REPORT OF THE COMPETITION AND ANTITRUST COMMITTEE

This report summarizes antitrust and competition developments of particular interest to energy law practitioners that occurred in 2008 and updates certain developments that occurred in 2009.*

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I. FEDERAL ENERGY REGULATORY COMMISSION

A. Rules and Orders

1. Standards of Conduct for Transmission Providers: Order No. 717

On October 16, 2008, the Federal Energy Regulatory Commission (FERC) issued Order No. 717,[1] which makes a number of fundamental changes to the Standards of Conduct, which were originally promulgated in Order No. 2004,[2] and replaces the previous Part 358 of the FERC's regulations with a new Part 358.[3] The Standards of Conduct generally seek to prevent electric and natural gas transmission providers[4] from leveraging market power over transmission to give affiliated transmission customers an advantage over unaffiliated customers. The central reform instituted by Order No. 717, which responded to the D.C. Circuit's remand of Order No. 2004 in *National Fuel*, is the elimination of the "corporate separation" approach adopted in Order No. 2004 and the return to the "employee functional" approach adopted in Order Nos. 497[5] and 889.[6] Order No. 717 seeks to facilitate compliance and enforcement by streamlining the Order No. 2004 Standards of Conduct's two core rules: (1) the Independent Functioning Rule, which requires "[t]ransmission function employee[s]"[7] to function separately and independently from "[m]arketing function employee[s],"[8] and (2) the No Conduit Rule, which prohibits disclosures of non-

1. Standards of Conduct for Transmission Providers, 73 Fed. Reg. 63,796 (Oct. 27, 2008) (codified at 18 C.F.R. pt. 358 (2009)) [hereinafter *Order No. 717*].

2. Standards of Conduct for Transmission Providers, 68 Fed. Reg. 69,134 (Dec. 11, 2003); Order on Rehearing, 69 Fed. Reg. 23,562 (Apr. 29, 2004); Order on Rehearing, 69 Fed. Reg. 48,371 (Aug. 10, 2004); Order on Rehearing, 70 Fed. Reg. 284 (Jan. 4, 2005); *Standards of Conduct for Transmission Providers*, 110 F.E.R.C. ¶ 61,320 (2005); *vacated and remanded as it applies to natural gas pipelines by* Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006) [hereinafter *National Fuel*].

3. 18 C.F.R. pt. 358 (2009) [hereinafter *Revised Standards*].

4. The Revised Standards apply to any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of Part 284 of the FERC's regulations and any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce that conducts transmission transactions with an affiliate that engages in "marketing functions," *i.e.*, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of natural gas or electric energy, capacity, ancillary services, and other electricity products, subject to certain exceptions. 18 C.F.R. § 358.3(c) (2009).

5. Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, 53 Fed. Reg. 22,139 (June 14, 1988); Order on Rehearing, 54 Fed. Reg. 52,781 (Dec. 22, 1989); Order Extending Sunset Date, 55 Fed. Reg. 53,291 (Dec. 28, 1990); Order Extending Sunset Date, 57 Fed. Reg. 9 (Jan. 2, 1992); Order Denying Rehearing, 57 Fed. Reg. 5,815 (Feb. 18, 1992); *aff'd in part and remanded in part in* Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992); Order on Remand, 57 Fed. Reg. 58,978 (Dec. 14, 1992); Order on Rehearing and Extending Sunset Date, 59 Fed. Reg. 243 (Jan. 4, 1994); Order Denying Rehearing and Granting Clarification, 59 Fed. Reg. 15,336 (Apr. 1, 1994); Order Extending Sunset Date, 59 Fed. Reg. 32,884 (June 27, 1994) [hereinafter *Order No.* 497].

6. Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21,737 (May 10, 1996); Order on Rehearing, 62 Fed. Reg. 12,484 (Mar. 14, 1997); Order Denying Rehearing, 62 Fed. Reg. 64,715 (Dec. 9, 1997) [hereinafter *Order No. 889*].

7. A "[t]ransmission function employee" is an employee, agent, consultant or contract that performs transmission functions. 18 C.F.R. § 358.3(j) (2009). "Transmission functions" means transmission system operations and the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests. *Id.* § 358.3(h).

8. A "[m]arketing function employee" is an employee, agent, consultant or contract that performs marketing functions, as defined above. 18 C.F.R. § 358.3(d) (2009). For a natural gas transmission provider,

public transmission system or customer information to marketing function employees. Order No. 717 also pares back the coverage of the Order No. 2004 Standards of Conduct, simplifies and reorganizes the existing non-discrimination, posting, and disclosure requirements, expands the scope of permitted information exchanges, and generally retains the existing training and implementation procedures. The FERC required transmission providers to be in full compliance with the Revised Standards by November 26, 2008, but granted them additional time to comply with the posting and training requirements.

