denied*, Order No. 642-A, 94 F.E.R.C. ¶ 61,289 (2001).

132. The relevant geographic markets were identified as the East Central Reliability Coordination Agreement (ECAR), the Mid-America Interconnected Network, Inc. (MAIN), the Tennessee Valley Authority (TVA), and Southern Indiana Gas & Electric Company (SIGE).



### *I. AEP Power Marketing, Inc.*

In an order concerning AEP Power Marketing, Inc., AEP Service Corp., CSW Power Marketing, Inc., CSW Energy Services, Inc., and Central and Southwest Services, the FERC announced a new standard for determining generation market power, known as the Supply Margin Assessment (SMA) standard.<sup>133</sup>

Under longstanding FERC precedent, electric utilities may make power sales at market-based rates if they can demonstrate that they do not have (or have adequately mitigated) generation and transmission market power, they do not have the power to erect other barriers to entry, and there are no concerns relating to affiliate abuse or reciprocal dealing. In determining whether electric utilities have generation market power, the FERC has traditionally used the so-called “hub and spoke” analysis. Under this analysis, the Commission examines the utility’s market share for installed and uncommitted generation in each of the relevant markets for that utility. As a general benchmark, the Commission has insisted that a seller have a market share of 20% or less in each market.

Under the SMA standard imposed in the order, the Commission compared the applicant’s capacity with the supply margin of the relevant market — that is, the market’s surplus of capacity above peak demand. The applicant will be deemed pivotal, and thus will fail the SMA screen, if it controls an amount of capacity that is greater than the market’s supply margin. The reason for this, the Commission explained, is that if a utility controls a greater amount of capacity than the market’s supply margin, it will be pivotal in that market during peak times—that is, at least some of the applicant’s capacity must be utilized to meet peak demand. Sales into an ISO or RTO with Commission-approved market monitoring and mitigation will be exempt from the SMA screen. The Commission noted that it intends to undertake a more generic review of markets and market power in which it will consider new analytical methods for analyzing market power. However, the SMA is now in place on an interim basis pending completion of that review.

### *J. Wisconsin Power and Light Co.*

In *Wisconsin Power and Light Co.*, the FERC granted the application of Wisconsin Power and Light Company (WP&L) and Wisconsin Public Service Corporation (WPS) requesting Commission authorization for WP&L to purchase a portion of WPS’s common equity interest in Wisconsin River Power Company (Wisconsin River).<sup>134</sup> WP&L is a public utility that provides retail and wholesale electric service to customers throughout Wisconsin. WP&L is a wholly owned subsidiary of Alliant Energy Corporation, which owns various operating companies engaged in the production, transmission, and distribution of electric power and energy in Iowa,

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133. *AEP Power Marketing, Inc.*, 97 F.E.R.C. ¶ 61,219 (2001).

134. *Wisconsin Power and Light Co.*, 96 F.E.R.C. ¶ 62,325 (2001).

Wisconsin, Illinois, and Minnesota. WPS is an investor-owned utility engaged in the generation, distribution, and sale of electric power and energy and the purchase, transportation, distribution, and sale of natural gas with retail customers in Wisconsin and a portion of Michigan. WPS's common stock is wholly owned by WPS Resources Corporation, an exempt public utility holding company under PUHCA. Wisconsin River is wholly owned by WPS and WP&L.

In a relatively short decision, the Commission authorized the proposed transaction as consistent with the public interest. The Commission noted that no motions to intervene or protests were filed before the applicable deadline.

*K. Energy East Corp.*

On May 9, 2001, Energy East Corporation (Energy East) and RGS Energy Group, Inc. (RGS Group)(collectively, Applicants) filed an application with the FERC under section 203 of the Federal Power Act (FPA) and part 33 of the Commission's regulations requesting Commission authorization for their proposed merger and the resulting disposition of jurisdictional facilities from RGS Group to Energy East.<sup>135</sup> Energy East, a registered public utility holding company under the PUHCA, had subsidiaries operating as electric utilities and gas utilities in New York, Maine, and other parts of New England. RGS Group, an exempt public utility holding company pursuant to the PUHCA, had two public utility subsidiaries—Rochester Gas & Electric Corporation and Energetix, Inc. The Commission conditionally authorized the merger and the related disposition of jurisdictional facilities as consistent with the public interest.

