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## **COMMITTEE REPORTS**

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**As a 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.**

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## REPORT OF THE ANTITRUST COMMITTEE

This report summarizes antitrust developments of particular interest to energy law practitioners that occurred in the year 2005.<sup>1</sup> The topics are covered in the following order:

- I. Federal Trade Commission (FTC) Enforcement Actions
- II. FTC Retail Gasoline and Ethanol Reports
- III. FTC Comments on Federal Energy Regulatory Commission (FERC) Proposals
- IV. Judicial Decisions
- V. Major FERC Competition-Related Rules and Orders

### I. FTC AND DOJ ENFORCEMENT ACTIONS

#### A. *Valero L.P., Valero Energy Corp., and Kaneb Services LLC, Kaneb Pipe Line Partners, L.P.*

On July 26, 2005, the FTC approved a final consent order involving Valero Energy Corp.'s (Valero) acquisition of partnership interests in Kaneb Services and Kaneb Pipe Line Partners (Kaneb), resulting in the companies' becoming wholly-owned subsidiaries of Valero.<sup>2</sup> In its complaint, the FTC alleged that the transaction would violate section 7 of the Clayton Act<sup>3</sup> and section 5 of the Federal Trade Commission Act (FTC Act)<sup>4</sup> by substantially lessening competition in the following markets: (1) terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area; (2) pipeline transportation and terminaling services for bulk suppliers of light petroleum products in the Colorado Front Range; (3) terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California; and (4) terminaling for bulk ethanol in Northern California.<sup>5</sup> For the Greater Philadelphia Area and the Northern California markets, the FTC found that Kaneb was the only independent provider of terminaling services (i.e., it did not own or market any of the products in its terminals) and thus, unlike its competitors, had no economic interest in the price of the products in its terminals; the elimination of the sole independent provider of terminaling services would thus restrict access by third-party marketers to these markets, reducing competitive pressures on the vertically-integrated suppliers and allowing them to maintain higher prices in the downstream markets for these products.<sup>6</sup> The FTC also considered vertical impacts in the Northern California

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1. This report was prepared by Brandon Johnson of the Federal Energy Regulatory Commission, with assistance from Mark Hegedus of Spiegel & McDiarmid and Metin Celebi and Phil Hanser of The Brattle Group.

2. Press Release, Fed. Trade Comm'n, Announced Action for July 26, 2005 (July 26, 2005), available at <http://www.ftc.gov/opa/2005/07/fyi0555.htm>.

3. 15 U.S.C. § 18 (2000).

4. 15 U.S.C. § 45 (2000).

5. Complaint of the Federal Trade Commission, *In the Matter of Valero L.P., Valero Energy Corp., Kaneb Servs. LLC, and Kaneb Pipe Line Partners, L.P.*, FTC Docket No. C-4141 (2005), available at <http://www.ftc.gov/os/caselist/0510022/050615comp0510022.pdf>.

6. Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Valero L.P., Valero Energy Corp., Kaneb Servs. LLC, and Kaneb Pipe Line Partners, L.P.*, FTC Docket No. C-4141 at 4, 7 (2005),

bulk ethanol market, finding that the merged entity “could use control over bulk ethanol terminaling to limit access to ethanol storage by refusing to renew storage agreements with terminaling customers, by canceling contracts at some terminals to force competitors to truck longer distances, or by simply raising prices or abusing confidential information for ethanol terminaling.”<sup>7</sup> The FTC found this particularly significant because ethanol is a required ingredient in California Air Resources Board (CARB) Reformulated Gasoline (RFG), and any price increases in this market could increase the price of finished gasoline.<sup>8</sup>

To remedy the horizontal harms of the transaction, the companies agreed to divest terminals in the Greater Philadelphia Area, pipelines and terminals in the Colorado Front Range, and terminals in Northern California.<sup>9</sup> To address the vertical harms associated with the bulk ethanol market in Northern California, Valero committed “not to discriminate in favor of or otherwise prefer Valero Energy in bulk ethanol terminaling services and to maintain customer information confidentiality at the Selby and Stockton terminals.”<sup>10</sup> The FTC approved the required divestitures on September 16, 2005.<sup>11</sup>

#### B. *Chevron Corp. and Unocal Corp.; Union Oil*

The FTC undertook two related enforcement actions involving CARB RFG and Unocal Corp. (Unocal). The first involved Chevron Corp.’s (Chevron) proposal to purchase Unocal and merge it into Chevron as a wholly-owned subsidiary.<sup>12</sup> Chevron was a leading refiner and marketer of CARB RFG, which is required to be sold in California to reduce air pollution and for which there is no substitute as an automotive fuel in California. Unocal had no downstream operations in refining or gasoline retailing, but was the owner of relevant U.S. patents for CARB RFG.

The FTC alleged that the transaction violated section 7 of the Clayton Act and section 5 of the FTC Act by substantially lessening competition in the refining and marketing of CARB RFG for sale in California, which was already moderately or highly concentrated.<sup>13</sup> The FTC alleged that, because of its significant CARB RFG refining and marketing operations, Chevron would “have a greater ability than Unocal to obtain additional profits by coordinating with its competitors at the downstream refining and marketing levels.”<sup>14</sup> In addition, by obtaining the Unocal patents, Chevron would receive additional production and other non-public information from competing refiners and marketers of CARB

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available at <http://www.ftc.gov/os/caselist/0510022/050615anal0510022.pdf> [hereinafter *Valero*]. Similarly, the FTC found that the elimination of an independent competitor in the pipeline transportation and terminaling services market would substantially increase concentration, and give rise to a monopoly in the Colorado Springs market. *Id.* at 5.

7. *Valero*, *supra* note 6, at 8.

8. *Id.*

9. *Valero*, *supra* note 6, at 2.

10. *Id.*

11. Press Release, Fed. Trade Comm’n, Announced Actions for September 16, 2005 (Sept. 16, 2005), available at <http://www.ftc.gov/opa/2005/09/fyi0567.htm>.

12. Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Chevron Corp. and Unocal Corp.*, FTC File No. 051-0125 at 1 (2005), available at <http://www.ftc.gov/os/caselist/0510125/050610analysis0510125.pdf> [hereinafter *Chevron/Unocal*].

13. *Id.* at 3.

14. *Chevron/Unocal*, *supra* note 12, at 3.

RFG, thereby allowing it to monitor and detect cheating on a collusive agreement.<sup>15</sup>

In a related complaint issued in March 2003, the FTC alleged that Unocal's subsidiary, Union Oil (the actual owner of the CARB RFG patents), "illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in violation of [s]ection 5 of the FTC Act in both the [upstream] technology market for the production and supply of CARB-compliant 'summer-time' gasoline, [as well as] the downstream 'summer-time' gasoline product market."<sup>16</sup> The complaint alleged that Union Oil actively participated in CARB RFG rulemaking proceedings in which it engaged in bad-faith, deceptive, and exclusionary conduct that enabled it to undermine competition and harm consumers by convincing the CARB to adopt regulations that incorporated Union Oil's proprietary interests.<sup>17</sup> Shortly before new CARB RFG regulations incorporating Union Oil's proprietary interest went into effect, and after the refining industry had spent billions of dollars to modify refining operations to produce CARB-compliant RFG, Union Oil "commenced vigorous enforcement of its patent rights through litigation and licensing, and obtained four additional patents based on the same RFG research results."<sup>18</sup>

To remedy both the competitive concerns associated with Chevron's acquisition of Unocal, including Union Oil's CARB RFG patents, and the alleged harms associated with Union Oil's CARB RFG-related actions in California, the companies entered into a consent agreement in which they agreed to stop ongoing efforts, and not to undertake new ones, concerning Union Oil's: (1) enforcement of its patents against any person; (2) recovering damages for alleged patent infringements; or (3) collecting fees, royalties, payments and the like related to the patents.<sup>19</sup> Chevron and Unocal further agreed to disclaim or dedicate to the public the remaining term of the CARB RFG patents and move to dismiss all pending patent infringement actions.<sup>20</sup> The FTC approved final consent orders involving both cases on August 2, 2005.<sup>21</sup>

### C. *FTC v. Aloha Petroleum, Ltd., and Trustreet Properties, Inc.*

On July 27, 2005, the FTC filed a complaint in the U.S. District Court for the District of Hawaii seeking a temporary restraining order and preliminary injunction to prevent Aloha Petroleum, Ltd. (Aloha) from acquiring Trustreet Properties, Inc. (Trustreet).<sup>22</sup> Aloha and Trustreet were co-owners of one of the two terminals for the import of gasoline into Hawaii that was not owned by

15. *Id.* at 3.

16. Analysis of Proposed Consent Order to Aid Public Comment, *In Union Oil Co. of California*, FTC Docket No. 9305 at 1 (2005), available at <http://www.ftc.gov/os/adjpro/d9305/050610analysis9305.pdf> [hereinafter *Union Oil*].

17. *Id.* at 1-2.

18. *Union Oil*, *supra* note 16, at 2-3.

19. *Id.*

20. *Union Oil*, *supra* note 16 at 3-4; *Chevron/Unocal*, *supra* note 12, at 4-5.

21. Press Release, Fed. Trade Comm'n, Announced Actions for August 2, 2005 (Aug. 2, 2005), available at <http://www.ftc.gov/opa/2005/08/fyi0557.htm>.

22. Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *Fed. Trade Comm'n v. Aloha Petroleum, Ltd., & Trustreet Properties, Inc.*, No. CV05-00471 (D. Haw. July 27, 2005), available at <http://www.ftc.gov/os/caselist/1510131/050728comp1510131.pdf> [hereinafter *Aloha Complaint*].

Hawaii's two refiners.<sup>23</sup> The FTC alleged that the transaction would reduce the number of gasoline marketers with ownership of, or guaranteed access to, a refinery or an import-capable terminal from five to four and would reduce "from three to two the number of bulk suppliers [who have been willing to sell] to nonintegrated retailers."<sup>24</sup>

Subsequent to the filing of the complaint, Aloha agreed to enter into a twenty-year throughput agreement with Mid Pac Petroleum LLC (Mid Pac), one of Hawaii's unintegrated gasoline retailers, which gave Mid Pac substantial rights to use the terminal. According to the FTC, the agreement would essentially substitute Mid Pac for Truststreet as a bulk supply gasoline marketer in Hawaii,<sup>25</sup> restoring the pre-merger level of competition, and thus announced on September 6, 2005 that it had moved to dismiss its FTC's complaint.<sup>26</sup>

#### D. *Shell Oil Co.*

In March 2004, the FTC opened an investigation of a decision by Shell Oil Products US (Shell) to close its petroleum refinery in Bakersfield, California after the FTC received "substantial inquiry questioning whether Shell's stated reasons for closing the refinery were mere pretext, which raised the possibility that Shell's action was part of an anticompetitive scheme to reduce refining capacity and raise gasoline prices in California."<sup>27</sup> However, on May 25, 2005, the FTC announced that it had closed the investigation based on evidence corroborating Shell's stated reasons for closing the refinery and contradicting an assertion that Shell possessed, acquired, or exercised market power in any way.<sup>28</sup> The FTC also found that other refiners could increase, and planned to increase, output which would make up the reduction associated with Shell's decision to close its refinery. This evidence strengthened the conclusion that there was no collusion between Shell and others in the decision to close the refinery.<sup>29</sup>

#### E. *Triton Coal Co.*

In last year's report, the Committee reported on the FTC's challenges to Arch Coal's acquisition of assets of Triton Coal.<sup>30</sup> The FTC initiated parallel proceedings, one in the U.S. District Court for the District of Columbia seeking a preliminary injunction to block the transaction, and a second proceeding under the FTC's administrative complaint procedures alleging violations of section 7 of the Clayton Act.<sup>31</sup> The court denied the request for an injunction, and its

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23. *Id.* at 5.

24. *Aloha Complaint*, *supra* note 22, at 5.

25. *Id.*

26. Press Release, Fed. Trade Comm'n, Aloha's Agreement with Mid Pac Restores Competition that Would Have Been Lost in the Bulk Supply Gasoline Market in Hawaii (Sept. 6, 2005), *available at* <http://www.ftc.gov/opa/2005/09/alohapetrol.htm>.

