SUBMITTED COMMITTEE REPORTS

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.

REPORT OF THE ANTITRUST COMMITTEE

This report summarizes antitrust developments of particular interest to energy law practitioners that occurred in the year 2004. The topics are covered in the following order:

I. FTC ENFORCEMENT ACTIONS AND REPORTS

A. The FTC Approves Merger Between Enterprise Products and GulfTerra Energy

On November 26, 2004, the FTC cleared the merger of Enterprise Products Partners, L.P. (Enterprise), with GulfTerra Energy Partners, L.P., and GulfTerra Energy Company, LLC (GulfTerra).[1] Enterprise and GulfTerra provide natural gas transportation, gathering, processing, and storage services; transportation, fractionation, storage, and terminaling of natural gas liquids; crude oil transportation; and offshore platform services.[2] The general partner of GulfTerra was managed and 50%-owned by El Paso Corporation (which also owned 31.1% of GulfTerra). The general partner of Enterprise, Enterprise Products GP, LLC, was wholly owned by Dan L. Duncan.[3] Enterprise merged with GulfTerra and GulfTerra's general partner through a series of transactions valued at approximately $13 billion.[4]

The FTC complained that the merger would increase the likelihood of collusion or coordinated interaction in certain markets for natural gas transportation, propane storage, and terminaling services. The FTC identified overlaps between Enterprise and GulfTerra pipeline assets "[i]n the West Central Deepwater region of the Gulf of Mexico" (where the companies owned interests in two of the three available pipelines) and between Enterprise and GulfTerra's propane storage and terminaling facilities in and around Hattiesburg, Mississippi (where the companies owned interests in three of only four propane storage facilities).[5]

1. Press Release, FTC, Announced Action for November 26, 2004 (Nov. 26, 2004), *available at* http://www.ftc.gov/opa/2004/11/fyi0467.htm [hereinafter November 26 FTC Press Release].

2. Press Release, Enter. Prods. Partners L.P., Enter. Completes Merger with GulfTerra; Creates $14 Billion Midstream Energy P'ship (Sept. 30, 2004), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=80547&p=irol-newsArticle&ID=621766&highlight=.

3. Complaint of the Federal Trade Commission, *In re Enter. Prods. Partners, L.P.*, FTC Docket No. C-4123 (2004), *available at* http://www.ftc.gov/os/caselist/0410039/040930comp0410039.pdf.

4. *Id.*

5. Press Release, FTC, FTC Accepts Divestitures in $13 Billion Merger of Enter. Prods. Partners and GulfTerra Energy Partners (Sept. 30, 2004), *available at* http://www.ftc.gov/opa/2004/09/enterprise.htm.

The FTC required the companies to divest:

- *Either* Enterprise's ownership interest in Starfish Pipeline Company, LLC (a joint venture that owns the Stingray Pipeline, the Triton Pipeline, and a dehydration facility at Holly Beach, Louisiana) (Starfish Pipeline Interest) *or* GulfTerra's businesses, assets, and contracts relating to the ownership or operation of the HIOS Pipeline and the East Breaks Gathering System (HIOS/East Break Assets); and
- *Either* Enterprise's ownership interest in a propane storage and terminaling facility and related assets in Petal, Mississippi (Enterprise Propane Storage Interest) *or* Enterprise's wholly-owned liquefied petroleum gas (LPG) storage facility and related assets in Petal, Mississippi (Enterprise Petal LPG Storage Facility).[6]

In addition, absent advance notice to the FTC, Enterprise and its affiliates are prohibited from acquiring any interest in gas storage caverns in Forrest County, Mississippi, or pipelines in the West Central Deepwater (or acquiring any interest in a business owning such assets). Further, they are prohibited from managing or operating such storage caverns or pipelines for a ten-year period.[7]

Enterprise petitioned for approval of the sale of "the Enterprise Propane Storage Interest to Enbridge Midcoast Energy, L.P., a wholly-owned subsidiary of Enbridge Energy Partners, L.P."[8] The FTC approved that divestiture on December 31, 2004.[9]

B. The FTC Approves Magellan's Purchase of Shell Product Pipeline Assets

On November 26, 2004, the FTC announced it had cleared, subject to divestiture, Magellan Midstream Partners, L.P.'s (Magellan) acquisition of certain refined product pipeline and terminaling assets from Shell Oil Company (Shell).[10] Magellan had agreed to acquire a package of Shell's Midwestern U.S. pipelines and terminals for $492.4 million, including an Oklahoma City, Oklahoma, terminal for gasoline, diesel, and other light petroleum products.[11] The FTC filed a complaint alleging that Shell and Magellan were direct competitors in light petroleum terminaling services in the Oklahoma City metropolitan area and that the proposed acquisition would reduce competition.[12] The FTC required Magellan to divest Shell's refined petroleum product storage and distribution terminal in Oklahoma City, Oklahoma, and all related assets and contractual rights.[13]

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6. FTC Decision and Order, *In re Enter. Prods. Partners L.P.*, FTC Docket No. C-4123, 7 (2004), *available at* http://www2.ftc.gov/os/caselist/0410039/041126do0410039.pdf.

7. *Id.* at 13.

8. Petition of Enterprise Products Partners L.P., *In re Enter. Prods. Partners, L.P.*, FTC Docket No. C-4123, 1 (2004) (Petition for Approval of the Proposed Divesture of the Enterprise Propane Storage Interest to Enbridge), *available at* http://www.ftc.gov/os/caselist/0410039/041029enterpriseduncan.pdf (footnote omitted).

9. Press Release, FTC, Announced Action for January 4, 2005 (Jan. 4, 2005), *available at* http://www.ftc.gov/opa/2005/01/fyi0501.htm.

10. *See* November 26 FTC Press Release, *supra* note 1.

11. Press Release, FTC, FTC Clears Magellan's $492.4 Million Acquisition of Shell Assets (Sept. 29, 2004), *available at* http://www.ftc.gov/opa/2004/09/magellan.htm.

12. For a copy of the complaint and related documents, see http://www.ftc.gov/os/caselist/0410164/0410164.htm (last visited Sept. 21, 2005).

13. FTC Decision and Order, *In re Magellan Midstream Partners, L.P.*, FTC Docket No. C-4122, 4 (Nov. 23, 2004), *available at* http://www.ftc.gov/os/caselist/0410164/041126do0410164.pdf.

C. FTC Approves Buckeye's Purchase of Shell Product Pipeline Assets

On December 17, 2004 the FTC allowed Buckeye Partners, L.P. (Buckeye) to acquire a package of pipeline and terminal assets from Shell Oil Company.[14] Buckeye had agreed to acquire five pipelines from Shell, including the North Line Products System, the East Line Products System, and the Two Rivers Pipeline, as well as twenty-four petroleum products terminals located in Illinois, Indiana, Ohio, and Michigan.[15] The proposed $530 million transaction originally included Shell's refined petroleum terminal at Niles, Michigan. The FTC's complaint alleged that Buckeye and Shell operated directly competing terminals in the Niles area and that the proposed acquisition would reduce competition in the light petroleum terminaling market in the Niles area.[16]

Buckeye and Shell were permitted to go forward on a $517 million asset sale that excluded Shell's Niles terminal.[17] The consent order required that, for a ten-year period, Buckeye notify the FTC before acquiring any interest in the Niles terminal, and Shell notify the FTC before disposing of any interest in the terminal. The Commission also required the observance of Hart-Scott-Rodino waiting periods in the case of any sale or purchase of any interest in the terminal during the same ten-year period, regardless of whether the Hart-Scott-Rodino Act would otherwise apply to the transaction.[18]

D. The FTC Challenges Arch Coal's Acquisition of Triton Coal

On April 1, 2004, the FTC filed a complaint in the U.S. District Court for the District of Columbia seeking a preliminary injunction to block Arch Coal, Inc. (Arch) from acquiring the assets of Triton Coal Co., L.L.C. (Triton) from New Vulcan Holdings, L.L.C. (New Vulcan),[19] including two major coal mines in Wyoming's Southern Powder River Basin (SPRB) region (one of which Arch proposed to sell to another party during the pendency of the FTC's review).[20] Allegedly, Arch and its competitors had historically publicly encouraged production limits and price increases for certain types of coal produced in the SPRB. Also, Triton was the principal producer in the SPRB to expand its output over the preceding five-year period.[21] The FTC alleged that the acquisition would increase concentration, magnify the prospects for coordination, reduce

14. Press Release, FTC, Announced Actions for December 21, 2004: Comm'n Approval of Final Consent Orders (Dec. 21, 2004), *available at* http://www.ftc.gov/opa/2004/12/fyi0472.htm.

15. Press Release, FTC, FTC Clears Buckeye Partners' $517 Million Purchase of Shell Pipelines and Terminals (Sept. 27, 2004), *available at* http://www.ftc.gov/opa/2004/09/buckeye.htm.

16. For a copy of the complaint and related documents, see http://www.ftc.gov/os/caselist/0410162/0410162.htm (last visited Sept. 21, 2005).

17. FTC Decision and Order, *In re Buckeye Partners L.P.*, FTC Docket No. C-4127, 3 (Dec. 17, 2004), *available at* http://www.ftc.gov/os/caselist/0410162/041221do.pdf. *See also* Press Release, FTC, FTC Clears Buckeye Partners' $517 Million Purchase of Shell Pipelines and Terminals (Sept. 27, 2004).

18. FTC Decision and Order, *In re Buckeye Partners L.P.*, FTC Docket No. C-4127 (Dec. 17, 2004), *available at* http://www.ftc.gov/os/caselist/0410162/041221do.pdf.

19. Press Release, FTC, FTC Files Federal Complaint Challenging Arch Coal's Proposed Acquisition of Triton Coal Co. (Apr. 1, 2004), *available at* http://www.ftc.gov/opa/2004/04/archcoal.htm.