The Commission was satisfied that the merger would not harm competition. With regard to horizontal effects, the Commission found that the affected generation markets were either unconcentrated or moderately concentrated. The Commission also found that the merger would result in only a slight increase in the level of concentration. In analyzing the vertical effects of this transaction, the Applicants and the Commission again focused on evidence showing that the affected generation markets were relatively unconcentrated. The Applicants argued that the merged firm would not have the ability to use its position in upstream natural gas transportation markets to foreclose entry by rival generating firms or raise downstream rivals' costs. They noted that the Commission stated in a previous Order that "highly concentrated upstream and downstream markets are necessary, but not sufficient, conditions for a vertical foreclosure strategy to be effective."<sup>136</sup> Applicants analyzed the downstream electricity markets based on the assumption that natural gas suppliers can control the output of the electric generation units they serve. Applicants attributed capacity of each gas-fired electric generator to the interconnected pipeline supplier for the purpose of calculating market shares and concentration in the

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135. *Energy East*, 96 F.E.R.C. ¶ 61,322, at 61,327(2001).

136. *Id.* at 61,327.

downstream electricity market. When appropriate, Applicants also provided a scenario in which they attributed the capacity of gas-fired electric generators to the local distribution company serving those generators. Under either method, the Applicants' results indicated that the relevant markets were unconcentrated in most periods and only moderately concentrated in other periods. The Commission found that since the downstream generating markets are not highly concentrated, there was no concern about preventing entry or raising rivals' costs.

As to the question of whether the merger enhances the likelihood of anti-competitive collusion, the Applicants argued that the resulting relatively unconcentrated generation market itself eliminated any risk of adverse effects. The Commission rejected this argument. The Commission nevertheless found that the merger did not raise concerns about anti-competitive coordination. Applicants were not owners of a significant amount of interstate pipeline capacity, and their combined firm transportation contracts cover only ten percent of the capacity in the Northeast. Moreover, the upstream gas transportation market was only moderately concentrated. In these circumstances, the Commission found that harmful vertical effects were extremely unlikely. The Commission noted that the intervenor raised no concerns about this issue or about regulatory evasion.

The Commission also found that the merger would not adversely affect rates. The order required one of the public utility subsidiaries making sales to customers under cost-based rate schedules to amend its open access transmission tariff to reflect Applicants' commitment to waive the subsidiary's local charge when necessary to avoid rate pancaking.

Finally, as to effects of the merger on regulation, the Commission was satisfied that the merger would not adversely affect federal or state regulation. The Commission expressed some initial concern regarding possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission. Applicants, however, committed to continue to abide by Commission policies regarding intra-corporate transactions. With respect to state regulation, the Commission noted that the merger would require regulatory approval by the New York Public Service Commission, and that the public utility subsidiaries would remain subject to the jurisdiction of their respective state commissions.

#### *L. Potomac Electric Power Co.*

On May 14, 2001, Potomac Electric Power Company (PEPCO), on behalf of itself and its jurisdictional subsidiaries, and Conectiv, on behalf of its jurisdictional subsidiaries, (collectively, Applicants) filed a joint application under section 203 of the Federal Power Act for authorization to merge public utilities that are subject to the Commission's jurisdiction.<sup>137</sup> PEPCO had entered into an agreement to acquire Conectiv for a combina-

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137. *Potomac Electric Power Co.*, 96 F.E.R.C. ¶ 61,323 (2001).

tion of cash and common stock. To effectuate the merger, a new holding company was formed as a subsidiary of PEPCO. After the merger, both PEPCO and Conectiv would be wholly-owned subsidiaries of the new holding company, which would be a registered public utility holding company under the PUHCA. The Commission concluded that the merger would not adversely affect competition, rates or regulation. Therefore, it approved the merger as consistent with public interest.