27. Statement of the Federal Trade Commission, *Concerning Shell Oil Co.*, FTC File No. 041-0087 at 1 (2005), *available at*: <http://www.ftc.gov/os/caselist/0410087/050525stmt0410087.pdf> [hereinafter *FTC Statement*].

28. *Id.* at 2.

29. *FTC Statement*, *supra* note 27, at 2.

30. *Report of the Antitrust Committee*, 26 ENERGY L.J. 521, 523 (2005) [hereinafter *2004 Antitrust Committee Report*].

31. *Id.* at 523-24.

decision was upheld by the Court of Appeals for the District of Columbia.<sup>32</sup>

The FTC closed the investigation on June 13, 2005,<sup>33</sup> explaining that, while it was possible that it would have made findings at an administrative trial different from those made by the District Court, the record in the *Arch/Triton* case did not contain significant new evidence that would prompt the FTC to reach a conclusion different from the district court's and so would not justify continued administrative litigation.<sup>34</sup> The FTC added that it did not need to pursue the administrative litigation to develop and enforce the antitrust laws, citing the D.C. Circuit's reversal of the District Court's conclusion that the FTC's competitive effects theory was novel.<sup>35</sup> The FTC also re-affirmed that it would continue to rely on customer views in its analysis of the potential competitive effects arising from proposed mergers because, given their intimate knowledge of the competitive dynamics of their markets, they would be unlikely to risk alienating important suppliers by testifying "unless they have calculated, based on reasoned analysis, that a transaction is likely to reduce competition in the supply of the relevant product or service."<sup>36</sup>

## II. FTC GASOLINE AND ETHANOL REPORTS

### A. *FTC Report on Ethanol Market Concentration*

Section 1501(a)(2) of the Energy Policy Act of 2005 (EPAAct 2005)<sup>37</sup> requires the FTC to "perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index [(HHI)] to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior[.]" and to annually report its findings to Congress and the Environmental Protection Agency.<sup>38</sup> The FTC issued its first report on December 1, 2005, which concluded that "U.S. ethanol production currently is not unduly concentrated."<sup>39</sup>

The report assumed that the United States was the relevant geographic market, but noted that the United States receives significant and increasing

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32. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004), *aff'd*, *FTC v. Arch Coal, Inc.*, No. 04-5291 (D.C. Cir. Sept. 15, 2004).

33. Press Release, Fed. Trade Comm'n, *FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine* (June 13, 2005), available at <http://www.ftc.gov/opa/2005/06/archcoal.htm>.

34. Statement of the Federal Trade Commission, *In the Matter of Arch Coal, Inc.*, FTC Docket No. 9316/File No. 031-0191 at 4 (2005), available at <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf> [hereinafter *Arch Coal Statement*].

35. *Id.* The FTC alleged competitive harm even though the transaction did not reduce the number of competitors, because of concerns that it would increase risks of coordinated interaction. *Arch Coal Statement*, *supra* note 34, at 2.

36. *Id.* at 6-7.

37. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a)(2), 119 Stat. 594.

38. FED. TRADE COMM'N, REPORT ON ETHANOL MARKET CONCENTRATION 1 (2005), available at <http://www.ftc.gov/reports/ethonal05/20051202ethanolmarket.pdf> (quoting Energy Policy Act of 2005 § 1501(a)(2)) [hereinafter *ETHANOL REPORT*].

39. *Id.* Specifically, the Herfindahl-Hirschman Index's (HHI) ranged between 499 and 1259, "depending on the degree to which individual [market] producers' shares can be attributed to their common marketers," indicating a market that was unconcentrated to moderately concentrated. *ETHANOL REPORT*, *supra* note 38, at 1-2.

imports of ethanol, which could suggest a larger geographic market.<sup>40</sup> The report also noted that ethanol may not be a separate product market, but might instead be “part of the overall gasoline product market, or . . . a smaller set of clean-burning blendstocks.”<sup>41</sup> According to the report, these various factors suggest that the HHI calculations overstate the likelihood of anticompetitive behavior.<sup>42</sup>

### B. FTC Gasoline Report

The FTC Gasoline Report attempts to explain two market phenomena: rising average gasoline prices and price spikes.<sup>43</sup> The report concludes that the large majority of incidents in the gasoline markets can be explained as the result of market forces, as can the market’s rising average prices. The first chapter examines gasoline price spikes in Phoenix, Arizona in 2003<sup>44</sup> and concludes that restrictions in supply from a rupture of the primary pipeline supplying gasoline to Phoenix from Texas, in combination with inelastic consumer demand, were the primary factors driving the price increases.<sup>45</sup>

Chapter 2 examines the causes of changes in U.S. gasoline prices and concludes that the world price of crude oil is the most important factor and, based on the FTC’s findings in a previous report, accounts for 85% of the changes in U.S. gasoline prices.<sup>46</sup> The report notes that world prices have increased recently due to the continued long-term growth in the demand for crude oil (which increased 27% between 1988 and 2004),<sup>47</sup> which recently has not been matched by an increase in crude oil production,<sup>48</sup> in part due to supply disruptions in Iraq, Gulf Coast hurricanes, and labor strikes in Norway.<sup>49</sup>

Chapter 3 finds that, despite the growth in U.S. consumer demand for gasoline, particularly since 1990, the real (i.e. inflation-adjusted) price of gasoline remained relatively low until 2004.<sup>50</sup> The report noted that the retail price of gasoline can be broken down as follows: crude oil (39.4%); taxes (30.3%); distribution, marketing costs, and profits (16.3%); and refining costs

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40. *Id.* at 7.

41. ETHANOL REPORT, *supra* note 38, at 6.

42. *Id.* at 2.

43. FED. TRADE COMM’N, GASOLINE PRICE CHANGES: THE DYNAMICS OF SUPPLY, DEMAND, AND COMPETITION (2005), available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf> [hereinafter FTC GASOLINE REPORT].

44. Prices in Phoenix climbed from \$1.52/gallon in the first week of August to \$2.11/gallon by the third week and then declined to \$1.80/gallon by the end of September. *Id.* at 1.

45. FTC GASOLINE REPORT, *supra* note 43, at 1–2.

46. *Id.* at 13 (citing BUREAU OF ECONOMICS, FED. TRADE COMM’N, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT 1 n.1 (2004), available at <http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf>).

47. FTC GASOLINE REPORT, *supra* note 43, at 14. The FTC Gasoline Report notes that demand seems to be fueled by the rapidly industrializing countries, particularly China and India. In 2003, China surpassed Japan and became the second largest consumer of petroleum products after the United States, while India’s demand doubled between 1987 and 2001. *Id.* at 19.

48. The FTC Gasoline Report notes that projections had placed the likely growth in demand for crude oil at 1.5% for 2004, while 2004’s actual growth was more than double that at 3.3%. FTC GASOLINE REPORT, *supra* note 43, at 26.

49. *Id.* at 28–29.

50. Between 1986 and 2003, the real price of gasoline varied between approximately \$0.80 and \$1.05 per gallon. In 2004, the real price of gasoline rose to \$1.44, the highest national average price since 1984, but below the 1981 high of \$2.10 per gallon. FTC GASOLINE REPORT, *supra* note 43, at 37.



and profits (14%).<sup>51</sup> The report finds that the cost of acquiring crude oil exhibits much greater volatility than the other cost components.<sup>52</sup> The report further finds that, although there have been no new plants built recently,<sup>53</sup> U.S. refiners have increased their total refining capacity through economies of scale<sup>54</sup> and improvements in technology.<sup>55</sup> These factors, combined with lowered inventory costs<sup>56</sup> and high capacity utilization rates,<sup>57</sup> have kept the real price of gasoline down, though these factors may also increase the potential for price volatility.<sup>58</sup>

Chapter 4 examines the sources of regional differences in gasoline prices. The U.S. is divided into five regions, or Petroleum Administration Defense Districts (PADDs),<sup>59</sup> which differ in a variety of ways including: gasoline demand; extent to which gasoline is indigenously produced or must be imported into the region; transport capabilities and the ability to substitute across supply resources; and the impact of environmental regulations on the supply of gasoline permissible to be used. The FTC Gasoline Report finds that, “[o]ver the [last] twenty years, regional differences have emerged in annual average . . . retail gasoline, excluding taxes.”<sup>60</sup> The report goes on to examine whether these regional differences are due to the large number of boutique fuel requirements and relative differences in access to gasoline supplies.<sup>61</sup> The report finds that “Gulf Coast boutique fuel gasoline prices are not more variable than conventional gasoline prices,”<sup>62</sup> while “[b]outique gasoline prices [for] California are significantly more variable than conventional gasoline prices on the Gulf Coast.”<sup>63</sup> The report also finds that gasoline prices in the East Coast, the Midwest, and the Rocky Mountain regions are significantly more variable than Gulf Coast prices,<sup>64</sup> which is largely a function of differences in pipeline access and substitutable gasoline supplies.<sup>65</sup> However, the use of some boutique fuels only in certain subregions of the East Coast can lead to an increase in price variability in those areas by virtue of the relative slowness of response to market

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51. *Id.* at 40.

52. Although that 39.4% share of gasoline costs attributed to crude oil translates into an average \$0.51 per gallon, the standard deviation was large, \$0.16 per gallon, nearly a third of the average. FTC GASOLINE REPORT, *supra* note 43, at 41.

53. *Id.* at 50.

54. FTC GASOLINE REPORT, *supra* note 43, at 51.

55. *Id.* at 53.

56. FTC GASOLINE REPORT, *supra* note 43, at 54.

57. *Id.* at 57.

58. FTC GASOLINE REPORT, *supra* note 43, at 55.

59. *Id.* at 77.

60. FTC GASOLINE REPORT, *supra* note 43, at 88.

61. “Boutique fuels include various types of RFG, less volatile summer gasoline, ultra-low sulfur gasoline (as [that] currently used in Atlanta, GA), winter-oxygenated gasoline, and gasoline mandated by the CARB.” *See id.* at 91.

62. FTC GASOLINE REPORT, *supra* note 43, at 92.

63. *Id.* at 93. The FTC Gasoline Report finds that this result appears to arise for three reasons. First, a refinery outage represents a larger proportion of supply in California than in the Gulf Coast. Second, the Gulf Coast’s connections to the East Coast and Midwest reduce the impact of a disruption because of the relatively large number of consumers it is spread over. Finally, the Gulf Coast’s interconnections to other regions also mean alternative supplies are more readily available. FTC GASOLINE REPORT, *supra* note 43, at 94.

64. *Id.*

65. FTC GASOLINE REPORT, *supra* note 43, at 95.

changes through the pipeline system.<sup>66</sup>

Chapter 5 examined the impact of a number of other local, state, and national factors on the retail price of gasoline. The report finds that, all things equal, the greater the number of gas stations, the lower gasoline prices.<sup>67</sup> The report further finds that the density of stations in an area is negatively affected by fixed costs, land and station construction, and zoning regulations.<sup>68</sup> The report notes four national trends that have tended to increase retail gasoline competition: (1) the decline in traditional gasoline pump and repair stations; (2) branded gasoline retailers shifting to convenience store format; (3) the entry of unbranded gasoline/convenience stores; and (4) hypermarkets such as Sam's Clubs.<sup>69</sup> The last, hypermarkets, appears to have the greatest impact on competition.<sup>70</sup> The report finds that state and local taxes can also be a significant factor in the retail price of gasoline<sup>71</sup> and that local regulations, such as "[s]tatutory bans on self-service sales and restrictions on below-cost sales appear to increase gasoline prices."<sup>72</sup>

With respect to vertical integration,<sup>73</sup> the FTC Gasoline Report finds that there are four potential cost advantages applicable to the gasoline market: (1) reduced transactions costs; (2) prevention of opportunism by contractual partners; (3) elimination of double markups; and (4) elimination of distortion in input choices.<sup>74</sup> The report then cites studies that support that vertical integration reduces costs and lowers gasoline prices,<sup>75</sup> while divorcement legislation (i.e., the prohibition of refiners from maintaining or acquiring retail stations) tends to raise retail gasoline prices.<sup>76</sup> With regard to the anticompetitive impacts of vertical integration, the FTC Gasoline Report cites: (1) raising rivals' costs; (2)

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66. *Id.* at 97.