20. The two mines were Triton's North Rochelle and the Buckskin. Although Arch offered to sell the Buckskin mine to Peter Kiewit Sons', Inc., the FTC concluded that the sale was "insufficient to 'materially change the acquisition or its . . . effect on competition.'" *Id.*

21. Complaint of the Federal Trade Commission at 11–18, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (Nos. 04-0534, 04-0535), *available at* http://www.ftc.gov/os/2004/04/archcoalcmp.pdf.

direct competition between Arch and Triton, and consolidate the only two producers in the region with significant excess capacity.[22] The states of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas filed a parallel suit (later consolidated with the FTC's suit),[23] and the FTC also filed an administrative complaint challenging the acquisition and making the same allegations made in the district court complaint.[24]

On August 13, 2004, the district court denied the FTC's request for an injunction,[25] holding that the FTC and the states had not shown a likelihood of substantially lessened competition in the SPRB. The district court found that coordination was unlikely because there was no or little current, specific, and comprehensive market data; there was a sealed bid process for the SPRB purchase contracts;[26] Triton had been an ineffective, high-cost competitor;[27] and emerging fringe competitors had concrete plans to expand production in the SPRB.[28]

The FTC requested that the U.S. Court of Appeals for the District of Columbia issue an injunction pending an expedited appeal of the decision.[29] On August 20, 2004, after the appeals court denied the request for an injunction, Arch announced that it had completed the $364 million purchase of the Triton assets.[30] On September 9, 2004, the FTC informed the court of appeals that it would not pursue an appeal of the district court's ruling.[31] On September 10, 2004, the FTC withdrew the administrative complaint from adjudication.[32]

E. FTC Staff Issues Report on Petroleum Industry Trends and Antitrust Enforcement

On August 13, 2004, the FTC released a Bureau of Economics report entitled, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (the Report).[33] The Report, the third such study released by the FTC since 1980,[34] analyzes significant economic trends affecting the petroleum production, transportation, refining, and marketing industries and discusses how

22. *Id.* at 18–20.

23. FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 114 (D.D.C. 2004).

24. Complaint of the Federal Trade Commission, *In re Arch Coal, Inc.*, FTC Docket No. 9316 (Apr. 6, 2004), *available at* http://www.ftc.gov/os/caselist/0310191/040704cmp0310191.pdf.

25. *Arch Coal*, 329 F. Supp. 2d at 160.

26. *Id.* at 140–45.

27. *Arch Coal*, 329 F. Supp. 2d at 146–47, 155–57.

28. *Id.* at 147–49.

29. Press Release, FTC, FTC Files Emergency Motion for Injunction Pending Appeal of Dist. Court Order in Arch Coal Case (Aug. 17, 2004), *available at* http://www.ftc.gov/opa/2004/08/archcoal.htm.

30. Press Release, Arch Coal, Inc., Arch Coal Completes Acquisition of Triton Coal Co. (Aug. 20, 2004), *available at* http://www.shareholder.com/archcoal/ReleaseDetail.cfm?ReleaseID=142000.

31. Press Release, FTC, Statement of FTC Gen. Counsel William E. Kovacic (Sept. 9, 2004), *available at* http://www.ftc.gov/opa/2004/09/archcoalstmt.htm.

32. FTC Order Withdrawing Matter from Adjudication, *In re Arch Coal, Inc.*, FTC Docket No. 9316 (Sept. 10, 2004), *available at* http://www.ftc.gov/os/adjpro/d9316/040910orderwithdrawmatterfromadjudi.pdf.

33. BUREAU OF ECON., FED. TRADE COMM'N, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (2004), *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf [hereinafter THE PETROLEUM INDUSTRY].

34. *Id.* at 2. The prior reports were *Mergers in the Petroleum Industry* (Sept. 1982) and *Mergers in the U.S. Petroleum Industry 1971–1984: An Updated Comparative Analysis* (May 1989). THE PETROLEUM INDUSTRY, *supra* note 33, at 2 n.3.

those trends affect both competition and the FTC's enforcement efforts in each segment. The Report includes many observations that will be of interest to the antitrust practitioner, including:

- The Report identifies "three distinct periods of . . . merger activity" involving large petroleum companies from 1985 to the present. Although the Report states that the most recent of these periods (1997–2001) was marked by "an extraordinary burst of merger activity,"[35] it notes that that activity "ha[d] resulted in little, if any, net growth in the size" of large oil companies on a revenue or asset basis.[36]

- The Report indicates that, when reviewing petroleum mergers, the FTC seeks to remedy any plausible competitive concerns by using low Herfindahl-Hirschman Index (HHI) thresholds and "requir[ing] merger parties to bear the risk that relief might be over-inclusive, rather than imposing on the public the risk that relief might be under-inclusive."[37] As an example, the Report indicates that where a divestiture of only those assets found in allegedly affected markets would not result in divestiture of an economically viable package of assets, the FTC has sometimes required that a broader range of assets, including some found outside the affected markets, be divested.[38]

- The Report notes that the FTC has frequently found risks of anticompetitive impacts where concentration in particular petroleum product markets would permit coordinated interaction by sellers, crude oil transportation and light petroleum product refining, bulk supply, pipeline transportation, terminaling, and marketing markets.[39]

- The Report states that "[c]oncentration is relatively low in most relevant markets for crude oil exploration and production[,]"[40] and concentration in both production and reserves has fallen since 1985[41] despite the recent large mergers among major oil companies such as BP/Amoco, Exxon/Mobil, Chevron/Texaco, and Conoco/Phillips.[42]

- The Report notes that several facts suggest the application of "broad relevant antitrust markets [for crude oil, encompassing] multiple crude oil types produced at widely separated locations," when reviewing mergers, including: large international flows of crude oil constraining domestic producers;[43] increasing flexibility among refineries in the types of crude oil that each can use;[44] and historically highly correlated price relationships among different crudes.[45] According to the Report, "[t]he expansion of spot and futures markets for crude oil" has facilitated "the entry of many independent brokers and traders," and "reduced the incentives [for] vertical integration between upstream and downstream" participants, and encouraged refiner flexibility.[46]

35. *Id.* at 93.
36. THE PETROLEUM INDUSTRY, *supra* note 33, at 98.
37. *Id.* at 14.
38. THE PETROLEUM INDUSTRY, *supra* note 33, at 28.
39. *Id.* at 31.
40. THE PETROLEUM INDUSTRY, *supra* note 33, at 36.
41. *Id.* at 132.
42. THE PETROLEUM INDUSTRY, *supra* note 33, at 135–36.
43. *Id.* at 130–31, 140.
44. THE PETROLEUM INDUSTRY, *supra* note 33, at 130–31, 178.
45. *Id.* at 130–31.
46. THE PETROLEUM INDUSTRY, *supra* note 33, at 140–41.

- In contrast, the Report indicates that the FTC often narrowly defines both product and geographic markets in the various refined product markets, due to often-limited demand-side substitution and sometimes-limited shipment linkages between producers and consumers of refined light petroleum products.[47]
- The Report notes the importance of two generally countervailing trends in the marketing and retailing segment: the increasing importance of non-branded and non-refiner marketers, and the increasing "duration of contracts involving loans from branded marketers to jobbers . . . ."[48]
- The Report states that antitrust enforcement has become more important in the crude oil pipeline transportation market due to regulatory changes permitting market-based rate setting.[49]

The Commission voted four to zero to release the Staff Report, with Commissioner Pamela Jones Harbour abstaining.[50] Commissioner Harbour issued a statement calling the report "a carefully-researched and well-written historical exegesis"[51] but cited the need to expedite the production of a single report that addresses gasoline pricing issues in a clear and comprehensive manner as the reason for her abstention. Commissioner Mozelle W. Thompson voted to release the report but issued a separate statement disagreeing with certain statements in the report. In his statement, Commissioner Thompson argued that certain statements in the Report imply that "the Commission has required remedies [of merging parties in energy-related mergers] that it was not entitled to obtain for the benefit of American consumers."[52] Commissioner Thompson stated that in mergers that he had "reviewed, the Commission [had] appropriately addressed potential anticompetitive harm."[53] In particular, he disputed that there was any evidence that the FTC took enforcement action "at lower market concentration levels" in the energy industry than in other industries; disputed that the FTC had forced merging parties into inappropriate settlements; and criticized the report for "fail[ing] to assess the full range of explanations . . . why the Commission has taken actions against mergers in petroleum-related markets that have lower concentration than in other markets where the Commission has taken action."[54]

The Commission issued its own statement in response to that of Commissioner Thompson's.[55] The Commission stated that the data

47. *Id.* at 182–85.

48. THE PETROLEUM INDUSTRY, *supra* note 33, at 40.

49. *Id.* at 164–65.

50. Press Release, FTC, FTC Issues Staff Report on "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement" (Aug. 13, 2004), *available at* http://www.ftc.gov/opa/2004/08/oilmergersrpt.htm.

51. Statement of Commissioner Pamela Jones Harbour, *Regarding the Bureau of Economics Staff Study: The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, *available at* http://www.ftc.gov/speeches/harbour/040813petrolmergers.pdf (last visited Sept. 8, 2005).

52. Statement of Commissioner Mozelle W. Thompson, *Concerning the Staff Report: The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* 2, *available at* http://www.ftc.gov/speeches/thompson/040813petrolmergers.pdf (last visited Sept. 1, 2005) [hereinafter Thompson].