The Commission found that the proposed merger would have no anti-competitive effects. PEPCO had previously divested, or committed to divest, nearly all of its generating facilities. With respect to horizontal effects, the Commission noted that not only was the amount of generation capacity owned by PEPCO small, but this capacity was economically viable in only a small fraction of hours during a year, and was largely geographically separate from Conectiv resources during periods of congestion in their transmission facilities. On this basis, the Commission found the degree of market overlap between Applicants to be minor. Likewise, the Commission determined that the merger was free of vertical concerns, largely because each firm had, at most, minor holdings of upstream natural gas inputs or delivery systems.

As to rates, Applicants committed to hold wholesale requirements and transmission customers harmless from the effects of the merger by not charging those customers for any merger-related costs that exceed merger-related savings. The Commission did not require that Applicants provide further explanation of quantification of merger-related benefits or costs, and found that the intervenors failed to demonstrate that they would be adversely affected as a result of the merger. The Commission noted that the intervenors<sup>138</sup> could file a complaint with the Commission under section 206 of the FPA if they believe that Applicants fail to fulfill their commitments.

Finally, the Commission was satisfied that the proposed merger would not adversely affect state or federal regulation. The new holding company formed to effectuate the merger would be subject to registration under the PUHCA, and the Applicants committed that, for Commission rate-making purposes, they would follow the Commission's policy regarding the treatment of the costs and revenues of such transactions. Furthermore, each state regulating the retail rates of the Applicants or their subsidiaries would continue to regulate those rates after the merger.

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138. The following parties filed timely notices of intervention: Public Service Commission of the District of Columbia; BOC Gases; PPL Energyplus, L.L.C. and PPL Generation, L.L.C.; Mirant Ams. Energy Mktg., L.P.; Mirant Chalk Point, L.L.C.; Mirant Mid-Atlantic, L.L.C.; Mirant Peaker, L.L.C.; Mirant Potomac River, L.L.C.; Maryland People's Counsel; Southern Md. Elec. Coop., Delaware Mun. Elec. Corp.

## VII. NOTEWORTHY NON-ENERGY ANTITRUST CASE

A. *United States v. Alcoa, Inc.*

While the *United States v. Alcoa, Inc.* case,<sup>139</sup> reviewed below, did not involve the energy industry, the underlying transaction involved an industry—the refining of bauxite ore into alumina—that was found to have inelastic demand and high entry barriers. Electricity generation markets can also have highly inelastic demand and high entry barriers. Thus, the DOJ's approach to analyzing the transaction may be instructive.

On July 10, 2001, District Judge Urbina entered a consent decree concerning the DOJ's antitrust action against Alcoa, Inc. and Reynolds Metals Company.<sup>140</sup> In its complaint, the Justice Department alleged, *inter alia*, that the proposed merger of Alcoa and Reynolds would concentrate ownership of facilities for the production of smelter grade alumina (SGA), would substantially lessen competition, would cause prices to rise and output of SGA to decline.<sup>141</sup> The complaint stated that under the HHI measure of concentration, the proposed transaction would increase the HHI in the world SGA market by more than 530 points to a post-merger level of approximately 1800.<sup>142</sup> The complaint further alleged that demand for SGA was highly inelastic and that entry into SGA refining was slow, costly, and difficult.<sup>143</sup> To address the DOJ's concerns, Alcoa and Reynolds agreed to divest Reynolds's alumina refining facilities in Texas and Australia.<sup>144</sup> The court determined that the proposed consent decree satisfied the public interest standard of the Antitrust Procedures and Penalties Act,<sup>145</sup> and it entered the final judgment effecting the same.<sup>146</sup>

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139. *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37 (D.D.C. 2001).

140. *Id.*

141. Proposed Final Judgment and Competitive Impact Statement, *United States v. Alcoa, Inc.*, 65 Fed. Reg. 38,574, at 38,581 (2000).

142. The HHI is a measure of market concentration derived from an analysis of the number of firms in a given market and their respective market share. An HHI of 1800 or more is considered a highly concentrated market. *Alcoa*, 152 F. Supp. 2d at 39 n.2.

143. 65 Fed. Reg. 38,581-82.

144. *Id.* at 38,582.

145. 15 U.S.C. § 16(c) (2001).

146. *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 41-42 (D.D.C. 2001).

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