67. FTC GASOLINE REPORT, *supra* note 43, at 102. The FTC Gasoline Report describes a field experiment in California that calculated how much a gas station's revenue would decrease as a function of the number of nearby competitors. If the number of nearby (defined as within two miles) competitors was 27 or greater, a 1% increase in price resulted in a 4.4% decrease in revenues. If the number of competitors was greater than 19, but less than 27, the decrease in revenue was 2.1% and 1.5% if the number of nearby competitors was less than 19. *Id.* at 104.

68. FTC GASOLINE REPORT, *supra* note 43, at 105.

69. For example, the FTC Gasoline Report cites a study comparing Siskiyou County and Redding, California, which determined that the widening gap in gasoline prices between these areas could be traced to increased competition in Redding as a result of an influx of high-volume discount gasoline stations. *Id.* at 108-09.

70. FTC GASOLINE REPORT, *supra* note 43, at 108-09.

71. For example, the highest state tax was in New York at \$0.334/gallon, while Florida localities impose taxes varying from \$0.099 to \$0.178 per gallon. *Id.* at 111.

72. FTC GASOLINE REPORT, *supra* note 43, at 113 (footnotes omitted).

73. The FTC Gasoline Report begins the discussion with a description of the structure of industry. It notes that the two stages in the distribution of gasoline are the storage terminals and wholesale distribution. Refined gasoline is conveyed, by pipeline or marine vessels to storage terminals and is then dispensed from units called racks into trucks for delivery to gas stations. Terminal charges are generally under 0.025/gallon and are not a significant component of the retail price. The two primary types of terminals are "public", owned by a pipeline company or other firm and which has neither upstream refining interest nor a downstream interest in retail gas stations and sells to all wholesalers; or, "proprietary", which is integrated upstream with a refiner or downstream with branded gas stations, or both, and which primarily distributes gasoline to their jobbers and retail stations. *Id.* at 115.

74. FTC GASOLINE REPORT, *supra* note 43, at 119-20.

75. *Id.* at 120.

76. FTC GASOLINE REPORT, *supra* note 43, at 121.

evading price regulation; (3) facilitating anticompetitive coordination; and (4) making entry more difficult.<sup>77</sup> The report notes that two case studies of vertical integration between refining and marketing on the West Coast indicated that higher wholesale gasoline prices resulted from vertical integration, although the impact on retail gasoline prices was either unexamined or unclear in these studies.<sup>78</sup> The report then examines the empirical evidence on vertical integration and finds that since 1990 the degree of vertical integration has generally decreased.<sup>79</sup>

The FTC Gasoline Report concludes with a discussion of zone pricing, a marketing practice in which a branded refiner varies its prices to lessees in various areas to reflect the level of competition within their local markets.<sup>80</sup> The antitrust concerns raised by zones are: (1) zone pricing may permit better coordination of wholesale gasoline pricing by branded refiners; and (2) branded refiners may use zones to deter entry by lowering prices in zone when new competitors attempt to enter.<sup>81</sup> However, the report notes that the FTC's investigations of zone pricing have provided no evidence of increased coordination among the refiners, nor of the use of zone pricing to deter entry.<sup>82</sup>

### III. FTC COMMENTS ON FERC PROPOSALS

#### A. *FTC Comments on Information Requirements for Available Transfer Capability*

On August 22, 2005, the FTC filed comments<sup>83</sup> with the FERC in its Notice of Inquiry<sup>84</sup> on revising and standardizing the calculation of available transfer capability (ATC)<sup>85</sup> by transmission providers. The FTC urges the FERC to standardize the way in which transmission providers calculate ATC to prevent transmission discrimination and to ensure the reliability and security of the transmission grid<sup>86</sup> and to consider improvements in total transfer capability (TTC) calculations, as TTC is the starting point for many ATC calculations.<sup>87</sup>

First, the FTC contends that increases in the transparency and uniformity of ATC calculations can increase the competitiveness of wholesale electricity markets. Although the FTC prefers structural solutions<sup>88</sup> to behavioral rules, it

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77. *Id.* at 121–23.

78. FTC GASOLINE REPORT, *supra* note 43, at 123–24.

79. *Id.* at 124.

80. FTC GASOLINE REPORT, *supra* note 43, at 125–27.

81. *Id.* at 126.

82. FTC GASOLINE REPORT, *supra* note 43, at 125–26.

83. See Comments of the Federal Trade Commission, *Information Requirements for Available Transfer Capability*, FERC Docket No. RM05-17-000 (2005), available at <http://www.ftc.gov/os/2005/08/050823availtranscapab.pdf> [hereinafter FTC ATC Comments].

84. See Information Requirements for Available Transfer Capability, 70 Fed. Reg. 34,417 (June 14, 2005) (to be codified at 18 C.F.R. pt. 37).

85. The term ATC refers to available transmission capability between two locations after all existing uses are accounted for. A similar term used in the industry is the available flowgate capability (AFC), which refers to available transmission capability on a flowgate (one or more transmission elements) after considering the flows associated with existing uses. Hereinafter, ATC will be used to refer to both ATC and AFC.

86. FTC ATC Comments, *supra* note 83, at 1.

87. *Id.* at 12.

88. FTC ATC Comments, *supra* note 83, at 3.

supports improving the calculation of ATC because such behavioral rules "are likely to be the best available short-term deterrent to profitable transmission discrimination in those areas without an [regional transmission organization (RTO)]."<sup>89</sup> Moreover, to the extent that some transmission providers currently understate ATC on certain paths, improvements to ATC calculation may help reduce unnecessary transmission curtailments.<sup>90</sup> The FTC also argues that improved ATC calculations improve network security by enabling the North American Electric Reliability Council (NERC) to respond to security incidents in a more timely and accurate way.<sup>91</sup> Finally, the FTC believes that improving ATC calculations may facilitate the formation of RTOs by vertically-integrated incumbent utilities to the extent such improvements "will reduce opportunities for profitable transmission discrimination . . . ."<sup>92</sup>

Second, the FTC highlights the findings of the NERC's Long-Term ATC/AFC Task Force's Final Report, which found that transmission operators use fifty to sixty different methods to calculate ATC, many of which are not comparable. The actual or perceived uncertainty about the ATC calculations may then preclude some efficient wholesale transactions from occurring, potentially raising prices of electricity.<sup>93</sup> Moreover, the NERC Report found that there were inconsistencies between the assumptions used by a transmission provider to calculate ATC for its own purposes and those it uses to evaluate the feasibility of importing electric power generated in other areas to maintain reliability and resource adequacy, which could discourage low-cost generators from attempting to enter the transmission provider's market.<sup>94</sup>

#### B. *FTC Comments on Long-Term Transmission Rights*

On August 8, 2005, the FTC filed comments<sup>95</sup> regarding the FERC's report<sup>96</sup> on its initiatives to reduce entry barriers in wholesale electricity markets that may be caused by long-term risk in obtaining transmission services. The FTC first points to the importance of reducing long-term transmission risk for efficient generation entry in areas with RTOs. According to the FTC, the only existing alternatives for market participants in RTOs to hedge against long-term transmission risk are to obtain long-term financial transmission rights (FTRs) by building new transmission lines, or to find a financial intermediary that is willing to provide this hedge for a fee.<sup>97</sup> In the absence of efficient tools to hedge this risk, the prospective generation entrants may be exposed to potentially significant congestion costs throughout the life of their planned generation

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89. *Id.* at 9.

90. FTC ATC Comments, *supra* note 83, at 9.

91. *Id.* at 10.

92. FTC ATC Comments, *supra* note 83, at 10.

93. *Id.* at 11.

94. FTC ATC Comments, *supra* note 83, at 11.

95. See Comments of the Federal Trade Commission, *Long Term Transmission Rights in Markets Operated by Regional Transmission Organizations and Independent System Operators*, FERC Docket No. AD05-7-000 (2005), available at <http://www.ftc.gov/os/2005/08/050823longtermtransrights.pdf> [hereinafter FTC LTR Comments].

96. See Long Term Transmission Rights Assessment in Markets Operated by Regional Transmission Organizations and Independent System Operators; Notice Inviting Comments on Establishing Long Term Transmission Rights in Markets with Locational Pricing, 70 Fed. Reg. 28,519 (May 18, 2005).

97. FTC LTR Comments, *supra* note 95, at 7 n.18.

assets, which are typically long-lived with high market exit costs, thus discouraging or delaying efficient generation entry and harming consumers through higher prices, less customer choice, and inefficient production that wastes real resources.<sup>98</sup> Moreover, the FTC argues that the lack of tools to hedge long-term transmission risk may also reduce the demand for long-term supply arrangements, with a shift in preferences towards shorter-term supply contracts.<sup>99</sup>

Second, the FTC argues that reducing long-term transmission risk outside of RTOs may be even more important for efficient entry than doing so in areas with RTOs. Unlike RTOs, which do not own any generation or transmission facilities, a transmission-owning generator with market power at the transmission level is likely to have the incentive to exercise that market power by discriminating against rival generators<sup>100</sup> or by cross-subsidizing their unregulated affiliates.<sup>101</sup>

Third, the FTC recommends that the FERC coordinate its policies to promote efficient transmission investment with its policies to reduce long-term transmission risk, since “transmission investment is often at least a partial substitute for long-term transmission rights from a transmission customer’s perspective.”<sup>102</sup> The FTC argues that coordinating these two policies would reduce long-term transmission risk to levels that can be managed more easily by potential generation entrants.<sup>103</sup>

#### IV. COURT CASES<sup>104</sup>

##### A. *Texas Commercial Energy v. TXU Energy, Inc.*

In *Texas Commercial Energy v. TXU Energy, Inc.*,<sup>105</sup> the Court of Appeals for the Fifth Circuit upheld the dismissal of Sherman Act price-fixing claims and state unfair competition law claims arising out of price spikes in the short-term energy market in Texas, which is administered by the Electric Reliability Council of Texas (ERCOT), an entity subject to rate regulation by the Public Utility Commission of Texas (PUCT), rather than the FERC.<sup>106</sup>

Texas Commercial Energy (TCE) argued that the filed rate doctrine did not

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98. *Id.* at 5.

99. FTC LTR Comments, *supra* note 95, at 8 n.21.

100. According to the FTC, such discrimination may occur through preferential curtailment of energy schedules during the periods of congestion, or through denial of transmission access by understating the available transmission capability. *Id.* at 10.

101. FTC LTR Comments, *supra* note 95, at 10. The FTC further notes that the additional risk of transmission discrimination applies to generators (existing and potential) located both inside and outside RTOs, as the wholesale transactions may occur between RTOs and non-RTOs.

102. *Id.* at 12.

103. FTC LTR Comments, *supra* note 95, at 13.

104. All of the cases discussed below address the applicability of the filed rate doctrine to bar federal antitrust and/or state law claims, and most of them consider and reject plaintiffs’ arguments that the filed rate doctrine cannot apply to transactions at market-based rates because there are no rates on file. The summaries will not address this argument because it has been uniformly rejected by the Courts. *See, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

105. *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005).