53. *Id.*

54. Thompson, *supra* note 52, at 2, 4.

55. Statement of the Federal Trade Commission, *Concerning the Bureau of Economics Staff Report on The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolcomst.pdf (last visited Sept. 1, 2005).

demonstrated that the FTC had challenged and obtained relief in petroleum industry mergers at lower concentration levels than in other merger cases but that its vote to approve the release of the report "does not indicate any criticism of those settlements."[56]

F. Kovacic Testifies Before House Subcommittee on Rising Gasoline Prices

On July 7, 2004, FTC general counsel William E. Kovacic testified before the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs with a prepared statement entitled "Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets."[57] An FTC press release said that the Kovacic testimony "detailed the Agency's initiatives to maintain competitive energy markets, and [indicated] that the Commission will take enforcement action to protect U.S. consumers from price increases resulting from illegal anticompetitive conduct."[58]

Kovacic explained that the General Accounting Office (GAO) Report finding that six of eight petroleum industry mergers permitted by the FTC had resulted in higher gasoline prices was fundamentally flawed.[59] Kovacic argued that the GAO Report failed to account for variables affecting gasoline prices, such as seasonal demand changes and changes in gasoline formulation; failed to define a relevant geographic market; and failed to account for facts pertinent to individual mergers, such as the divestitures the FTC required with respect to the Exxon/Mobil merger.[60]

Kovacic stated that the FTC actively monitors wholesale and retail gasoline prices and has policed anticompetitive activity in both the merger and nonmerger contexts.[61] The FTC's monitoring techniques include regular statistical studies to identify unusual gasoline price movements.[62] Such movements are analyzed by the FTC and either deemed worthy of further investigation or determined to be the result of natural causes.[63] Kovacic also testified regarding the FTC's examination of factors affecting refined petroleum product prices such as the price of crude oil, crude and refined product inventory levels, refinery utilization, pipeline capacity, and regulatory requirements.[64]

56. *Id.* at 2.

57. *Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Before the House Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs Comm. on Gov't Reform*, 108th Cong. (2004) (prepared statement of the FTC presented by William E. Kovacic), *available at* http://www.ftc.gov/os/2004/07/040707gaspricetestimony.pdf [hereinafter Kovacic Statement].

58. Press Release, FTC, FTC Testifies on its Initiatives to Protect Competitive Markets for Gasoline (July 7, 2004), *available at* http://www.ftc.gov/opa/2004/07/gastest.htm.

59. Kovacic Statement, *supra* note 57, at 8 (discussing U.S. GEN. ACCOUNTING OFFICE, ENERGY MARKETS: EFFECTS OF MERGERS AND MARKET CONCENTRATION IN THE U.S. PETROLEUM INDUSTRY (May 2004), *available at* http://www.gao.gov/highlights/d0496high.pdf).

60. *Id.* at 8–10.

61. Kovacic Statement, *supra* note 57, at 11, 15.

62. *Id.* at 16.

63. Kovacic Statement, *supra* note 57, at 16.

64. *Id.* at 25–32.

II. MAJOR COMPETITION-RELATED FERC ISSUANCES AND ORDERS

A. *Market-Based Rates for Generation*

On April 14, 2004, the FERC issued its Order on Rehearing and Modifying Interim Generation Market Power Analysis and Mitigation Policy in *AEP Power Marketing, Inc* (April 14 Order).[65] For an interim period,[66] the April 14 Order adopted two "indicative" screens for evaluating generation market power in all pending and future market-based rate applications, including three-year[67] market-based rate reviews. The indicative screens the FERC will use are (1) an uncommitted pivotal supplier analysis that will assess the potential of an applicant and its affiliates to exercise market power based on the control area market's annual peak demand,[68] and (2) an uncommitted market share analysis that will assess the applicant's and its affiliates' market share of uncommitted capacity on a seasonal basis.[69] Both screens will consider native load obligations and other commitments of the applicant.[70]

The FERC determined that the uncommitted pivotal supplier analysis will allow it to determine whether market demand can be met during peak times without some contribution of supply by the applicant and its affiliates. If not, the applicant could be considered pivotal and therefore will be presumed to have market power. The FERC found that the uncommitted market share analysis will allow a determination as to whether the applicant and its affiliates have a dominant position in the market.[71] The FERC concluded that by using the two screens it will be able to "measure market power both at peak and off-peak times, and the ability to exercise market power both unilaterally and in coordinated interaction with other sellers."[72]

An applicant that passes both screens will be presumed to lack market power in generation.[73] Applicants that fail either screen will be presumed to have market power.[74] An applicant can rebut this presumption by (1) presenting

65. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018 (2004).

66. The FERC simultaneously established a separate, generic rulemaking docket in which it will undertake a comprehensive review of the appropriate analysis for granting market-based rate authority, addressing generation market power, transmission market power, other barriers to entry, and affiliate abuse and reciprocal dealing. Initiation of Rulemaking Proceeding and Notice of Technical Conference, *Notice of Technical Conference and Initiation of Rulemaking Proceeding*, 69 Fed. Reg. 21,777 (2004).

67. 107 F.E.R.C. ¶ 61,018, at 61,050. FERC orders granting market-based rate authority require the applicant to file an updated market analysis within three years of the FERC order, and to do so again every subsequent three years. *MidAmerican Energy Co.*, 108 F.E.R.C. ¶ 61,043, 61,249 (2004).

68. 107 F.E.R.C. ¶ 61,018, at 61,060–61,061.

69. *Id.* at 61,055.

70. For purposes of the pivotal supplier analysis, the FERC will use the average daily peak native load for the peak month as a proxy for capacity committed and not otherwise available for wholesale transactions. For purposes of the market share analysis, the FERC will subtract the native load obligation on the minimum peak demand day, in a given season, from the capacity otherwise controlled by the applicant and competing suppliers.

71. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018, 61,061 (2004).

72. *Id.* at 61,061.

73. Intervenors will be able to rebut this presumption by making a countervailing showing, such as by presenting historical wholesale sales data and/or challenging the FERC's assumption that competing suppliers inside a control area have access to the market.

74. Once such a presumption is made, the applicant's rates will be made subject to refund prospectively, until a final determination or market power is made or the applicant effectuates mitigation.

a more rigorous Delivered Price Test,[75] (2) historical evidence indicating a lack of market power; (3) submitting a mitigation proposal designed for the applicant's particular circumstances that would eliminate the ability to exercise market power, and/or (4) notifying the FERC that it will utilize default cost-based rates or proposing alternative cost-based rates.[76]

An applicant may submit a streamlined application for market-based rate authority. The FERC stated that an applicant that is able to "pass the screens without considering competing supplies from adjacent[, first-tier] control areas . . . need not include such imports in its studies."[77] In addition, an applicant may avoid the market power analysis by opting to go directly to mitigation. Further, applicants making sales from capacity for which construction commenced on or after July 9, 1996 need not present a market power analysis. However, if such an applicant or its affiliates own or control other generation assets, the applicant will need to "address whether its new capacity, when added to existing capacity, raises generation market power concerns."[78]

The FERC will no longer exempt sales into an ISO or RTO with FERC-approved market monitoring and mitigation. The FERC noted, however, that "applicants located in ISOs/RTOs with sufficient market structure may consider [using] the geographic region under the control of the ISO/RTO as the relevant default geographic region . . . ."[79]

Where an ISO/RTO region is not used, the "default relevant geographic markets . . . will be first, the control area market where the applicant is physically located, and second, the markets directly interconnected to the applicant's control area market (the first-tier control area markets)."[80] On a case-by-case basis, the FERC will allow applicants and intervenors to present evidence that a broader or narrower geographic market should be used.[81]

Applicants providing transmission service will be required to conduct

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75. The Delivered Price Test is a more thorough test that has been used to analyze the effect on competition for transfers of jurisdictional facilities in proceedings under section 203, using the framework described in Appendix A to the FERC's Merger Policy Statement. Order No. 592, *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,044 (1996), 61 Fed. Reg. 68,595 (1996), *reconsideration denied, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act*, 79 F.E.R.C. ¶ 61,321 (1997). The Delivered Price Test "defines the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each season and load condition." *Electric Highlights*, ENERGY INSIGHTS (Duane Morris LLP, New York, NY), Apr. 16, 2004, at 4.

76. 107 F.E.R.C. ¶ 61,018, at 61,055. The FERC's default cost-based rates will be determined as follows:

> (1) sales of power of one week or less must be priced at the applicant's incremental cost plus [ten percent]; (2) sales of power of more than one week but less than one year must be priced at an embedded cost "up to" rate reflecting the costs of the unit or units expected to provide the service; and (3) new contracts for sales of power for more than one year must be priced at a rate [no greater than the] embedded cost of service . . . .

Id.

77. 107 F.E.R.C. ¶ 61,018, at 61,055.

78. *Id.*

79. 107 F.E.R.C. ¶ 61,018 at 61,056.

80. *Id.* at 61,061 (footnote omitted).

81. 107 F.E.R.C. ¶ 61,018 at 61,061.

simultaneous transmission import capability studies for their control areas and each first-tier control area. These studies are to be used with both screens to determine the transmission import capability. When applying the study to first-tier control areas, the applicant must use the methodologies addressed in the FERC-approved OATT tariff to make a reasonable approximation of simultaneous import capability available to suppliers "in first-tier markets during each seasonal peak. The transfer capability . . . also [must] include . . . other limits . . . as defined in the tariff and that existed during each seasonal peak."[82] "If an applicant demonstrates that it is unable to perform a simultaneous import study for [its] control area[,]" the FERC may allow the "use [of] proxy amounts for transmission limits" on a case-by-case basis.[83]

The pivotal supplier analysis must be conducted by first determining the total supply by adding the total amount of uncommitted capacity ("total nameplate capacity of generation . . . less operating reserves, native load commitments, and long-term firm non-requirement sales")[84] located in the relevant control area with that of uncommitted supplies that can be imported (as determined by the simultaneous transmission import capability studies) from first-tier markets.[85] "Any simultaneous transmission import capability [must] be allocated to the applicant's uncommitted remote generation" first, with any remaining capability allocated to competing supplies.[86] The pivotal supplier analysis next subtracts the wholesale load from the total uncommitted supply. "[T]he wholesale load is the annual peak load (needle peak) less the proxy for the native load obligation . . . (i.e., the average of the daily native load peaks during the month in which the annual peak load day occurs)."[87] Where the applicant's uncommitted capacity is less than the net uncommitted supply, the applicant passes the pivotal supplier analysis.