106. Texas Commercial Energy claimed that the price increases were due to market manipulation, anticompetitive bids and withholding of energy, but its Sherman Act and state law claims were dismissed by the district court on the basis of the filed rate doctrine. *Id.* at 506–07.

apply to bar its claims because the Texas legislature clearly intended for aggrieved parties to bring private claims under the Public Utility Regulatory Act (PURA),<sup>107</sup> the state law that deregulated the Texas energy markets in 1999, as evidenced by its antitrust savings clause, which provided that the relevant provisions of the law did not confer antitrust immunity and were intended to complement other state and federal antitrust provisions.<sup>108</sup> The Fifth Circuit rejected this argument, noting that the filed rate doctrine is not an immunity (because it does not bar government actions, criminal sanctions, or equitable relief) and that, contrary to TCE's assertions, the filed rate doctrine is a part of current federal antitrust law and thus complemented it.<sup>109</sup> For the same reasons, the Fifth Circuit held that TCE's arguments that the filed rate doctrine did not apply to state antitrust law claims were misplaced because "[c]ourts have uniformly held . . . that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies."<sup>110</sup> Finally, the Fifth Circuit rejected TCE's attempt to bring itself within the so-called "competitor exception" to the filed rate doctrine, finding that all of TCE's claims of market manipulation were focused solely on TXU's actions as an electric generation company, rather than the actions of TXU's electric retail provider subsidiaries.<sup>111</sup>

*B. Utility Choice, L.P. v. TXU Corp.*

In *Utility Choice, L.P. v. TXU Corp.*,<sup>112</sup> the Texas Southern District Court dismissed various federal antitrust and state law claims submitted by Utility Choice and other plaintiffs, which alleged that TXU and other defendants had unlawfully cornered and conspired to monopolize and manipulate prices in the Texas energy market. Utility Choice argued that the Fifth Circuit's decision in *TCE* did not bar its claims for damages because the lack of a substitute mechanism for recovery made the filed rate doctrine inapplicable.<sup>113</sup> Specifically, Utility Choice argued that, because the PUCT lacked the "authority to order disgorgement of profits and lack of power to refund profits derived from wrongful conduct necessarily makes the courts the only place [p]laintiffs [could] seek such remedies."<sup>114</sup>

The court rejected this argument noting that, first, "*Keogh* [did] not state that an alternative damages mechanism is required, but rather [simply] indicates that the plaintiff in that case could have recovered damages through agency proceedings[.]" and second, "subsequent decisions indicate that an alternative damages mechanism is not required for claims to be barred by the filed rate

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107. TEX. UTIL. CODE ANN. §§ 11.001–66.017 (Vernon 2005)

108. *Tex. Commercial Energy*, 413 F.3d at 509.

109. *Id.* at 508–09.

110. *Tex. Commercial Energy*, 413 F.3d at 509 (alterations in original) (quoting *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994)).

111. *Id.* at 510.

112. *Utility Choice, L.P. v. TXU Corp.*, No. H-05-573, 2005 U.S. Dist. LEXIS 38657 (S.D. Tex. Dec. 6, 2005).

113. In *Tex. Commercial Energy*, the Fifth Circuit held that these arguments were waived because plaintiff TCE did not raise them before the district court. *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 510 (5th Cir. 2005).

114. *Utility Choice*, 2005 U.S. Dist. LEXIS 38657, at \*13 (citing *Keogh v. Chicago Nw. Ry. Co.*, 260 U.S. 156 (1922)).

doctrine.”<sup>115</sup> The court also dismissed plaintiffs’ claims for equitable and injunctive relief to modify the rules for market participation, emphasizing that the requested relief would “require the Court to engage in continued oversight of the Texas energy market” and “determine the appropriateness of the rates charged by [d]efendants,” unduly infringing on the PUCT’s rate setting authority.<sup>116</sup>

### C. *In re Enron Corp.*

In *In re Enron Corp.*,<sup>117</sup> the New York Southern Bankruptcy Court held that the filed rate doctrine barred allegations by the State of California and others that Enron and certain of its affiliates manipulated energy markets in California and overcharged for energy through the use of unlawful and anticompetitive acts during the California energy crisis of 2000–2001.<sup>118</sup> The bankruptcy court distinguished this case from *Otter Tail Power Co. v. United States*,<sup>119</sup> noting that, while at the time *Otter Tail* was decided, the FERC had no authority under the Federal Power Act (FPA)<sup>120</sup> to remedy the conduct in question. During the time period at issue here, “there [was] a regulatory scheme against anti-competitive behavior that has been entrusted to [the] FERC,” and the FERC had already taken action to remedy this conduct.<sup>121</sup> The bankruptcy court also rejected plaintiffs’ attempt to rely on dicta in *California ex rel. Lockyer v. FERC*<sup>122</sup>—where the Ninth Circuit stated that, because Enron and others had failed to comply with filing requirements, “[p]ragmatically, under such circumstances, there is no filed tariff in place at all”—to find that the filed rate doctrine did not apply.<sup>123</sup> The bankruptcy court instead concluded that “[t]his argument, however, inappropriately equates the Debtors’ alleged violation of the filing requirements with no-filed tariffs.”<sup>124</sup> Finally, the bankruptcy court rejected plaintiffs’ argument that providing a remedy would not require the court to determine the price that would have prevailed in a competitive market (e.g., by determining liability and remanding to the FERC for a determination of remedies) because a determination of liability for their overcharge claims for market manipulation would require the bankruptcy court to decide the reasonableness of the filed tariff.<sup>125</sup>

115. *Id.* at \*13–14.

*Taffet v. Southern Co.*, 967 F.2d 1483, 1492 (11th Cir. 1992) (noting that filed rate doctrine barred RICO claims, despite the fact that state public service commissions could not order refund of excessive rates); *Wegoland, LTD v. NYNEX Corp.*, 806 F. Supp. 1112, 1120 (S.D.N.Y. 1992), *aff’d* 27 F.3d 17 (2d Cir. 1994) (“availability of adequate administrative relief has never been a prerequisite to applying the filed rate doctrine”).

*Utility Choice*, 2005 U.S. Dist. LEXIS 38657, at \*13–14.

116. *Id.* at \*21.

117. *In re Enron Corp.*, 326 B.R. 257 (Bankr. S.D.N.Y. 2005).

118. *Id.* at 259.

119. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

120. 16 U.S.C. § 824–824m (2000).

121. *Enron*, 326 B.R. at 264.

122. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

123. *Enron*, 326 B.R. at 261.

124. *Id.*

125. *In re Enron Corp.*, 326 B.R. 257, 262 (Bankr. S.D.N.Y. 2005).

*D. Stand Energy Corp. v. Columbia Gas Transmission Corp.*

In *Stand Energy Corp. v. Columbia Gas Transmission Corp.*,<sup>126</sup> plaintiff shippers, wholesalers, and marketers of natural gas alleged that interstate pipeline owners (Pipeline Defendants) “granted preferential access to storage capacity and transportation,” including park and loan services (PAL Services), on their system to defendant shippers (Select Shippers) in exchange for kickback payments, which, in turn, allowed these shippers to monopolize the market for sales to end-user customers.<sup>127</sup> The West Virginia Southern District Court rejected defendants’ argument that plaintiffs’ claims were barred by the filed rate doctrine. The court began its analysis by stating that the critical factor in the filed rate doctrine analysis is the nature of the damages sought by the plaintiff.<sup>128</sup> The court agreed that plaintiffs’ complaint did not concern Pipeline Defendants’ rates or services. Instead, plaintiffs complained of being denied the benefits of their service agreements and being injured by the unfair advantage purportedly given to the Select Shippers. Because plaintiffs did not seek “damages based on the rates they were charged or some hypothetical rate to be determined by the court,” the court held that the filed rate doctrine did not bar their claims.<sup>129</sup>

The court also rejected defendants’ arguments that plaintiffs’ state law claims were barred by field preemption under the Natural Gas Act (NGA)<sup>130</sup> because “[d]efendants [had] not demonstrated that the relief sought for [p]laintiffs’ claims would interfere with [the] FERC’s regulatory authority.”<sup>131</sup> The court emphasized that defendants’ Stipulation and Consent Agreement with the FERC—in which the Pipeline Defendants acknowledged that they had provided to Select Shippers PAL Service not included in their FERC-approved tariff, while excluding the plaintiffs—did “not purport to remedy [p]laintiffs’ claims, and there ha[d] been no showing that [the] FERC was engaged in any proceedings that conflict[ed] with [p]laintiffs’ lawsuit.”<sup>132</sup> For the same reason, the court rejected defendants’ arguments (relying on the Supreme Court’s decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*)<sup>133</sup> that plaintiffs had alleged only FERC violations, which are inadequate to state an antitrust claim.<sup>134</sup> The court found that defendants had not demonstrated

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126. *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631 (S.D.W.V. 2005).

127. *Id.* at 633. The court divided the plaintiffs’ claims chronologically as follows: (1) Pipeline Defendants provided illegal preferences to the Select Shippers by providing PAL Service not included in their FERC-approved tariff, which “kept [plaintiffs’] natural gas out of the market and allowed . . . Select Shippers greater [preferential] access to the market, causing [p]laintiffs to lose customers;” and (2) “[a]fter disclosure of these practices, Pipeline Defendants obtained approval from FERC to offer the PAL service, but implemented it so as to perpetuate the advantage given the Select Shippers and the injury to [p]laintiffs’ business.” *Stand Energy Corp.*, 373 F. Supp. 2d at 638. FERC subsequently issued an order approving a Stipulation and Consent Agreement in which the FERC found that industry participants, which included many of the plaintiffs, had been illegally excluded from the scheme, and the Pipeline Defendants agreed to pay refunds and disgorge profits resulting from this scheme to these industry participants. *Id.* at 633.

128. *Stand Energy Corp.*, 373 F. Supp. 2d at 636.

129. *Id.* at 638.

130. 15 U.S.C. § 717–717w (2000).

131. *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631, 639 (S.D.W.V. 2005).

132. *Id.*

133. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

134. *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631, 640 (S.D.W.V. 2005).



that this case involves the same level of regulatory overlay and unique market found in *Trinko*, and that, instead, *Otter Tail*<sup>135</sup> was more closely on point. The district court emphasized that the “FERC’s authority to remedy anti-competitive behavior [was] decidedly less” than that of the Federal Communications Commission considered in *Trinko*, as evidenced by the Stipulation and Consent Agreement, which did not purport to address any anticompetitive results of the scheme and limited relief to disgorgement of profits and a refund of certain fees.<sup>136</sup>

*E. In re Western States Wholesale Natural Gas Antitrust Litigation*

In *In re Western States Wholesale Natural Gas Antitrust Litigation*,<sup>137</sup> the Nevada District Court dismissed as barred by the filed rate doctrine the Sherman Act and state unfair competition claims of plaintiff Texas-Ohio, which was acting on behalf of a class of similarly-situated natural gas ratepayers.<sup>138</sup> The court first found that Texas-Ohio’s claims were barred by the filed rate doctrine because, “[t]o calculate the necessary damages under both the Sherman Act and Texas-Ohio’s state law claims, [the c]ourt would be required to make a determination as to what a just or reasonable rate would have been, thereby usurping a function that Congress explicitly has assigned to [the] FERC.”<sup>139</sup>

The court also rejected Texas-Ohio’s argument that “‘decisions based on the electricity market cannot be [extended] to the natural gas market given the wide discrepancies in levels of regulation of the two markets at the time of the events giving rise to this action.’”<sup>140</sup> The court acknowledged that in *In re Natural Gas Litigation*, it held that, for purposes of federal preemption, decisions regarding the natural gas market and the energy market are not interchangeable. It concluded, however, that, “[u]nlike the doctrine of complete preemption, which may serve as a basis for federal jurisdiction, the filed rate doctrine is a defense on the merits” and “cannot serve as a jurisdictional basis to authorize removal to federal court.”<sup>141</sup>

*F. In re Western States Wholesale Natural Gas Antitrust Litigation*

In a second decision in this proceeding, *In re Western States Wholesale Natural Gas Antitrust Litigation*,<sup>142</sup> the Nevada District Court held that the claims of plaintiff Fairhaven, under the Sherman Act and the state unfair competition law (which were identical to those in *Western States I*), were also barred by the filed rate doctrine. Plaintiff Fairhaven argued that the filed rate doctrine did not apply in this instance because the “FERC does not regulate first sales, including sales to end users, and therefore the rates which [p]laintiffs

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135. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

136. *Stand Energy Corp.*, 373 F. Supp. 2d at 641.

137. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 368 F. Supp. 2d 1110 (D. Nev. 2005).

138. Specifically, Texas-Ohio claimed that defendant natural gas sellers had engaged in false reporting of natural gas prices, participated in wash trades, entered into illegal netting agreements, and conspired not to compete in natural gas markets. *Id.* at 1113.

139. *Antitrust Litig.*, 368 F. Supp. 2d at 1116.

140. *Id.* at 1117 (citing *In re Natural Gas Litig.*, 346 F. Supp. 2d 1123 (D. Nev. 2004)).

141. *Antitrust Litig.*, 368 F. Supp. 2d at 1117.

142. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 408 F. Supp. 2d 1055 (D. Nev. 2005).

challenge[d] are not within [the] FERC's jurisdiction . . . ."<sup>143</sup> Alternatively, "if the first sale exclusion [was] inapplicable, [Fairhaven maintained that] the filed rate doctrine still [would not] bar [its] claims because [the] FERC did not have the power to regulate the natural gas industry at the time of the alleged misconduct[.]" and, even if it did, it chose not to.<sup>144</sup>

The court first noted that *Western States I* did not "address the central issue presented by this case: whether the filed rate doctrine bars the claims of both wholesale gas purchasers and end[] users of natural gas."<sup>145</sup> In *Western States I*, "the named plaintiff was not an end[] user, but rather purported to represent a class, which would include end-run users" but that had not yet been certified.<sup>146</sup> The court noted that a similar issue had been addressed in *E. & J. Gallo Winery v. Encana Energy Services, Inc.*,<sup>147</sup> which found that the filed rate doctrine was inapplicable to first sales because they were not within the FERC's jurisdiction.<sup>148</sup> The court concluded that, unlike in *Gallo*, the damages plaintiffs sought required it "to make a determination as to what a just and reasonable rate would have been in the wholesale natural gas market" because, "[a]lthough the transactional rates at issue [in *Gallo I* were] for the first sales of natural gas, and thus outside of [the] FERC's jurisdiction, the misconduct alleged [by plaintiffs here] centers on misconduct in the wholesale gas market which is within [the] FERC's exclusive jurisdiction."<sup>149</sup>

*G. E. & J. Gallo Winery v. Encana Energy Services, Inc.*

In *E. & J. Gallo Winery v. Encana Energy Services, Inc.*,<sup>150</sup> the California Eastern District Court revisited, and affirmed, its earlier decision in *Gallo I*, in which it denied defendants' motion for dismissal of plaintiffs' federal and state antitrust law claims. Here, defendant natural gas sellers acknowledged that the sales of natural gas to plaintiff Gallo were retail sales that expressly lie outside the FERC's jurisdiction, but they contended that Gallo's action was preempted because Gallo would have to engage in speculative rate-setting to establish any damages.<sup>151</sup>

According to the court, this case presented an issue of first impression, namely, "whether the filed rate doctrine applies where the plaintiff challenges the fairness of a retail rate paid for natural gas" that was not directly related "to a wholesale rate or tariff that has been filed with [the] FERC."<sup>152</sup> The court concluded that "the aggregate of case authority points to a three-step inquiry to determine whether the filed rate doctrine applies in a given case:" (1) "whether

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143. *Id.* at 1064.

144. *Antitrust Litig.*, 408 F. Supp. 2d at 1064.

145. *Id.* at 1066.

146. *Antitrust Litig.*, 408 F. Supp. 2d at 1066.

147. *E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, No. CV F 03-5412 AWI LJO, 2005 U.S. Dist. LEXIS 24240 (E.D. Cal. Sept. 30, 2005).

148. *Antitrust Litig.*, 408 Supp. 2d at 1067.

149. *Id.*

150. *E. & J. Gallo Winery*, 2005 U.S. Dist. LEXIS 24240.

151. *Id.* at \*25. The court then determined that "[d]efendants' contention that Gallo's action is barred by preemption is analytically indistinguishable from its contention that the action is barred by the filed rate doctrine" and proceeded to examine their filed rate defense. *E. & J. Gallo Winery*, 2005 U.S. Dist. LEXIS 24240, at \*28.

152. *Id.* at \*40.

the action directly challenges the fairness of a rate paid or a tariff that has been filed[;]”<sup>153</sup> (2) “whether the sales that are the subject of the action are jurisdictional[, i.e.,] whether the sales were wholesale sales in interstate commerce[;]”<sup>154</sup> and (3) if the sale giving rise to the action is not jurisdictional, then the court must determine if the retail rate paid is “pegged specifically to a rate or tariff that was filed with [the] FERC and was either prospectively or retrospectively approved by [the] FERC” such that the court, in order to grant relief, must make a determination of the fairness of a wholesale rate or tariff.<sup>155</sup> The court concluded that, where a “defendant wishing to invoke the doctrine in the context of a dispute arising out of non-jurisdictional sales of natural gas cannot point with some precision to some rate or tariff that has been filed by [the] FERC that is directly implicated by the plaintiff’s claim for relief[.]” the filed rate doctrine does not apply.<sup>156</sup>

The court held that the sales involved in this case lie outside exclusive FERC jurisdiction, and thus the determination of Gallo’s claims would not require the court to intrude on exclusive FERC jurisdiction.<sup>157</sup> First, the court found that defendants had failed to demonstrate any connection between the retail rates charged to Gallo and FERC-jurisdictional wholesale rates.<sup>158</sup> Furthermore, it was undisputed that the retail rates charged to Gallo were based upon natural gas price indices, which, while closely linked to rates, are not rates themselves.<sup>159</sup> Consequently, “any inquiry by the court into those indices and into factors that may have unlawfully inflated them [would] not have the effect of invalidating any determination made by [the] FERC.”<sup>160</sup>

## V. FERC COMPETITION-RELATED RULES AND ORDERS

### A. *EPA Act 2005 and the FERC’s Implementing Regulations*

#### 1. Order No. 669: Transactions Subject to FPA Section 203

On December 23, 2005, the FERC issued Order No. 669,<sup>161</sup> which

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153. *E. & J. Gallo Winery*, 2005 U.S. Dist. LEXIS 24240, at \*40.

154. *Id.* at \*41.

155. *E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, No. CV F 03-5412 AWI LJO, 2005 U.S. Dist. LEXIS 24240, at \*42 (E.D. Cal. Sept. 30, 2005).

156. *Id.* at \*45.

157. *E. & J. Gallo Winery*, 2005 U.S. Dist. LEXIS 24240, at \*66–67.

158. *Id.* at \*52.

159. *E. & J. Gallo Winery*, 2005 U.S. Dist. LEXIS 24240, at \*54. The Court acknowledged that, “[w]hile wholesale rates derived from published index values may come within FERC’s exclusive jurisdiction, it does not follow that retail rates that are derived from the same indices also come within FERC’s jurisdiction.” *Id.* at \*57–58 (emphasis omitted).

160. *E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, No. CV F 03-5412 AWI LJO, 2005 U.S. Dist. LEXIS 24240, at \*62 (E.D. Cal. Sept. 30, 2005). The Court concluded by expressing its disagreement with the holding in *Western States II*, which considered both wholesale purchases and retail purchases as coming equally under FERC jurisdiction. According to the *Gallo II* Court, “the difference between the legal status of the retail purchaser and the wholesale purchaser in their relationship to FERC oversight makes all the difference with respect to the filed rate doctrine.” *Id.* at \*64–65.

161. Order No. 669, *Transactions Subject to FPA Section 203*, [Regs. Preambles 2001–2006] F.E.R.C. STATS. & REGS. ¶ 31,200 (2006), 71 Fed. Reg. 1348 (2006) (to be codified at 18 C.F.R. pts. 2, 33) [hereinafter Order No. 669].

implements the amendments to section 203(a) of the FPA made by section 1289 of EPAAct 2005.<sup>162</sup> Section 203(a) is amended to, among other things: (1) increase the value threshold for transactions subject to section 203 from \$50,000 to \$10 million and extend the scope of the FERC's section 203 jurisdiction to cover generation-only transactions and certain intra-holding company securities transactions or mergers with a value in excess of \$10 million;<sup>163</sup> (2) require that the FERC, when reviewing proposed section 203 transactions, examine cross-subsidization and pledges or encumbrances of utility assets; and (3) direct the FERC to adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions under section 203 of the FPA.<sup>164</sup>

Order No. 669 incorporates, in relevant part, these amendments to the statutory text into section 2.26 and part 33 of the FERC's regulations. In addition, Order No. 669 sets forth FERC policy on a number of additional matters. First, Order No. 669 grants blanket authorizations for certain types of transactions covered by amended section 203(a)(2), including foreign utility acquisitions by holding companies, intra-holding company system financing and cash management arrangements, certain internal corporate reorganizations, and certain acquisitions by holding companies of nonvoting securities and of up to 9.9% of voting securities of transmitting utilities and electric utility companies.<sup>165</sup>

Second, Order No. 669 states that the FERC will use market value as the appropriate measure of value to determine whether a given transaction satisfies the amended section 203 thresholds.<sup>166</sup> For transfers of physical facilities between nonaffiliates, Order No. 669 establishes a rebuttable presumption that the market value is the transaction price, but for physical asset transactions between affiliates, the measure of market value will be the original, undepreciated cost.<sup>167</sup> With regard to transfers of wholesale contracts, the FERC will presume that market value to be the transaction price for deals between non-affiliates, while for affiliate transactions the market value will be total contract revenues.<sup>168</sup>

Third, Order No. 669 adds a new section 33.2(j) to the FERC's regulations, which provides that section 203 applicants are to include an assurance, with appropriate evidentiary support, that the proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company. If no such assurance can

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162. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (amending 16 U.S.C. 824b(a)).

163. As amended, section 203(a)(2) of the FPA states:

No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

Energy Policy Act of 2005 § 1289(a)(2) (codified at 16 U.S.C. § 824b(a)(2)).

164. *Id.*

165. Order No. 669, *supra* note 161, at P 204.

166. *Id.* at P 117.

167. Order No. 669, *supra* note 161, at P 124.

168. *Id.* at P 106.

be provided, applicants are to provide an explanation of “how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”<sup>169</sup> Section 203 applicants will bear the burden of proof to demonstrate that customers will be protected.<sup>170</sup>

Finally, Order No. 669 adds a new section 33.11 to the FERC’s regulations, which provides that the FERC will act on a completed application for approval of a transaction not later than 180 days after the completed application is filed.<sup>171</sup> Moreover, the FERC will provide expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with FERC precedent, in particular those that involve only a disposition of transmission facilities and that do not involve an Appendix A analysis.<sup>172</sup>

## 2. Order No. 670: Prohibition of Energy Market Manipulation

On January 19, 2006, the FERC issued Order No. 670,<sup>173</sup> which adds a new part 1c to the FERC’s regulations to implement sections 315 and 1283 of EPAct 2005, which add a new section 4A to the NGA and section 222 to the FPA.<sup>174</sup> These new provisions prohibit the employment of manipulative or deceptive devices or contrivances in connection with certain FERC-jurisdictional transactions.

Order No. 670 notes that sections 315 and 1283 of EPAct 2005 closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934<sup>175</sup> (Exchange Act) and provide that the terms “manipulative or deceptive device or contrivance” are to be used as those terms are used in section 10(b) of the Exchange Act.<sup>176</sup> In light of this statutory directive, the FERC has modeled new Part 1c of its regulations on Security and Exchange Commission (SEC) Rule 10b-5 as much as possible.<sup>177</sup> However, given the differences

169. Order No. 669, *supra* note 161, at P 146 (to be codified at 18 C.F.R. § 33.2(j)).

170. *Id.* at P 194.

171. However, if the FERC “does not act within 180 days, such application shall be deemed granted unless the [FERC] finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of” section 203(a)(4) of the FPA and issues, by the 180th day, “an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the [FERC] shall grant or deny the application.” Order No. 669, *supra* note 161, at P 20.

172. *Id.*

173. Order No. 670, *Prohibition of Energy Market Manipulation*, F.E.R.C. STATS. & REGS. ¶ 31,202 (2006), 71 Fed. Reg. 4244 (2006) (to be codified at 18 C.F.R. pt. 1c) [hereinafter Order No. 670].

174. Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 315, 1283, 119 Stat. 594 (adding 15 U.S.C. 717c-1; 16 U.S.C. § 824v).

175. Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000).

176. Energy Policy Act of 2005 §§ 315, 1283(a) (to be codified at 15 U.S.C. § 717c-1 and 16 U.S.C. § 824v).

177. Order No. 670, *supra* note 173, at P 2 (citing 17 C.F.R. § 240.10b-5 (2005)). Specifically, new sections 1c.1(a) and 1c.2(a) of the FERC’s regulations provide that it shall:

be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services [or electric energy or the purchase or sale of transmission services] subject to the jurisdiction of the [FERC]: (1) to use or employ any device, scheme, or artifice to defraud; (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any [entity].

between the SEC's jurisdiction under the Exchange Act and the FERC's jurisdiction under the FPA and the NGA, the FERC determined that certain modifications are necessary.