The market share analysis is conducted by using the minimum peak load day for each season considered as the proxy for native load, and by considering planned outages done in accordance with good utility practice.[88] An applicant "who has less than a twenty percent market share in the relevant market for all seasons [passes] the market share analysis."[89]

Where an applicant has market-power, the FERC will require cost-based rates or other mitigation. Such an applicant will no longer be exempt from applicable accounting regulations (e.g., parts 41, 101, and 141 of the FERC's regulations), and the applicant and its affiliates will no longer have blanket approval for issuances of securities or assumptions of liability under part 34.[90]

Numerous parties filed requests for rehearing of the April 14 Order, and on July 8, 2004, the FERC clarified and modified certain instructions for performing

82. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018, 61,063 (2004).

83. *Id.* at 61,063.

84. 107 F.E.R.C. ¶ 61,018, at 61,065.

85. *Id.* Applicants may "de-rate their hydroelectric capacity based on historical capacity factors, [using] a five-year average capacity factor and a sensitivity test using the lowest capacity factor in the previous five years in order to more accurately capture hydroelectric availability." 107 F.E.R.C. ¶ 61,018, at 61,069.

86. *Id.* at 61,065.

87. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018, 61,065 (2004).

88. *Id.*

89. 107 F.E.R.C. ¶ 61,018, at 61,066.

90. *Id.* at 61,073.

the generation market power analyses.[91] The FERC clarified that (1) "intervenors may submit a Delivered Price Test . . . [to] rebut the presumption established by an applicant's' passage of the screens";[92] (2) "supply curve evidence [can be used] to assess a seller's ability and incentive to exercise market power based upon the shape and composition of the supply curve and the seller's place on it";[93] (3) "only the portion of an applicant's uncommitted remote generation capacity that has firm or network reservations should be modeled in the base case and subtracted from available simultaneous transmission import capability";[94] (4) "the simultaneous transmission import capability measure should account for [capacity benefit margin (CBM)] to the extent that it was historically available to non-firm transmission markets during recent seasonal peaks";[95] (5) "all first-tier interconnecting control areas are to be modeled as a single surrounding entity for the purposes of calculating simultaneous transmission import capability, voltage limits, and stability limits";[96] (6) "where appropriate, applicants may deduct for long-term firm requirements sales that are specifically tied to generation owned or controlled by the applicant";[97] (7) "applicants may deduct 'load following' and 'provider of last resort' contracts for terms of one year or more under certain conditions";[98] and (8) "peak load[, for purposes of the pivotal supplier analysis,] is the largest electric power requirement (based on net energy for load) during a specified period of time . . . for the native load, firm wholesale requirements, and non-firm wholesale sales actually made in the relevant geographic market during the relevant time period."[99]

With respect to making adjustment to the base case for transmission reliability margins (TRM) and portions of CBM not available to firm and non-firm transactions, the FERC clarified that:

> (a) [i]f TRM is reserved by the transmission-providing utility applicant on any flowgate or path, the lines associated [must] be de-rated to reflect the reliability margin that is not available to transmission customers for non-firm transmission reservations during recent seasonal peaks; (b) [i]f CBM is not made available, in whole or in part, to non-firm markets, the base case [must] reflect the reliability margin by modeling generation outage and path de-ratings that [reflect] the CBM not available to unaffiliated transmission customers in non-firm transmission markets . . . ; (c) [i]f counterflow margins are maintained seasonally and not made available for non-firm reservations requested by transmission customers, the [associated] lines should be de-rated . . . on lines/flowgates such that counterflow margins were maintained during each recent seasonal peak; [and] (d) [i]f any other reliability margin was utilized . . . during recent seasonal peaks, those margins [must] appear as de-rated lines, as appropriate, in developing the base case.[100]

91. *AEP Power Marketing, Inc.*, 108 F.E.R.C. ¶ 61,026 (2004).
92. *Id.* at 61,115.
93. 108 F.E.R.C. ¶ 61,026, at 61,114.
94. *Id.* at 61,118.
95. 108 F.E.R.C. ¶ 61,026, at 61,118.
96. *Id.* at 61,119.
97. *AEP Power Marketing, Inc.*, 108 F.E.R.C. ¶ 61,026, 61,121 (2004).
98. *Id.*
99. 108 F.E.R.C. ¶ 61,026, at 61,123.
100. *Id.* at 61,119.

B. *Section 203 Affiliate Transactions*

On July 29, 2004, the FERC announced its expectations for future transactions under section 203 of the Federal Power Act involving disposition of jurisdictional facilities between affiliates in an Opinion and Order Affirming Initial Decision in Part, Denying Requests for Rehearing, and Announcing New Guidelines for Evaluating section 203 Affiliate Transactions in *Ameren Energy Generating Co.*[101] The case involved a section 203 application filed by Ameren Energy Generating Company (AEG) and its corporate affiliate Union Electric Company d/b/a AmerenUE (AmerenUE) by which the applicants sought "Commission authorization for the transfer of certain jurisdictional transmission facilities associated with the sale of the Pinckneyville and Kinmundy facilities from AEG to AmerenUE . . . ."[102] The applicants stated that "the purpose of the transaction [was] to enable AmerenUE to meet its [short-term and long-term] peak load requirements, . . . including planning reserve requirements . . . ."[103] The applicants contended "that AmerenUE's decision to meet [these] needs by buying the" facilities from an affiliate was a reasonable decision that did "not reflect [an] affiliate preference."[104]

The FERC found that the proposed disposition would have no adverse effect on rates or regulation.[105] It set for hearing only the issue of whether the disposition would have an adverse effect on competition. The presiding Administrative Law Judge subsequently issued an Initial Decision finding that there would be no adverse effect on competition.[106]

The FERC's July 29 Order affirmed the Initial Decision in part and "authorize[d] the proposed disposition of facilities as consistent with the public interest."[107] The FERC affirmed the Initial Decision's finding that affiliate abuse did not occur. Specifically, the FERC found that "AmerenUE appropriately decided among alternatives on the basis of price and non-price factors."[108] Thus, the FERC found that "AmerenUE's acquisition of the . . . facilities [at issue would] not represent an exercise of a "safety net" for [benefit of] Ameren and its subsidiaries."[109] However, the FERC reversed the Initial Decision's "findings that [a] safety net is not a generally valid concern and that for a safety net transaction to harm competition, there must be regulatory failure [that is] widespread and systematic."[110] The FERC held that the Initial Decision "gave undue credence to the proposition that a utility that sells power in a competitive market, and thus is not guaranteed recovery of its costs, [lacks an] incentive to pay more than market value for . . . generating asset[s, owned by an affiliate, that are] being used for sales for resale in interstate commerce . . . ."[111] The FERC

101. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081 (2004).

102. *Id.* at 61,401.

103. 108 F.E.R.C. ¶ 61,081 at 61,401.

104. *Id.* at 61,401.

105. 108 F.E.R.C. ¶ 61,081, at 61,400 (citing *Ameren Energy Generating Co.*, 103 F.E.R.C. ¶ 61,128 (2003).)

106. *Ameren Energy Generating Co.*, 106 F.E.R.C. ¶ 63,011 (2004).

107. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081, 61,400 (2004).

108. *Id.* at 61,407.

109. 108 F.E.R.C. ¶ 61,081, at 61,407.

110. *Id.* at 61,407–08.

111. 108 F.E.R.C. ¶ 61,081, at 61,408.

noted that "[p]referential procurement of an affiliate asset by a public utility may harm competition in electricity markets" by, inter alia, "raising entry barriers, increasing market power and impeding market efficiency."[112] The FERC found that such affiliate abuse causes anticompetitive harm that may not be adequately remedied by rate regulation and that the FERC must act to prevent such harm in the exercise of its authority under section 203.[113]

The FERC determined "that the competitive implications of intra-corporate asset transfers are similar to those of intra-corporate sales contracts . . . ."[114] It announced that in section 203 proceedings it will apply the "standards developed in *Boston Edison Company Re: Edgar Electric Company*, for evaluating the justness and reasonableness of a franchised utility's wholesale ([sales] contracts) involving an affiliate to ensure that affiliate abuse has not occurred and to ensure prices that are consistent with competitive outcomes."[115] The *Edgar* decision provides three examples of how to show that affiliate abuse has not occurred:

> (1) evidence of direct head-to-head competition between . . . affiliate[d] and . . . unaffiliated suppliers . . . ; (2) evidence of the prices [that] non-affiliated buyers were willing to pay for similar services from the affiliate; and (3) . . . benchmark evidence . . . [of] the prices, terms and conditions of sales made by non-affiliated sellers.[116]

The FERC stated that "[b]ecause the market for generating assets is not nearly as liquid as the market for [power purchase agreements], a competitive solicitation through a formal [request for proposals (RFP)] in future [s]ection 203 cases is likely to be the most effective way to show that"[117] a disposition of assets between affiliates is not the product of affiliate abuse.

The FERC addressed four principles that would reduce application processing time (including litigation) and increase the likelihood of timely FERC approval. First, "the competitive solicitation process should be open and fair."[118] "The RFP and all relevant information . . . should be released to all potential bidders at the same time."[119] Second, the facilities "sought through the competitive solicitation should be precisely defined."[120] "RFP[s] should not be written to exclude [facilities] that can appropriately fill the issuing company's objectives[,]" particularly if such exclusions favor affiliates.[121] Third, the "evaluation criteria should be standardized and applied equally to all bids and bidders."[122] "[The] RFPs should clearly specify [both] price and nonprice criteria under which the bids [will be] evaluated."[123] The relative importance of the price criteria should be specified, as well as any discount rate(s) used in the evaluation. The relative importance of non-price criteria should also be detailed,

112. *Id.* at 61,410.

113. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081, 61,408 (2004).

114. *Id.* at 61,409.

115. 108 F.E.R.C. ¶ 61,081, at 61,402 (2004) (citing *Boston Edison Co. Re: Edgar Electric Co.*, 55 F.E.R.C. ¶ 61,382 (1991)).

116. *Id.* at 61,411.

117. 108 F.E.R.C. ¶ 61,081, at 61,411.

118. *Id.* at 61,412.

119. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081, 61,412 (2004).

120. *Id.*

121. 108 F.E.R.C. ¶ 61,081, at 61,412 (2004).

122. *Id.*

123. 108 F.E.R.C. ¶ 61,081, at 61,413 (2004).

including "items such as firm transmission reservation requirements, including [specific] delivery points; credit evaluation criteria, . . . plant technology . . . ; plant performance requirements, . . .; and the anticipated in-service date" for new construction.[124] Fourth, "an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection."[125] To be considered independent, "the third party [must have] no financial interest in any of the potential bidders, including the affiliate, or in the outcome of the process."[126] "[T]he third party [also must] not own or operate facilities that participate in the market affected by the RFP."[127]

III. FTC COMMENTS TO STATES

The FTC's Bureau of Competition, Bureau of Economics and Office of Planning and Policy commented on legislation in three states (Alabama,[128] Kansas,[129] and Michigan[130]) (FTC State Comments) to prohibit marketers and/or retailers from selling "below-cost" motor fuel to customers. Because each state's legislation is quite similar, the FTC provided nearly identical analyses to each state. The FTC made four main points.

First, "low prices benefit consumers. Consumers are harmed only if below-cost prices allow a dominant competitor to raise prices later to supracompetitive levels" (i.e., if the competitor can engage in predatory pricing).[131] Aggressive pricing, even if below total costs, benefits consumers if it does not produce a dominant competitor that subsequently raises prices above competitive levels.

Second, economic and legal studies, and court decisions indicate that predatory pricing occurs infrequently. Based upon many studies of pricing in the motor fuel industries, "[b]elow-cost sales of motor fuel that lead to monopoly [appear to be] especially unlikely."[132]

Third,

> [t]he federal antitrust laws [already] deal with below-cost pricing that has a "dangerous probability" or a "reasonable prospect" of leading to monopoly. The FTC, the Department of Justice's Antitrust Division, [the] state attorneys general, and private parties can bring suit under the federal antitrust laws against anticompetitive below-cost pricing and price discrimination. [The proposed legislation], however, does more than duplicate these protections; it exceeds them in ways that do not benefit consumers. Federal law prohibits pricing that could harm

124. *Id.*

125. *Ameren Energy Generating Co.*, 108 F.E.R.C. ¶ 61,081, 61,412 (2004).

126. *Id.* at 61,413.

127. 108 F.E.R.C. ¶ 61,081, at 61,413 (2004).

128. Letter from Susan A. Creighton, Director, Bureau of Competition, Fed. Trade Comm'n, to Demetrius C. Newton, Speaker Pro Tempore, Alabama State House of Representatives (Jan. 29, 2004), *available at* http:/ftc.gov/ftc/oilgas/competn_advocacy.html [hereinafter Alabama FTC Letter].

129. *See* Letter from Susan A. Creighton, Director, Bureau of Competition, Fed. Trade Comm'n, to Les Donovan, Assistant Majority Leader, Kansas Senate (Mar. 12, 2004), *available at* http:/www.ftc.gov/ftc/oilgas/competn_advocacy.html [hereinafter Kansas FTC Letter].

130. *See* Letter from Todd J. Zywicki, Director, Office of Policy Planning, Fed. Trade Comm'n, to Gene DeRossett, Member, Michigan House of Representatives (June 17, 2004), *available at* http:/www.ftc.gov/ftc/oilgas/competn_advocacy.html [hereinafter Michigan FTC Letter].

131. Kansas FTC Letter, *supra* note 129, at 1; Alabama FTC Letter, *supra* note 128, at 1. *See also* Michigan FTC Letter, *supra* note 130.

132. Kansas FTC Letter, *supra* note 129, at 1; Alabama FTC Letter, *supra* note 128, at 1; Michigan FTC Letter, *supra* note 130, at 3.

> competition and consumers, not just competitors, whereas [the proposed legislation] prohibits pricing that could harm competitors even if there is no harm to consumers.[133]

Fourth, if enacted, the legislation would discourage competitive pricing and raise prices to motor fuel buyers. It would "subject[] vendors to civil liability—including treble damages—for cutting prices even [when] there is no likelihood of harm to market-wide competition."[134] By defining the cost target as "total unit costs rather than marginal costs, [this legislation] subjects a greater range of prices to liability in comparison to federal antitrust law. As a result, many vendors would likely avoid [normal] procompetitive price-cutting[,]" which would result in higher motor fuel prices.[135]

IV. FTC COMMENTS TO THE FERC AND THE DOE

A. FTC Comments on the FERC's Solicitation Processes for Public Utilities' Acquisition and Disposition of Merchant Generation Assets

On July 14, 2004, the FTC filed comments with the FERC (July 14, 2004 FTC Comments)[136] on the FERC's policies governing public utilities' acquisition and disposition of merchant generation assets. In response to the FERC's public notice inviting comments from interested parties,[137] the July 14, 2004 FTC Comments addressed the FERC policies for regulating public utilities' power purchases from affiliated entities and their acquisitions of unbundled generation facilities.[138] The FTC expressed concern that utilities might have the incentive to harm consumers by taking advantage of any ability they may have to exercise market power and discriminate in favor of their own affiliated entities.[139]

First, the FTC evaluated the historical and contextual background of the FERC's *Edgar* Policy, which the FERC follows in evaluating market power in utilities' power purchase agreements with affiliates.[140] The FTC encouraged the FERC to expand the *Edgar* Policy to the FERC's review of utilities' purchase of generation assets because the issues that arise are similar in both contexts.[141] In addition, concluding that incentives for utilities to discriminate or cross-

133. Kansas FTC Letter, *supra* note 129, at 2; Alabama FTC Letter, *supra* note 128. *See also* Michigan FTC Letter, *supra* note 130, at 3.

134. Michigan FTC Letter, *supra* note 130, at 3. *See also* Kansas FTC Letter, *supra* note 129, at 2; Alabama FTC Letter, *supra* note 128.

135. Alabama FTC Letter, *supra* note 128. *See also* Kansas FTC Letter, *supra* note 129; Michigan FTC Letter, *supra* note 130.

136. Comments of the Federal Trade Commission, *Solicitation Processes for Public Utilities Acquisition and Disposition of Merchant Generation Assets by Public Utilities*, FERC Docket Nos. PL04-6-000 and PL04-9-000 (July 14, 2004) [hereinafter July 14, 2004 FTC Comments]; *see also* Press Release, FTC, Announced Action for July 16, 2004 (July 16, 2004), *available at* http//www.ftc.gov/opa/2004/07/fyi0442.htm (announcing FTC approval of the FTC July 14, 2004 Comments by a vote of five to zero).

137. Comments of Edison Electric Institute and Alliance of Energy Suppliers, *Post Technical Conference Comments of Edison Electric Institute and Alliance of Energy Suppliers*, FERC Docket Nos. PL04-7-000, PL04-6-000, and PL04-9-000 (June 10, 2004).

138. July 14, 2004 FTC Comments, *supra* note 136, at 1.

139. *Id.*

140. July 14, 2004 FTC Comments, *supra* note 136, at 4–6 (analyzing FERC policy first articulated in *Boston Edison re: Edgar Elec. Co.*, 55 F.E.R.C. ¶ 61,382 (1991)).

141. July 14, 2004 FTC Comments, *supra* note 136.

subsidize still would exist even under an expanded application of the *Edgar* Policy, the FTC suggested that the FERC consider structural remedies such as: (1) requiring transmission upgrades that would expand the geographic market's scope; (2) eliminating barriers to entry into the market; (3) divesting appropriate assets; and (4) encouraging price-responsive demand by methods such as economically efficient real-time metering and distributed generation.[142] The FTC also stated that these structural remedies would be most effective if the FERC worked in cooperation with the states.[143]

The FTC then discussed the forms of and incentives for evading rate regulation in utilities' transactions with affiliates.[144] The FTC recognized two specific areas of concern regarding power purchases or generation asset transfers from unregulated affiliates: (1) transactions at inflated prices; and (2) utilities' preferential treatment of affiliates.[145] The FTC noted that the utilities' customers could pay higher rates if the utilities took advantage of their ability to inflate the costs of their affiliate transactions.[146] The FTC also expressed concern that when a wholesale customer is dependent upon a regulated transmission provider to act as its agent in acquiring power, the customer again could be forced to pay inflated rates.[147]

Conversely, public utilities also would have the incentive to evade regulation by cross-subsidizing unregulated affiliates' costs.[148] These actions could improperly shore up inefficient affiliates at the expense of other independent power generators, improperly increasing the affiliates' market share. The FTC suggested that the FERC consider expanding its *Edgar* Policy to address both inflated and below-market transactions between regulated utilities and their unregulated affiliates.[149]

The FTC July 14, 2004 Comments identified specific and direct harm to customers if utilities discriminated in favor of affiliates in power solicitations and transfers of generation assets.[150] First, more efficient generators might be forced out of the market while less efficient affiliates would remain.[151] Second, such favoritism could increase potential unrecoverable costs associated with entering the market and thus deter potential power providers from entering the market.[152] Finally, utilities would have an incentive to rebundle affiliates, resulting in inefficient vertical integration.[153]