First, the FERC notes that EAct 2005 sections 315 and 1283 apply to "any entity," a deliberately inclusive term, which the FERC interprets "to include any person or form of organization, regardless of its legal status, function or activities[.]"<sup>178</sup> rather than being limited to jurisdictional entities under the FPA or NGA.<sup>179</sup>

Second, with respect to the scope of transactions subject to the anti-manipulation rules, Order No. 670 notes that section 315 of EAct 2005 applies to transactions involving "the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the [FERC]," and section 1283 applies to those involving "the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the [FERC] . . . ."<sup>180</sup> Thus the critical issue is whether the limiting phrase of "subject to the jurisdiction of the FERC" in EAct 2005 sections 315 and 1283 applies only to transactions involving the purchase or sale of natural gas and electric commodity, or to those involving transportation or transmission services as well.<sup>181</sup> The FERC concludes that the phrase "subject to the jurisdiction of FERC"<sup>182</sup> modifies both of these phrases and, consequently, that EAct 2005's anti-manipulation provisions authorize the FERC to prohibit market manipulation for jurisdictional transactions involving both the gas or electric commodity and those for transportation or transmission services.<sup>183</sup>

Third, Order No. 670, relying on SEC and court precedent to interpret the "in connection with" requirement, concludes that EAct 2005's anti-manipulation provisions apply only to "situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction."<sup>184</sup> Order No. 670 concludes that the anti-manipulation provisions apply only where an entity, in committing fraud, "intended to affect, or have acted recklessly to affect, a jurisdictional transaction."<sup>185</sup>

Order No. 670 provides additional guidance and clarifications in response to the concerns of commenters. First, Order No. 670 provides that the elements of

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*Id.* at P 1.

178. Order No. 670, *supra* note 173, at P 18.

179. In reaching this conclusion, the FERC notes that, had Congress intended to limit their scope to jurisdictional entities, it "could have used the existing defined terms in the NGA and FPA of 'person,' 'natural-gas company,' or 'electric utility,' but instead chose to use a broader term without providing a specific definition." *Id.* at P 18.

180. Order No. 670, *supra* note 173, at P 1.

181. *Id.* at P 2.

182. Order No. 670, *supra* note 173, at P 20.

183. *Id.*

184. Order No. 670, *supra* note 173, at P 22.

185. *Id.*

Transactions not subject to the [FERC's] jurisdiction include first sales, sales of imported natural gas, sales of imported LNG, sales and transportation by NGA section 1(b)-(d) entities (*i.e.*, activities including production and gathering, local distribution, "Hinshaw" pipelines, and vehicular natural gas), or by NGA [s]ection 7(f) companies, retail sales of electric energy, sales of electric energy in intrastate commerce, sales of electric energy by governmental entities and certain electric power cooperatives, and certain interstate transmission by governmental entities.

Order No. 670, *supra* note 173, at P 20 n.34.

a manipulation claim are identical to those under SEC Rule 10b-5.<sup>186</sup> Second, the FERC clarifies that, unlike the securities laws, which are designed to protect customers through a regime of disclosure (rather the price regulation), Order No. 670 creates no new affirmative duty of disclosure.<sup>187</sup> With respect to the applicable procedures, Order No. 670 states that the FERC “will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.”<sup>188</sup>

### 3. Market-Based Rates for Gas Storage

On December 22, 2005, the FERC issued a Notice of Proposed Rulemaking (NOPR)<sup>189</sup> regarding revisions to its policy on market-based rates for gas storage facilities and to implement section 312 of EPAct 2005, which adds new section 4(f) of the NGA.<sup>190</sup> First, the Gas Storage NOPR proposes to modify the FERC’s market-power analysis to better reflect the competitive alternatives to storage. The FERC currently evaluates requests to charge market-based rates for storage services under the analytical framework established in its 1996 *Alternative Rate Policy Statement*,<sup>191</sup> which does not take into account “the fact that non-storage products and services in a properly defined geographic market may be good alternatives to storage services, and thus mitigate a storage provider’s ability to exercise market power.”<sup>192</sup> Accordingly, the Gas Storage NOPR proposes to “adopt a more expansive definition of the relevant product market for storage [that may] include close substitutes for gas storage services[,]” such as available pipeline capacity, including firm capacity available through capacity release, and local gas production or LNG terminals.<sup>193</sup> In addition, the FERC proposes to require natural gas storage providers with market-based rates to comply with “existing reporting requirements applicable to open-access service providers under [section] 284.13 of the [FERC’s]

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186. Specifically, the FERC

will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction [of the FERC].

*Id.* at P 49. As under the Exchange Act, “a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly altered the total mix of information available,” while recklessness is sufficient to satisfy the scienter standard.

Order No. 670, *supra* note 173, at P 51.

187. *Id.* at P 36.

188. Order No. 670, *supra* note 173, at P 70.

189. Notice of Proposed Rulemaking, *Rate Regulation of Certain Underground Storage Facilities*, F.E.R.C. STATS. & REGS. ¶ 32,595 (2005), 70 Fed. Reg. 77,079 (2005) (to be codified at 18 C.F.R. pt. 284) [hereinafter Gas Storage NOPR].

190. Energy Policy Act of 2005, Pub. L. No. 109-58, § 312, 119 Stat. 594 (adding 15 U.S.C. 717c(f)).

191. *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 F.E.R.C. ¶ 61,076 (1996), *reh’g and clarification denied*, 75 F.E.R.C. ¶ 61,024 (1996), *petitions denied and dismissed*, Burlington Resources Oil & Gas Co. v. FERC, 172 F.3d 918 (D.C. Cir. 1998).

192. Gas Storage NOPR, *supra* note 189, at P 21.

193. *Id.* at P 23.

regulations”<sup>194</sup> and “to file an updated market-power analysis within five years of the date of the [FERC] order granting authority to charge market-based rates, and every five years thereafter.”<sup>195</sup>

Second, to implement new section 4(f) of the NGA, the Gas Storage NOPR proposes to add a new section 285.505 to its regulations, which would authorize the FERC to permit a natural gas company to provide natural gas storage capacity and related services, from a specific facility placed into service after August 8, 2005, at “market-based rates even [though] it is unable to show that it lacks market power[;],” where: (1) the storage service provider has demonstrated that market-based rates are “necessary to encourage the construction of the storage capacity in the area needing storage services[;],” and (2) the storage service provider provides a means of protecting customers from the potential exercise of market power.<sup>196</sup> However, any storage service provider seeking market-based rates for storage capacity pursuant to this section would be presumed by the FERC to have market power.<sup>197</sup>

#### 4. FERC Report on California Refund Proceeding

On December 27, 2005, the FERC submitted a report to Congress entitled *The Commission’s Response to the California Electricity Crisis and Timeline for Distribution of Refunds*,<sup>198</sup> (California Refund Report) as required by section 1824 of EPAct 2005.<sup>199</sup> The California Refund Report states that FERC

staff has facilitated settlements resulting in over \$6.3 billion . . . [Which] includes amounts related to the settlement of issues regarding allegations of market manipulation in the West during the period January 2, 2000 to June 20, 2001 ( . . . “Market Manipulation Proceeding”), as well as settlements involving the investigation of the justness and reasonableness of wholesale electric rates for sales into the California Independent System Operator Corporation (California ISO) and California Power Exchange (Cal PX or PX) markets for the period October 2, 2000 through June 20, 2001 ( . . . “California Refund Proceeding”).<sup>200</sup>

To date, the FERC “has approved nine global settlements resulting in approximately \$4.5 billion in refunds or other benefits to California and others, which constitute approximately more than half of the estimated refund liability owed by jurisdictional entities.”<sup>201</sup>

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194. Gas Storage NOPR, *supra* note 189, at P 33.

195. *Id.* at P 34.

196. Gas Storage NOPR, *supra* note 189, at P 1.

197. *Id.* at P 2.

198. FED. ENERGY REGULATORY COMM’N, THE COMMISSION’S RESPONSE TO THE CALIFORNIA ELECTRICITY CRISIS & TIMELINE FOR DISTRIBUTION OF REFUNDS (2005), *available at* <http://www.ferc.gov/legal/staff-reports/comm-response.pdf> [hereinafter COMMISSION’S RESPONSE].

199. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1824, 119 Stat. 594.

200. COMMISSION’S RESPONSE, *supra* note 198, at 3 (emphasis omitted).

201. *Id.* at 17 (emphasis omitted). The Report notes the following settlements in the California Refund Proceeding: (1) *Pub. Utils. Comm’n of the State of Cal.*, 105 F.E.R.C. ¶ 61,201 (2003) (settlement with El Paso Natural Gas Company for approximately \$1.45 billion); (2) *San Diego Gas & Elec. Co.*, 108 F.E.R.C. ¶ 61,002 (2004) (settlement with Williams Companies, Inc. and Williams Power Co., Inc. for approximately \$140 million); (3) *San Diego Gas & Elec. Co.*, 109 F.E.R.C. ¶ 61,071 (2004) (settlement with Dynegy, Inc. for approximately \$281 million); (4) *San Diego Gas & Elec. Co.*, 109 F.E.R.C. ¶ 61,257 (2004) (settlement with the Duke Companies for approximately \$207.5 million); (5) *San Diego Gas & Elec. Co.*, 111 F.E.R.C. ¶ 61,017 (2005) (settlement involving Mirant Companies and others, which if approved by the bankruptcy court, will transfer approximately \$495 million to the State of California and others); (6) *Enron Power Mktg., Inc.*, 113



With respect to the Market Manipulation Proceeding, the Report states that the FERC has completed all but one of 60 investigations.<sup>202</sup> In addition, to address the possibility of manipulation on a generic basis, the FERC adopted Order No. 644<sup>203</sup> and Market Behavior Rules,<sup>204</sup> which prohibited certain manipulative practices and imposed reporting requirements “on all blanket certificates for wholesale sales of natural gas and market-based rate authorizations for sales of wholesale power.”<sup>205</sup>

Finally, the Report emphasizes that final action in these proceedings depends on actions by parties other than the FERC. The Report notes that “[t]he courts of appeals currently are considering more than 100 petitions for review of FERC orders,”<sup>206</sup> and, for that reason, the FERC stated that it could not provide a date certain at this time for the conclusion of these proceedings.

## B. Mergers

### 1. Exelon Corp. and Public Service Enterprise Corp. Inc.

On July 1, 2005, the FERC authorized the merger of Exelon Corporation and Public Service Enterprise Corporation, Inc., in light of the merging parties’ proposed divestitures and mitigation.<sup>207</sup> The merging parties performed their horizontal competitive analysis, using the Delivered Price Test analysis, for four relevant geographic markets: Expanded PJM, PJM Pre-2004, PJM East, and Northern PSEG.<sup>208</sup> For energy markets, their analysis indicated that, without

F.E.R.C. ¶ 63,002 (2005) (Enron settlement with various entities California, Oregon, and Washington, which would require Enron’s payment of \$47 million in cash or its equivalent, an allowed unsecured claim in bankruptcy of \$875 million, and a \$600 million civil penalty); (7) *San Diego Gas & Elec. Co.*, 113 F.E.R.C. ¶ 61,226 (2005) (discussing separate Enron settlement that requires Enron to pay \$884,000 and other non-monetary considerations); (8) *San Diego Gas & Elec. Co.*, 113 F.E.R.C. ¶ 61,235 (2005) (settlement of the Public Service Co. of Colorado for over \$7 million); and (9) *San Diego Gas & Elec. Co.*, 113 F.E.R.C. ¶ 61,308 (2005) (settlement with Reliant for \$460 million).