Finally, the FTC listed mechanisms that the FERC could use to independently determine the market value of the transaction under review, including: (1) engaging in open solicitations; (2) selling some affiliate assets; (3) performing a comparables analysis to estimate market price; and (4) preparing a

142. *Id.* at 5–6.
143. July 14, 2004 FTC Comments, *supra* note 136.
144. *Id.* at 6–10.
145. July 14, 2004 FTC Comments, *supra* note 136, at 6–7.
146. *Id.*
147. July 14, 2004 FTC Comments, *supra* note 136, at 8.
148. *Id.*
149. July 14, 2004 FTC Comments, supra note 136, at 9.
150. *Id.* at 10–12.
151. July 14, 2004 FTC Comments, *supra* note 136, at 10–11.
152. *Id.* at 11.
153. July 14, 2004 FTC Comments, *supra* note 136, at 11–12.

discounted cash flow analysis.[154] While recognizing that its suggestions would be challenging to implement, the FTC concluded that neither relying on an administrative determination nor historic book value would accurately reflect the market value. Thus, the FTC suggested that the FERC promote the use of independent market value assessments to make the process more objective and reduce the risk of affiliate abuse.[155]

B. *FTC Comments on the FERC's Market-Based Rates for Public Utilities*

The FTC submitted comments (FTC MBR Comments)[156] to the FERC on July 16, 2004, in a rulemaking instituted to review, evaluate, and revise the FERC's "four-pronged test to assess whether a wholesale electric utility has market power . . . ."[157] The FTC described the FERC four-pronged test as follows:

> (1) whether the supplier has generation market power, (2) whether the supplier has transmission market power, (3) whether the supplier can erect barriers to entry, and (4) whether there are concerns involving the supplier that relate to affiliate abuse and/or reciprocal dealing. If [all] the answers . . . are "no," the supplier is eligible to offer electricity for sale at market prices rather than at regulated rates.[158]

The FTC MBR Comments noted that the FTC has supported the FERC's efforts to develop an appropriate market screen. In addition, the FTC also suggested that "FERC may wish, however, to update the thresholds or screens that apply to each prong based on the significant experience [the] FERC has obtained in monitoring wholesale market operations."[159] The FTC commended the FERC for establishing interim standards that created a rebuttable presumption regarding market power, thus allowing utilities or intervenors to use more refined techniques to demonstrate the existence or lack of market power and reducing the possibility of errors.[160]

1. Updating FERC's Methodology

The FTC MBR Comments suggested that the FERC could improve its screen if it updated the methodology used to identify relevant product and geographic markets.[161] The FTC found the FERC's pivotal supplier analysis and market share analysis too limited because neither accounts for all periods of time in which market power could occur. Specifically, the FTC expressed concern that market power might exist during periods of transmission congestion which might or might not correspond to the annual or seasonal demand peaks evaluated in the FERC test.[162] The FTC therefore suggested that the FERC identify the

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154. *Id.* at 12.

155. July 14, 2004 FTC Comments, *supra* note 136, at 13.

156. Comments of the Federal Trade Commission, *Market-Based Rates for Public Utilities*, FERC Docket No. RM04-7-000 (filed July 16, 2004) [hereinafter FTC MBR Comments]; *see also* Press Release, FTC, Announced Action for July 16, 2004 (July 16, 2004), *available at* http//www.ftc.gov/opa/2004/07/fyi0442.htm (announcing FTC approval of FTC MBR Comments by a vote of five to zero).

157. FTC MBR Comments, *supra* note 156, at 1 (citing *Market-Based Rates for Public Utilities*, 107 F.E.R.C. ¶ 61,019 (2004)).

158. FTC MBR Comments, *supra* note 156, at 1.

159. *Id.*

160. FTC MBR Comments, *supra* note 156, at 6.

161. *Id.* at 6–11.

162. FTC MBR Comments, *supra* note 156, at 6–7.

relevant product markets using the Horizontal Merger Guidelines' hypothetical monopolist test. "This analysis involves determining whether the pricing in a hypothesized product market is so constrained by competition from products outside that proposed market that additional products should be included in the same market."[163]

The FTC noted that the FERC's screens identify the geographic market by the administratively determined control area, which "will be accurate only by coincidence . . . ."[164] The FTC suggested that the FERC instead undertake a long-term project to develop a computer simulation analysis.[165] Because so much data is publicly available, the FTC concluded that the FERC could build a computer simulation model to determine the relevant geographic market for the hypothetical monopolist analysis: "a region in which a hypothetical monopolist . . . would profitably impose at least a small but significant and nontransitory increase in price, holding constant the terms of sale for all products produced elsewhere."[166]

The FTC further identified other purposes for computer simulation models, including helping predict industry changes, exploring the potential for a merger to result in certain competitive effects, and evaluating possible market power remedies. Recognizing that that the FERC would need to expend long-term resources to develop computer simulation models and keep them up-to-date, the FTC concluded that "if [the] FERC used such models on an ongoing basis, the incremental cost and time involved in review of market-based rate applications would decrease over time as its staff gained experience and expertise."[167]

2. Transmission Market Power Screen

The FTC MBR Comments lauded the FERC's efforts to free the electric wholesale market of discrimination in favor of utilities' affiliates since FERC first required open access in 1996.[168] Noting that the FERC recognized that its Orders 888 and 889 did not sufficiently remedy discrimination, the FTC cited FERC's Order 2000 favorably.[169] The FTC then suggested that in developing its transmission market power screen, FERC might look to the insights it gained in Orders 888, 889, and 2000.[170] Specifically, the FTC suggested that utilities joining an approved RTO be deemed to have "pass[ed] the transmission market power screen."[171] The FTC concluded that utilities that have not joined such an RTO should have the burden of proving they do not have the incentive or ability to take advantage of market power.[172]

3. Entry Barriers Screen

The FTC noted that wholesale electricity suppliers would not have

163. *Id.* at 7.

164. FTC MBR Comments, *supra* note 156, at 8–9.

165. *Id.* at 8–9.

166. FTC MBR Comments, *supra* note 156, at 10.

167. *Id.* at 11, n. 27.

168. FTC MBR Comments, *supra* note 156, at 12.

169. *Id.* at 11–12.

170. FTC MBR Comments, *supra* note 156, at 13.

171. *Id.* at 13.

172. FTC MBR Comments, *supra* note 156, at 13.

generation and transmission market power if entry into the market was timely, likely, and sufficient.[173] To facilitate ease of market entry, the FTC proposed that the FERC look to its recent development of new interconnection rules and rules governing RTO transmission expansions.[174] The FTC concluded that the FERC's new interconnection procedures address the same kind of concern that utilities would gain the incentive and ability to exert market power by delaying transmission interconnection. In the RTO context, the FTC recognized that the FERC had developed procedures to facilitate grid expansion.[175] The FTC suggested that failure to comply with the new interconnection rules and lack of membership in an RTO would place the burden of proof on the utility to establish that there are no barriers to entry.[176]

4. Affiliate Abuse Screen

Referring to its FTC July 14, 2004 Comments in FERC's current proceeding regarding Solicitation Processes for Public Utilities Acquisition and Disposition of Merchant Generation Assets by Public Utilities, the FTC recognized that the FERC's policies likely would change because of this proceeding.[177] The FTC reiterated its suggestion that FERC consider encouraging independent third parties to assess the transactions' market value. The FTC suggested that the FERC require utilities to comply with new policies to meet this prong of the market power screen, and that utilities violating the policies be required to bear the burden of proof.[178]

5. FTC Staff Participation at the FERC Technical Conference

On December 7, 2004, FTC Staff economist John Hilke participated in a panel at a FERC Technical Conference for Market-Based Rates for Public Utilities.[179] Mr. Hilke repeated the FTC recommendations that the FERC draw upon its past experiences in drafting Orders 888, 889, and 2000, and that the FERC use RTO membership as its initial screen for transmission market power.[180] For utilities operating in areas without an RTO, or for those that choose not to join an RTO, Mr. Hilke reiterated that those utilities "should have the burden of proof [to establish] that they do not have . . . market power."[181]

C. FTC Comments on the U.S. Department of Energy (DOE) Designation of National Interest Electric Transmission Bottlenecks (NIETB)

On September 20, 2004, the FTC submitted Comments[182] before the DOE

173. *Id.* at 13.

174. FTC MBR Comments, *supra* note 156, at 14.

175. *Id.* at 14.

176. FTC MBR Comments, *supra* note 156, at 15.

177. *Id.* at 15.

178. FTC MBR Comments, *supra* note 156, at 15.

179. Comments of the Federal Trade Commission, *In re Market-Based Rates for Public Utilities* (Dec. 7, 2004) [hereinafter MBR Conference Transcript].

180. *Id.* at 10.

181. MBR Conference Transcript, *supra* note 179, at 11.

182. Comments of the Federal Trade Commission, *Designation of National Interest Electric Transmission Bottlenecks* (2004) (approving FTC NIETB Comments by a vote of five to zero) [hereinafter FTC NIETB Comments].