202. COMMISSION’S RESPONSE, *supra* note 198, at 3. These investigations included: (1) *Enron Power Mktg., Inc.*, 103 F.E.R.C. ¶ 61,343 (2003) (The FERC “found that Enron engaged in gaming activities in the form of impermissible trading strategies” and “revoke[ing] the market-based rate authorization of the Enron-affiliated electricity marketers . . .” COMMISSION’S RESPONSE, *supra* note 198, at 12.); (2) *Investigation of Anomalous Bidding Behavior & Practices in the W. Mkts.*, 103 F.E.R.C. ¶ 61,347 (2003) (The “investigation of potential anomalous bidding behavior and practices in the PX and California ISO markets[.]” allowed the FERC “to negotiate settlements worth more than \$90 million. COMMISSION’S RESPONSE, *supra* note 198, at 14–16.); (3) *Enron Power Mktg., Inc.*, 103 F.E.R.C. ¶ 61,346 (2003) and *Am. Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003) (The FERC challenged gaming strategies, which “involved over 60 power trading companies alleged to have engaged in market manipulation either unilaterally or with other entities. All companies (except Enron) opted to settle the allegations and return the revenues they had obtained as a result of using those strategies.” COMMISSION’S RESPONSE, *supra* note 198, at 12.).

203. Order No. 644, *Amendment to Blanket Sales Certificates*, F.E.R.C. STATS. & REGS. ¶ 31,153 (2003), 68 Fed. Reg. 66,323 (2003), *reh’g denied*, 107 F.E.R.C. ¶ 61,174 (2004).

204. *Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 F.E.R.C. ¶ 61,218 (2003), *reh’g denied*, 107 F.E.R.C. ¶ 61,175 (2004).

205. COMMISSION’S RESPONSE, *supra* note 198, at 12.

206. *Id.* at 25.

207. *Exelon Corp. & Pub. Serv. Enter. Corp., Inc.*, 112 F.E.R.C. ¶ 61,011 (2005), *reh’g denied*, 113 F.E.R.C. ¶ 61,299 (2005).

208. *Id.*

Expanded PJM is all of PJM including American Electric Power Service Corporation (AEP), Dayton Power and Light, and ComEd; PJM Pre-2004 is the portion of PJM consisting of the original PJM members in MAAC plus Allegheny Energy Supply Company, LLC (Allegheny); PJM-East is that

mitigation, the merging parties failed the FERC's Competitive Analysis Screen<sup>209</sup> in all season/load conditions in PJM East, PJM Pre-2004, and Expanded PJM.<sup>210</sup> To address these screen failures in the energy markets, they proposed mitigation in the form of physical divestiture of peaking and mid-merit units<sup>211</sup> and "virtual divestiture" of baseload nuclear capacity.<sup>212</sup> Exelon and PSEG proposed additional mitigation measures to address their screen failures in the capacity markets.<sup>213</sup>

The FERC found that this mitigation would restore competition to the pre-merger level and thus that the merging parties had met their burden to show that the merger, as mitigated, would not harm competition in wholesale energy markets.<sup>214</sup> The FERC rejected protests arguing that it should only accept actual, physical divestiture as effective mitigation, rather than the proposed virtual divestitures, emphasizing that the virtual divestiture effectively transfers control of the output of 2,600 MW of nuclear capacity from the merged firm to the purchasers and that the merged firm could not withhold the energy from the market.<sup>215</sup> The FERC also rejected protestors' objections to virtual divestiture on the grounds that it would be difficult to monitor. The FERC concluded that the operational characteristics of, and regulatory scrutiny over, "nuclear units virtually eliminate the possibility of withholding output to drive up prices."<sup>216</sup> It was also persuaded by the merging parties' commitment to establish an independent monitor to oversee the auction and to comply 'with the contracts.'<sup>217</sup> The FERC conditioned approval of the merger on the parties' agreement to propose additional mitigation measures if the virtual divestiture failed to mitigate the identified problems.<sup>218</sup> The FERC also accepted the parties' commitment to bid all of their uncommitted capacity at zero, which would eliminate their ability

part of PJM east of the Eastern Interface within PJM; and Northern PSEG is the portion of the PSE&G service territory in northeastern New Jersey.

112 F.E.R.C. ¶ 61,011 at P 12 n.9.

209. Order No. 592, *Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,044 (1996), 61 Fed. Reg. 68,595 (1996), *reconsideration denied*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321 (1997), 62 Fed. Reg. 33,341 (1997).

210. 112 F.E.R.C. ¶ 61,011 at P 15.

For PJM-East, . . . post-merger market concentrations ranging from 2,057 to 2,492 on the Herfindahl-Hirschman Index (HHI) . . . and merger-related changes in HHI ranging from 848 to 1,067 HHI . . . For the PJM Pre-2004 and Expanded PJM markets, the post-merger HHIs indicate moderately concentrated markets, with merger-related increases in HHI ranging from 172 to 668 HHI . . .

*Id.*

211. The merging parties proposed to divest 2,900 MW of peaking and mid-merit generation capacity in PJM-East and committed that "no more than half of the 2,900 MW would be sold to a single buyer and that no capacity would be sold to a market participant with a greater than five percent market share in PJM-East or Expanded PJM . . ." *Exelon Corp. & Pub. Serv. Enter. Corp., Inc.*, 112 F.E.R.C. ¶ 61,011 at P 25 (2005).

212. The virtual divestitures included 2,250 MW of energy from nuclear units located in PJM-East and 200 MW of capacity in the larger Pre-2004 PJM market, either in the form of firm sales contract for 15 years or longer or an annual auction of 3-year entitlements to baseload energy, in 25 MW blocks. *Id.* at PP 27-28.

213. 112 F.E.R.C. ¶ 61,011 at PP 148-55.

214. *Id.* at P 130.

215. The FERC also noted that "the liquidated damages provisions in the contracts, reduced the merged firm's incentive to withhold output to drive up wholesale energy prices because it would be contractually obligated to pay the cost of any price increase." 112 F.E.R.C. ¶ 61,011 at P 134.

216. *Id.* at P 135 (citing *Commonwealth Edison Co.*, 91 F.E.R.C. ¶ 61,036 (2000)).

217. *Exelon Corp. & Pub. Serv. Enter. Corp., Inc.*, 112 F.E.R.C. ¶ 61,011 at P 134 (2005).

218. *Id.*

to withhold capacity in order to increase the market clearing price.<sup>219</sup>

## 2. Duke Energy Corp. and Cinergy Corp.

On December 20, 2005, the FERC authorized the merger of Duke Energy Corporation (Duke) and Cinergy Corporation (Cinergy).<sup>220</sup> The merging parties analyzed the competitive effects of the transaction in the Duke control area as well as three geographic markets within the Midwest Independent Transmission System Operator, Inc. (MISO) and PJM, Interconnection, L.L.C. (PJM) footprint, namely, MISO, the “MISO Submarket,” and “MISO-PJM Midwest.”<sup>221</sup> The FERC concluded that the Duke/Cinergy merger would not harm competition in any of these markets, as there is very little overlap between Duke’s and Cinergy’s generating capacity.<sup>222</sup> Second, the FERC found that, while the Duke market is highly concentrated, with Duke being the dominant firm in that market, the proposed merger would not adversely affect competition or eliminate a competitor in that market because Cinergy did not have any significant presence in the Duke market.<sup>223</sup> The FERC also found that the proposed merger did not raise vertical competitive concerns.<sup>224</sup>

The FERC rejected intervenors’ arguments that, in light of the repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935) by EPAct 2005,<sup>225</sup> the FERC should reexamine its current standard for reviewing mergers, the Competitive Analysis Screen, because the FERC is likely to be faced with several new “long-distance” mergers that may each pass this screen, but may nevertheless undermine competition.<sup>226</sup> The FERC concluded that its standard of review is flexible enough to analyze a specific merger in the context of market structure changes that may ultimately result from the repeal of PUHCA 1935.<sup>227</sup>

Finally, the FERC rejected protesters’ arguments that the merger raised “safety net” issue relating to the transfer of certain Duke merchant generation in

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219. 112 F.E.R.C. ¶ 61,011 at P 134.

220. *Duke Energy Corp. & Cinergy Corp.*, 113 F.E.R.C. ¶ 61,297 (2005).

221. *Id.*

The MISO Submarket is all of MISO, excluding the Louisville Gas & Electric control area, the Wisconsin-Upper Michigan System, Iowa, and Minnesota. MISO-PJM Midwest includes the MISO Submarket and the western part of PJM inclusive of the areas in which Duke Energy North America’s PJM assets are located, but exclusive of that part of PJM East of Allegheny Energy, Inc., as well as Dominion Resources, Inc.

113 F.E.R.C. ¶ 61,297 at P 24 n. 5.

222. *Id.* at PP 25–26.

223. 113 F.E.R.C. ¶ 61,297 at P 83. Furthermore, while the Delivered Price Test analysis indicated that the Duke Power control area was highly or moderately concentrated in all time periods, with one exception the post-merger increase in the HHI was less than fifty in all time periods, and thus did not fail the FERC’s Competitive Analysis Screen. *Id.* at PP 32–34.

224. In particular, the FERC found that the combination of Duke’s natural gas pipeline assets and Cinergy’s generation in MISO would not lead to vertical foreclosure because the relevant gas transportation markets are not highly concentrated and that the only interstate natural gas pipeline company owned by Duke that runs through MISO, Texas Eastern Transmission, L.P. accounted for less than 10% of delivery capacity into relevant markets. *Duke Energy Corp. & Cinergy Corp.*, 113 F.E.R.C. ¶ 61,297 at P 87 (2005).

225. Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1264, 1274(a), 119 Stat. 594.

226. 113 F.E.R.C. ¶ 61,297.

227. *Id.* at P 39. The FERC rejected the same argument in *MidAmerican Energy Holdings Co.*, 113 F.E.R.C. ¶ 61,298 (2005).

Ohio to a Cinergy subsidiary.<sup>228</sup> The FERC concluded that Cinergy would not be able to pass on inflated costs to captive ratepayers because Ohio restructuring law allows CG&E to recover only the costs associated with its existing generation, but not for newly-acquired generation.<sup>229</sup>

### 3. Advance Authorizations for Future Transactions

In a number of recent orders, the FERC has set forth its policy for advance authorizations of transactions under section 203 of the FPA by financial institutions.<sup>230</sup> In *La Paloma*, the applicants were financial institutions that had provided initial financing for the La Paloma facility and that had assumed ownership of the facility pursuant to a bankruptcy reorganization.<sup>231</sup> The applicants sought advance authorization (i.e., without further section 203 filings) for future transfers of their interests in the La Paloma facility to unidentified buyers that would be banks, institutional investors, financial institutions, investment or related entities not primarily engaged in energy-related business activities, which would result in the acquiring party owning or controlling an equity interest of 20% or less (Future Transactions).<sup>232</sup> The FERC granted advance authorization of these Future Transactions for a two-year period, subject to the limitations proposed by the applicants and to an additional condition that a "buyer and its affiliates [could] not collectively own or control [5%] or more voting interest in any public utility that has interests in any generation facilities or engages in jurisdictional activities [in the market in which] the La Paloma generating plant is located."<sup>233</sup> The FERC authorized similar future transactions in *Lake Road* and *MACH Gen*, subject to the same conditions.

### C. Market-Based Rates

#### 1. Order No. 652: Change in Status Reporting Requirement for Market-Based Rate Sellers

On February 10, 2005, the FERC, acting pursuant to section 206 of the FPA, issued Order No. 652<sup>234</sup> to amend section 35.27(c) of its regulations to

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228. 113 F.E.R.C. ¶ 61,297 at P 99-106.

229. The FERC further clarified that the "safety net" concern raised in *Ameren Corp.*, 108 F.E.R.C. ¶ 61,094 at P 68 (2004),

is restricted to vertical foreclosure through regulatory evasion, which is relevant only if a utility can pass inflated costs onto captive cost-based customers [and that,] in such circumstances, there are a number of ways to show that no such affiliate preference occurred, including review of competitive solicitation processes by the relevant state commissions.

*Duke Energy Corp. & Cinergy Corp.*, 113 F.E.R.C. ¶ 61,297 at P 116 (2005).

230. See, e.g., *MACH Gen, LLC*, 113 F.E.R.C. ¶ 61,138 (2005); *Lake Road Holding Company, LLC, & Lake Road Generating Co., L.P.*, 112 F.E.R.C. ¶ 61,051 (2005); *La Paloma Holding Co., LLC & La Paloma Generating Co., LLC*, 112 F.E.R.C. ¶ 61,052 (2005).

231. *La Paloma Generating Trust Ltd.*, 107 F.E.R.C. ¶ 62,179 (2004). The Reorganization Order limited the ownership by any individual Creditor to a maximum of 20% of the equity interests in HoldCo. *Id.*

232. 112 F.E.R.C. ¶ 61,052 at P 6.

233. *Id.* at P 17. The FERC emphasized that this order did not address the jurisdictional question of whether the transfer of a specific amount of ownership is a change of control and thus a disposition of jurisdictional facilities. 112 F.E.R.C. ¶ 61,052 at P 20.

234. Order No. 652, *Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, F.E.R.C. STATS. & REGS. ¶ 31,175 (2005), 70 Fed. Reg. 8,253 (2005) [hereinafter Order

require public utilities with market-based rate authority to timely report to the FERC any change in status that would reflect a departure from the characteristics the FERC relied upon in granting market-based rate authority.<sup>235</sup> Order No. 652 thus “impose[d] uniform standards on all market-based rate sellers by eliminating the [previously-available] option to delay reporting changes in status until submission of the triennial review or to file a triennial review in lieu of reporting changes in status as they occur . . . .”<sup>236</sup>

Order No. 652 clarifies that a notice of change in status is required in case of deviations from any of the four factors the FERC relies upon in authorizing market-based rates—generation market power, transmission market power, barriers to entry, and affiliate abuse.<sup>237</sup> Second, Order No. 652 allows a market-based rate seller to incorporate by reference in its notice of change in status any similar filings made pursuant to other reporting requirements (e.g., section 203 applications). The Order exempts from the reporting requirements purely financial transactions or intra-corporate reorganizations.<sup>238</sup> Moreover, Order No. 652 does not require small increases in generation of less than 100 MW to be immediately reported, though market-based rate sellers must report each cumulative increase in generation of 100 MW or more that has occurred since the most recent notice of a change in status filed by that seller.<sup>239</sup> Agreements, contractual or otherwise, that relate to operation (including scheduling and dispatch), maintenance, fuel supply, risk management, and marketing that transfer the control of jurisdictional assets are reportable changes in status.<sup>240</sup> Finally, Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariffs of all market-based rate sellers.<sup>241</sup>

## 2. Major 206 Investigations of Generation Market Power

In orders issued on April 14, 2004 and July 8, 2004,<sup>242</sup> the FERC established two new screens for assessing whether market-based rate sellers possess generation market power: a wholesale market share screen and a pivotal supplier screen. The FERC stated that failure of either screen provides the basis for instituting a proceeding under section 206 of the FPA and establishes a rebuttable presumption of market power in the resulting section 206 proceeding.<sup>243</sup> Applicants and intervenors may rebut the presumption

No. 652], *order on reh'g*, 111 F.E.R.C. ¶ 61,413 (2005) (codified at 18 C.F.R. pt. 33) [hereinafter Order No. 652 Rehearing].

235. Such changes in status include, but are not limited to, changes in:

(i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.

Order No. 652 Rehearing, *supra* note 234, at P 27.

236. Order No. 652, *supra* note 234, at P 2.

237. *Id.* at PP 25–26.

238. Order No. 652, *supra* note 234, at PP 33–43.

239. *Id.* at P 68.

240. Order No. 652, *supra* note 234, at P 83.

241. *Id.* at P 98.

242. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018 (2004), *order on reh'g*, 108 F.E.R.C. ¶ 61,026 (2004). See also 2004 Antitrust Committee Report, *supra* note 30, at 528–31.

243. 107 F.E.R.C. ¶ 61,018 at PP 200–01.

established by the results of the initial screens by submitting a Delivered Price Test analysis. Alternatively, applicants may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.<sup>244</sup>

a. AEP, Entergy, and Southern Companies

While the generation market power screens set forth in the April 14 and July 8 Orders apply generically to market-based rate sellers, the July 8 Order directed Southern Companies, American Electric Power (AEP), Entergy Services, Inc. (Entergy), and a number of associated entities to submit a compliance filing with revised generation market power analyses within thirty days, consistent with the requirements of the April 14 and July 8 Order. The companies submitted such revised generation market power analyses indicating that they failed the FERC's wholesale market share screens in their home control areas (i.e., Southern control area, Entergy control area, and AEP's control area in the Southern Power Pool (SPP)).

Based on their failure of the wholesale market share screens, the FERC instituted three separate section 206 investigations to determine whether these entities had the potential to exercise generation market power in their home control areas and thus whether they could continue to charge market-based rates there.<sup>245</sup> The FERC also established a refund effective date and directed these entities to either file a Delivered Price Test analysis or to submit mitigation proposals.<sup>246</sup> Southern Companies and Entergy submitted Delivered Price Test analyses, while AEP submitted cost-based mitigation, all of which were set for hearing, as discussed below.

The Delivered Price Test analyses submitted by Southern Companies<sup>247</sup> and

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244. In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to demonstrate whether the applicant does or does not possess market power. *Id.* at P 6.

245. *S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 109 F.E.R.C. ¶ 61,275 (2004); *Entergy Servs., Inc.*, 109 F.E.R.C. ¶ 61,282 (2004); *AEP Power Mktg., Inc.*, 109 F.E.R.C. ¶ 61,276 (2004). The FERC initially rejected the arguments of protesters that it should broaden the section 206 investigation beyond generation market power to consider the other three prongs of the Commission's market-based rate test (i.e., transmission market power, barriers to entry, and affiliate abuse/reciprocal dealing). 109 F.E.R.C. ¶ 61,275 at PP 37–42; 109 F.E.R.C. ¶ 61,282 at PP 39–44; 109 F.E.R.C. ¶ 61,276 at P 30–36. On rehearing, however, the FERC decided to address in separate investigations the other three prongs with respect to Southern Companies and the transmission market power and affiliate abuse prongs with respect to Entergy. *See S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 111 F.E.R.C. ¶ 61,144 at P 16 (2005) (the investigation of the other three prongs was to be held in abeyance pending the outcome of a separate section 206 investigation examining allegations pertaining to Southern Companies Intercompany Interchange Contract (IIC)); *S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 111 F.E.R.C. ¶ 61,146 (2005); *Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 61,145 (2004).

246. *S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 109 F.E.R.C. ¶ 61,275 at P 35 (2004); *Entergy Servs., Inc.*, 109 F.E.R.C. ¶ 61,282 at P 35 (2004); *AEP Power Mktg., Inc.*, 109 F.E.R.C. ¶ 61,276 at P 26 (2004).

247. *S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 112 F.E.R.C. ¶ 61,054 (2005). Southern Companies Delivered Price Test analysis indicated that, "under the economic capacity measure . . . , Southern Companies possesses market shares in excess of 62[%] in all season/load conditions and that the HHI exceeds 4000 in all season/load conditions." *Id.* at P 9. Furthermore, "Southern Companies also present[ed] three alternative market power studies—a modified pivotal supplier screen, a surplus capacity index, and a contestable load analysis" and historical data to rebut the presumption of market power. 112 F.E.R.C. ¶ 61,054 at P 10. However, the FERC stated that it would defer action in this regard until it had before it a properly-constructed DPT, discussed below. *Id.* at PP 89–96.

Entergy<sup>248</sup> indicated that they exceeded the thresholds established in the April 14 Order. The FERC found that the Delivered Price Test analyses and the parties' pleadings raised issues of material fact that would be more appropriately addressed in a trial-type evidentiary hearing. Accordingly, the FERC directed the presiding judge to make factual findings necessary to fully develop the record and to provide the FERC with a properly-constructed Delivered Price Test analysis on whose results the FERC could rely.<sup>249</sup> However, the FERC emphasized that it was not setting for hearing the issue of how the DPT results should be interpreted and whether these entities do or do not have generation market power; instead, once the presiding judge had submitted a decision regarding a properly-constructed DPT, and once the parties had filed briefs on and opposing exceptions, the FERC itself would address the issue of whether Southern Companies and Entergy have generation market power in their home control areas.<sup>250</sup> The FERC similarly set for hearing AEP's proposed revisions to its market-based rate tariffs for sales in the AEP-SPP control area.<sup>251</sup>

#### b. Other 206 Investigations of Market-Based Rate Authority

The FERC instituted section 206 investigations of a number of other market-based rate sellers in 2005 based on their failure of one or both generation market power screens.<sup>252</sup> For example, the FERC instituted a section 206

248. *Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 61,507 at PP 15–19 (2005). Entergy's Delivered Price Test analysis, using the economic capacity measure, indicated that Entergy's market shares are above 20% in all periods and that its market shares are around 30% in the peak and super-peak periods, slightly above 45% in all off-peak periods and 51% in the extreme summer peak. *Id.* at P 16.

249. In the Southern Companies' proceeding, the FERC directed the presiding judge to address the following issues:

(i) the use of simultaneous import capability, rather than [total transfer capability], as the measure of transmission constraints; (ii) the performance of the pivotal supplier analysis under the economic capacity measure; (iii) the use of historical data for prices, loads, and generation, rather than projected data; (iv) the development of sensitivity analyses and the data necessary to corroborate the DPT results in compliance with the [FERC's] regulations; and (v) the impact of any transmission constraints on the appropriate scope of the relevant market.

*S. Co. Energy Mktg., Inc. & S. Co. Servs., Inc.*, 112 F.E.R.C. ¶ 61,054 at P 61 (2005). In the Entergy proceeding, the presiding judge was instructed to consider the following issues:

(1) the location in the Entergy control area of transmission constraints that bind; (2) the time (load conditions) at which those constraints bind and the duration of those binding conditions; (3) the identity and ownership of generators affected, particularly generators dispatched out of economic merit order; (4) the impact of such binding constraints on the DPT results; and (5) the procedures used by Entergy to address constraints in dispatching its own generators and whether those procedures differ with respect to non-Entergy generators.

*Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 61,507 at P 26 (2005).

250. 112 F.E.R.C. ¶ 61,054 at P 61; 111 F.E.R.C. ¶ 61,507 at P 26.

251. *AEP Power Marketing, Inc.*, 112 F.E.R.C. ¶ 61,047, P 22 (2005). Specifically, the FERC found that AEP's proposed rates had not been shown to be just and reasonable and that, for certain rates, AEP had not provided sufficient cost support for the rate levels proposed, and directed the presiding judge to address the specific formulas and methodology according to which AEP proposed to calculate incremental costs. *Id.* at P 28.

252. See, e.g., *S. Point Energy Center, LLC*, 111 F.E.R.C. ¶ 61,239 at P 2 (2005), *order on reh'g*, 113 F.E.R.C. ¶ 61,073 at P 1 (2005) (presumption of generation market power for Cleco rebutted by Delivered Price Test); *Aquila, Inc.*, 111 F.E.R.C. ¶ 61,030 (2005), *order on compliance*, 112 F.E.R.C. ¶ 61,307 at P 20 (2005) (conditionally accepting Aquila's proposed cost-based mitigation measures); *LG&E Energy Mktg., Inc.*, 111 F.E.R.C. ¶ 61,153 (2005), *order on compliance*, 113 F.E.R.C. ¶ 61,229 at P 1 (2005) (order conditionally accepting cost-based mitigation).

proceeding to investigate Duke's generation market power in its control area.<sup>253</sup> Duke submitted a Delivered Price Test analysis, which the FERC found did not rebut the presumption of market power in Duke's control area established by its failure of the generation market power screen.<sup>254</sup> The FERC revoked Duke's related market-based rate authority and directed Duke to file a revised market-based rate tariff prohibiting sales at market-based rates in the Duke control area and providing for the default cost-based rates specified in the April 14 Order.<sup>255</sup>

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253. *Duke Power*, 109 F.E.R.C. ¶ 61,270 at P 2 (2004).

254. *Duke Power*, 111 F.E.R.C. ¶ 61,506 at P 2 (2005). In particular, Duke's Delivered Price Test analysis indicated that, under the economic capacity measure, its market share was in excess of 50% and the HHI in excess of 3000 in all season/load conditions and that, under the available economic capacity measure, its market share exceeded 20% in all season/load conditions but one. *Id.* at PP 30–34.

255. 111 F.E.R.C. ¶ 61,506 at PP 60–67.



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