Office of Electric Transmission and Distribution concerning the designation of NIETB (FTC NIETB Comments).[183] The FTC addressed recommendations made by the DOE's Electricity Advisory Board (EAB) that the DOE identify NIETBs as an initial step in improving the national transmission grid infrastructure. The FTC suggested that before designating a congested transmission area as an NIETB, the DOE first require a determination: (1) of compelling evidence that the benefits of such designation exceed the costs; and (2) that the market is unlikely to obtain the needed investment in a reasonable amount of time.[184] Further, the FTC suggested that DOE consider procedures that are sensitive to likely changes in the underlying markets that could change the need for an NIETB designation.[185]

The FTC recognized that there are legitimate concerns that economic incentives may not be sufficient to provide the needed transmission capacity growth, but concluded that the DOE should not assume that all transmission congestion is a result of socially suboptimal transmission investment.[186] Potential investors may view the congestion as temporary or the remedy as to expensive to be efficient. The FTC suggested that because an NIETB designation could distort an efficient investment environment that would harm consumers, it should be used only to "steer [investments] toward the socially optimal level."[187] To avoid an inefficient outcome, the FTC suggested that the DOE focus its program on areas that clearly exhibit suboptimal investment and avoid designations where high-quality data would allow investors to make efficient investment decisions or where an effective operating RTO could make these decisions.[188]

The FTC also noted that because changes in market conditions could effect transmission bottlenecks, not all factors in future transmission congestion could be known in advance. The FTC also suggested that the DOE consider identification of NIETB designations that are contingent on conditions such as fuel price changes. The FTC suggested that DOE retain the authority to initiate designations and not leave it to private application, as initially proposed.[189]

V. U.S. DEPARTMENT OF JUSTICE COMMENTS TO THE FERC

On November 15, 2004, the U.S. Department of Justice (DOJ) filed comments with the FERC (DOJ Comments) on the FERC's proposed reporting requirements for changes of market positions by electric utilities with market rate authority.[190] In response to the FERC's notice of proposed rulemaking,[191] the

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183. Notice of Inquiry and Opportunity to Comment, *Designation of National Interest Electric Transmission Bottlenecks*, 69 Fed. Reg. 43,833 (2004).

184. FTC NIETB Comments, *supra* note 182, at 2.

185. *Id.* 1–2.

186. FTC NIETB Comments, *supra* note 182, at 4.

187. *Id.* at 5.

188. FTC NIETB Comments, *supra* note 182, at 6.

189. FTC NIETB Comments, *supra* note 182.

190. Comments of the United States Department of Justice, *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, FERC Docket No. RM04-14-000 (2004) [hereinafter DOJ Comments].

191. Notice of Proposed Rulemaking, *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, 109 F.E.R.C. ¶ 61,021 (2004).

DOJ addressed the types of information likely to be useful in assessing continuation of market-rate authority. "The [DOJ] urge[d] the Commission to consider carefully the costs and benefits of any new reporting requirements. Unduly burdensome reporting requirements, such as a 'transmittal letter' requiring a full-blown market analysis, may discourage agreements that are beneficial to electricity consumers."[192]

The DOJ outlined both the potential procompetitive and anticompetitive effects of contracts. Energy contracts can benefit electricity consumers by lowering costs. "Three categories of efficiencies that may arise from such agreements [include:] (1) combining complementary skills, (2) allocating risk[s,] and (3) reducing financing costs."[193] "Contractual arrangements between competitors may [have] anticompetitive effects" by shifting control from one competitor to the other and by increasing the buyer's incentive to exercise market power.[194] "Contractual arrangements between [companies] that are not competitors [might] also [produce] anticompetitive effects."[195] For example, a power marketer that purchased all the energy output from generation companies in an area might obtain the incentive to exercise market power.

The DOJ supplied a list of information that it believes would be sufficient to assess whether a contract or plant acquisition would likely require a more thorough analysis of competitive position. Relevant information includes: names of the contracting parties and affiliates; ownership interests of the parties; agreement date; service start and expiration dates; identity and locations of plants subject to the agreement; capacity in megawatts; fuel; plant type; compensation mechanism (e.g., tolling, pure energy, or capacity and energy); identity and location of generation under the control of the parties and affiliates; and attributes of the other generation.[196] A simple factual form is likely to be preferable to analyses similar to those required in the initial application for market-rate authority.[197]

VI. COURT DECISIONS[198]

A. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko (Verizon)*

In January 2004, the United States Supreme Court held that a local telephone company had no liability under section 2 of the Sherman Act for failing to share its network facilities with a rival, under either the Court's previous refusal-to-deal precedents or the essential facilities doctrine adopted by the lower federal courts.[199] Although the case involved facilities used to provide telecommunications services, it has implications for the energy industry because electric transmission lines and natural gas pipelines have often been claimed to be essential facilities.

192. DOJ Comments, *supra* note 190, at 3 (footnote omitted).

193. *Id.* at 5–6.

194. DOJ Comments, *supra* note 190, at 6.

195. *Id.* at 7.

196. DOJ Comments, *supra* note 190, at 15, Appendix A.

197. *Id.* at 11–12.

198. This Section does not address pending cases.

199. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

The Telecommunications Act of 1996 (TCA 96)[200] required local telephone companies, such as Verizon Communications, Inc. (Verizon), to share their network facilities with competitors at cost-based rates. The issue before the Court was whether a failure to comply with that requirement also constituted a violation of section 2 of the Sherman Act.[201]

The Court began by reiterating the basic antitrust principle that mere possession of monopoly power, without some element of anticompetitive conduct, does not violate section 2.[202] It distinguished prior refusal-to-deal cases, such as *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, where the defendant had discontinued an existing and presumably profitable business arrangement with the plaintiff, thereby creating an inference of anticompetitive intent.[203] In this case, there had been no prior course of dealing between Verizon and its competitors, and since there was no allegation that Verizon would have shared its network facilities with its competitors at cost-based rates absent the requirements of the TCA 96, its failure to do so created no inference of monopolistic or anticompetitive intent.[204] As a result, the Court found no basis for section 2 liability under its prior refusal-to-deal precedents.[205]

The Court likewise held that the essential facilities doctrine, adopted by a number of lower federal courts,[206] provided no basis for liability under section 2. While declining to either endorse or repudiate that doctrine, the Court found it inapplicable where a state or federal regulatory agency had authority to compel access to the facility in question.[207] Since the Federal Communications Commission had that authority under TCA 96, the essential facilities doctrine provided no basis for liability in this case.

Finally, noting the extensive regulatory structure created by the TCA 96, the Court declined to create any new exceptions to the general rule that a business has no duty to aid competitors.[208] Three justices, concurring in the judgment, would have found that the plaintiff, as a customer of a competitor rather than a competitor, lacked standing to bring an antitrust suit against Verizon.[209]

B. American Central Eastern Texas Gas Company v. Union Pacific Resources Group, Inc.

Although the *Verizon* decision narrowed the circumstances under which parties may bring essential facilities or similar claims in the future, some of those claims may survive. In January 2004, shortly after *Verizon* was decided, the Fifth Circuit upheld an arbitrator's award requiring a defendant, who owned a gas processing facility, to contract with a natural gathering company on

200. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

201. *Verizon*, 540 U.S. at 401.

202. *Id.* at 407.

203. *Verizon*, 540 U.S. at 408–09 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

204. *Id.* at 409–10.

205. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 410 (2004).

206. *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983).

207. *Verizon*, 540 U.S. at 410–11.

208. *Id.* at 411.

209. *Verizon*, 540 U.S. at 416–17.

designated terms and conditions.[210] The arbitrator had found that the defendant, who had monopoly power over gas gathering in the area, had engaged in a variety of anticompetitive and exclusionary conduct, including a refusal to negotiate fairly and in good faith with the plaintiff in order to prevent it from competing. The arbitrator further found that the defendant "had no valid business justification for [its] refus[al] to deal . . . ."[211] No regulatory agency had authority to compel access to the gathering facility, and the court specifically distinguished *Verizon* on the basis that there had been a prior course of dealing between the parties.[212]

C. *California Energy Crisis Litigation*

A number of cases decided during 2004 arose out of the California energy crisis of 2000–2001. During that time, California and other western states experienced severe shortages of electricity and extremely high prices for available supplies. Several litigants, including the California Attorney General, subsequently turned to state courts to obtain relief from electric suppliers, which they had been unable to obtain at the FERC.

In June 2004, the Ninth Circuit held that a suit filed by the California Attorney General against various electric suppliers, claiming a variety of fraudulent business practices in violation of California's unfair competition law, was preempted by the FERC's exclusive jurisdiction over the transmission and wholesale sale of electricity in interstate commerce.[213] The challenged practices were governed by the FERC-approved operating agreements or tariffs, the enforcement and remediation of which fell within the exclusive domain of the FERC.[214]

The court also held that such claims were barred by the filed rate doctrine, which essentially provides that state law may not be used to invalidate a filed rate approved by a federal agency such as the FERC or to assume, for purposes of calculating damages, a rate other than that approved by the agency. One purpose of that doctrine, according to the court, is to ensure that the filed rates (which encompass the entire tariff) are the exclusive source of the terms and conditions under which the regulated entity provides the service in question.[215] Claims that utilities owe obligations beyond those set forth in the filed tariff are specifically barred by the filed-rate doctrine.[216]

In August and September 2004, the Ninth Circuit issued similar rulings with respect to state-law claims filed by two Washington public utility districts, one claiming unjust enrichment and seeking rescission of a contract with an electric

210. Am. Cent. E. Texas Gas Co. v. Union Pac. Res. Group Inc., 93 F.App'x 1 (5th Cir. 2004).

211. *Id.* at 10.

212. *Am. Cent.*, 93 F.App'x at 9.

213. California *ex rel.* Lockyer v. Dynegy, 375 F.3d 831 (9th Cir. 2004), *amended on denial of rehearing*, 387 F.3d 966 (9th Cir. 2004). The court also rejected the state's argument that the removal of a case filed by a state in state court violated the Eleventh Amendment.

214. *Lockyer*, 75 F.3d at 849–52.

215. *Id.* at 853 (quoting Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002)).

216. *Lockyer*, 75 F.3d at 853 (emphasis omitted) (quoting Evanns v. AT&T Corp., 229 F.3d 837, 841 (9th Cir. 2000)).

supplier,[217] and the other alleging that various electric suppliers had violated California's antitrust and consumer protection laws.[218] With one exception (involving a request for declaratory relief concerning contract formation), the court held that these state-law claims were likewise preempted by the FERC's exclusive rate-setting jurisdiction and barred by the filed-rate doctrine.[219] In deciding these cases, the court specifically rejected the argument that the preemption and filed-rate doctrines were inapplicable where the FERC had authorized market-based rates.[220]

In September 2004, the Ninth Circuit ruled that the FERC erred in concluding that it could not order retroactive refunds from electric suppliers as a result of their failure to file required reports containing transaction-specific data.[221] While rejecting the state's argument that market-based electric rates were impermissible under the Federal Power Act, the court disagreed with the FERC's suggestion that the reporting failures were mere technical compliance issues.[222] In the court's view, market-based rates could not satisfy the legal requirements of the Federal Power Act unless those rates were "coupled with enforceable post-approval reporting that would enable [the] FERC to determine whether the rates were 'just and reasonable' and whether market forces were truly determining the price."[223] The court acknowledged that the FERC might exercise its discretion not to order refunds, "but [held that] it unquestionably has the power to do so."[224] The case was remanded to the FERC for further proceedings.

At the same time that California and other western states were experiencing shortages and high prices in the market for electricity, the spot price of natural gas also rose to extraordinary levels.[225] A number of consumers subsequently filed suits in California state courts against various gas suppliers, claiming violations of California's unfair competition and antitrust laws. Those cases were later removed to various federal district courts in California, and were ultimately transferred to the District Court for the District of Nevada.

In November 2004, that court granted a motion to remand these cases to the California state courts.[226] The court began by noting that plaintiffs were masters of their complaints, and could defeat removal by relying exclusively on state law and choosing not to plead independent federal claims.[227] The court acknowledged that the plaintiffs could not defeat removal by failing to plead a necessary federal question, but found no such questions to exist.[228] Noting key differences between the markets for natural gas and electricity, such as the gas market's lack of institutional mechanisms such as the ISO and California Power

217. Pub. Util. Dist. No. 1 of Grays Harbor County v. Idacorp, Inc, 379 F.3d 641 (9th Cir. 2004).

218. Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc., 384 F.3d 756 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3298 (U.S. Nov. 5, 2004) (No. 04-621).

219. *Idacorp, Inc.*, 379 F.3d at 652.

220. *Id.* at 649, 651–52; *Snohomish*, 384 F.3d at 761.

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

222. *Id.* at 1015.

223. California *ex rel.* Lockyer, 383 F.3d at 1014.

224. *Id.* at 1016.

225. *In re* W. States Wholesale Natural Gas Antitrust Litig., 346 F. Supp. 2d 1123, 1126 (D. Nev. 2004).

226. *Id.* at 1123.

227. *Antitrust Litig.*, 346 F. Supp. 2d at 1129.

228. *Id.*

Exchange, the absence of a governing tariff, the lack of individualized pre-market determinations (concerning the absence or mitigation of market power), and the lack of periodic rate filings, the court distinguished Ninth Circuit decisions such as *Grays Harbor* and *Snohomish*, and found that plaintiffs' claims under the California's antitrust and unfair competition laws were neither preempted by the Natural Gas Act (NGA) nor within the exclusive domain of the FERC.[229] The court found that the complaints had failed to raise any federal questions, and since the court had no original jurisdiction over plaintiffs' state-law claims in the absence of diversity of citizenship, the plaintiffs' motion to remand was granted.[230]

D. *Williams Gas Processing—Gulf Coast Co., L.P. v. FERC*

In July 2004, the D.C. Circuit held that the FERC exceeded its authority in asserting jurisdiction over an interstate pipeline's gathering affiliate.[231] Section 1(b) of the NGA states that the NGA does not apply to the production or gathering of natural gas.[232] The FERC has asserted, however, that where a pipeline acts in concert with an affiliated gathering company in a manner that frustrates the FERC's ability to regulate the pipeline, the agency may disregard the separate corporate structure and regulate the gathering affiliate as if its facilities were owned by the pipeline.[233]

Shell Offshore Inc. (Shell) filed a complaint with the FERC alleging that Transcontinental Gas Pipe Line Corp. (Transco), an interstate pipeline, and Williams Field Services (WFS), an affiliated gathering company, had leveraged their dominance in the area of North Padre Island, Texas, in order to force Shell to pay unjust and unreasonable rates and accept anticompetitive terms and conditions. The FERC agreed, reasserting jurisdiction over the spun-down gathering facilities held by WFS.[234]

The D.C. Circuit reversed, finding that the allegedly anticompetitive actions such as charging exorbitant rates and imposing onerous conditions, had nothing to do with its affiliation with Transco.[235] Any ability of WFS to engage in such conduct resulted from its status as a deregulated monopolist operating in the North Padre Island market area, and not from the fact that it operated in concert with an affiliated interstate pipeline. Moreover, there was no showing that concerted actions of Transco and WFS frustrated the FERC's ability to regulate Transco. As a result, the court held that the FERC's action failed to satisfy its own test articulated in *Arkla Gathering*. The court found it unnecessary to address the broader argument that the NGA never permits the FERC to assert jurisdiction over gathering companies, whether or not they are affiliated with interstate pipelines.[236]

229. *Antitrust Litig.*, 346 F. Supp. 2d at 1123.

230. *Id.*

231. Williams Gas Processing—Gulf Coast Co. v. FERC, 373 F.3d 1335 (D.C. Cir. 2004).

232. Natural Gas Act § 3, 15 U.S.C. § 717(b) (2000).

233. *Arkla Gathering Servs. Co.*, 67 F.E.R.C. ¶ 61,257, 61,871 (1994).

234. *Shell Offshore, Inc.*, 98 F.E.R.C. ¶ 61,253 (2002).

235. *Williams Gas Processing—Gulf Coast Co.*, 373 F.3d at 1335.

236. *Id.*

E. *Utilimax.com, Inc. v. PPL Energy Plus, LLC*

In March 2004, the Third Circuit held that a retail electricity marketer's claims that an electricity supplier had exercised undue market power, in violation of the Sherman and Clayton Acts and various state laws, were barred by the filed rate doctrine.[237] Although wholesale electric rates, including the capacity charges in question, were unquestionably subject to FERC jurisdiction, the plaintiff had argued that its claims fell within both "the competitor and the non-rate anticompetitive activity exceptions" to the filed rate doctrine.[238]

The court found both exceptions inapplicable. Although the plaintiff was, in fact, a competitor of the defendant in the retail electric market, the activities that gave rise to the antitrust claims occurred in the wholesale market, where the plaintiff was a customer, and not a competitor. The non-rate anticompetitive activity exception was rejected because the plaintiff had failed to allege any such activity on the part of the defendant.[239]

F. *Snake River Valley Electric Ass'n v. Pacificorp*

In February 2004, the Ninth Circuit held that recently-enacted Idaho legislation conferred state action immunity with respect to various antitrust claims brought against an electric utility.[240] The complaint, brought by a local electric cooperative, alleged that the utility had wrongfully refused to wheel power to the cooperative and to sell the cooperative portions of its distribution system. The statutory amendments allowed electric suppliers to refuse to wheel power where it would result in retail wheeling or a sham wholesale transaction. A supplier refusing to wheel power on those grounds was obligated to petition the Idaho Public Utilities Commission (PUC) for a review of whether the refusal was consistent with the new legislation.[241]

The amendment also prohibited a supplier from serving customers of another supplier, unless the proposed supplier petitioned the PUC and the PUC issued an order allowing the service.[242] The court held that the new statutory scheme satisfied both prongs of the Supreme Court's *Midcal* test concerning state action immunity: (i) the legislation set forth a clearly-articulated state policy to allow certain anticompetitive conduct in order to stabilize the retail electric market; and (ii) it provided for active state supervision, through the PUC, of any permitted anticompetitive activities.[243]

G. *Modesto Irrigation District v. Pacific Gas & Electric Co.*

In March 2004, the U.S. District Court for the Northern District of California dismissed an antitrust claim brought by an irrigation district against a local electric utility. The district claimed that the utility, Pacific Gas and Electric Company, had attempted to prevent the district from offering electric service in

237. Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303 (3d Cir. 2004).

238. *Id.* at 306.

239. *Utilimax.com*, 378 F.3d at 303.

240. Snake River Valley Elec. Ass'n v. Pacificorp, 357 F.3d 1042 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 416 (2004).

241. *Id.* at 1048.

242. *Snake River*, 357 F.3d at 1048.

243. *Id.* at 1047 (citing Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)).

Pittsburg, California. After an extensive analysis of California law, the court concluded that the district lacked the statutory authority to provide electric service within the town, and therefore could not prove an antitrust injury.[244]

H. Dagher v. Saudi Refining, Inc.

In June 2004, the Ninth Circuit reversed a district court's dismissal of an antitrust complaint against Shell Oil, Co. and Texaco, Inc.[245] The complaint, brought on behalf of a class of service station owners, alleged price-fixing in violation of the Sherman Act. Shell and Texaco had formed a joint venture, which, among other things, established a single, unified price for both Shell and Texaco gasoline, even though the two brands continued to be marketed and sold separately. The court remanded the case for a determination of whether the pricing arrangement was an ancillary agreement that was reasonably necessary to further the legitimate aims of the joint venture, or a naked restraint that would constitute a *per se* violation of section 1 of the Sherman Act.[246]

244. Modesto Irrigation Dist. v. Pac. Gas and Elec. Co., 309 F. Supp.2d 1156 (N.D. Cal. 2004).

245. Dagher v. Saudi Ref. Inc., 369 F.3d 1108 (9th Cir. 2004), *petitions for cert. filed*, 73 U.S.L.W. 3363 (U.S. Dec. 14, 2004) (No. 04-805), 73 U.S.L.W. 3376 (U.S. Dec. 14, 2004) (No. 04-814). Defendant Saudi Refining Inc. (SRI) was dismissed from the case because the plaintiffs had purchased no products from SRI and had failed to produce evidence linking SRI to a price-fixing conspiracy in Western United States.

246. *Id.*