Order No. 717 narrows the coverage of the Standards of Conduct. First, Order No. 717 eliminates the concept of "energy affiliate,"[9] so that the Revised Standards do not govern the relationship between a transmission provider and its energy affiliates. Second, as was the case under Order No. 497, the Revised Standards apply to a transmission provider when it commences transmission transactions with an affiliate, whereas the Order No. 2004 Standards of Conduct applied to a newly-formed transmission provider and its affiliates prior to the construction or placement in service of its transmission facilities.[10]

The Revised Standards prohibit a transmission provider from unduly discriminating against any transmission customer, whether affiliated or non-affiliated, and from making or granting any undue preference or advantage to any person or subjecting any person to any undue prejudice or disadvantage with respect to the interstate transmission or wholesale sale of electric energy or natural gas.[11] A transmission provider must also provide equal access to non-public transmission function information to all of its transmission customers, except in the case of confidential customer information or Critical Energy Infrastructure Information (CEII).[12] With respect to implementation of its tariff, a transmission provider must strictly enforce all tariff provisions relating to open access transmission service that do not permit the use of discretion,[13] and for those that do, the transmission provider must treat all customers in a fair and impartial manner.[14] Finally, a transmission provider must process all similar requests for transmission service in the same manner and timeframe.[15]

The Independent Functioning Rule requires a transmission provider to ensure that its transmission function employees operate independently of its

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marketing functions do not include (i) bundled retail sales; (ii) incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities; (iii) sales of natural gas solely from a seller's own production; (iv) sales of natural gas solely from a seller's own gathering or processing facilities; and (v) sales by an intrastate natural gas pipeline, a Hinshaw pipeline, or a local distribution company making an on-system sale. For an electric transmission provider, marketing functions do not include bundled retail sales and sales of electric energy made by providers of last resort acting in this capacity. *Id.* at § 358.3(d).

9. *Order No. 717*, *supra* note 1, at 63,798. Subject to certain exclusions, an "energy affiliate" is defined as:

[A]n affiliate of a transmission provider that: (1) engages in or is involved in transmission transactions in U.S. energy or transmission markets; (2) manages or controls transmission capacity of a transmission provider in U.S. energy or transmission markets; (3) buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets. *Id*. at 63,797 (repealed).

10. 18 C.F.R. § 358.1(a)-(b) (2009); *Order No. 717*, *supra* note 1, at 63,800.

11. *Id.* § 358.2(a).

12. *Id.* § 358.2(d).

13. *Id.* § 358.4(a).

14. *Id.* § 358.4(b).

15. *Id.* § 358.4(d).

marketing function employees.[16] Under the Revised Standards, this means that a transmission provider must prohibit (i) its marketing function employees from conducting transmission functions, (ii) its marketing function employees from having access to transmission system control facilities or similar facilities used for transmission operations that differs in any way from the access available to other transmission customers, and (iii) its transmission function employees from conducting marketing functions.[17]

Order No. 717 limits the coverage of the Independent Functioning Rule (which under the Order No. 2004 Standards of Conduct had previously applied to all employees of marketing and energy affiliates) by defining the employees subject to it as those transmission function and marketing function employees who "actively and personally engages on a day-to-day basis" in transmission or marketing functions, respectively.[18] Consequently, supervisors, officers, directors, and "shared" employees (*e.g.*, attorneys, accountants, and personnel involved in risk management, regulatory compliance, rate design, and strategic planning) who were covered by this rule under the Order No. 2004 Standards of Conduct are no longer subject to this rule under the Revised Standards if they are not actively and personally engaged on a day-to-day basis in such functions. For example, a supervisor who merely signs off on functional activities without having directed or organized them is not "personally engaged" in such activities.[19] Similarly, executives involved in corporate governance, strategic and long-range planning, or setting the general negotiating parameters for wholesale contracts are not covered by this rule because they are not involved "on the day-to-day operation."[20] Shared employees such as lawyers and accountants may advise or support both marketing function employees and transmission function employees.[21] These employees must, however, continue to observe the No Conduit Rule.

Under the No Conduit Rule, a transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission system or customer information to marketing function employees.[22] Similarly, all employees of the transmission provider and its affiliates who are engaged in marketing functions are prohibited from disclosing such non-public information to marketing function employees.[23] The No Conduit Rule continues to apply to shared employees, supervisors, officers, and directors, as well as to any other person employed or retained by an affiliate who engages in marketing functions.[24]

16. *Id.* § 358.5(a).

17. *Id.* § 358.5(b).

18. *Id.* § 358.3(d) & (i).

19. *Order No. 717*, *supra* note 1, at 63,809.

20. *Id.* at 63,810.

21. *Id.* at 63,811.

22. 18 C.F.R. § 358.6(a) (2009).

23. *Id.* § 358.6(b).

24. Notwithstanding the restrictions of the Independent Functioning and No Conduit Rules, transmission function employees and marketing function employees may exchange (i) information pertaining to compliance with reliability standards approved by the Commission, and (ii) information necessary to maintain or restore operation of the transmission system or generating units, or that may affect the dispatch of generating units. In the event of such disclosure, a transmission provider must make a contemporaneous record of the information

Order No. 717 also contains various disclosure and posting requirements. If a transmission provider discloses non-public transmission information (other than non-public customer information or CEII) in violation of the No Conduit Rule, the transmission provider must immediately post such information on its website.[25] If a transmission provider discloses non-public customer information or CEII in violation of the No Conduit Rule, it must immediately post a notice on its website that such information was disclosed, but not the non-public information itself.[26] These disclosure requirements are subject to two exceptions for discussions with marketing function employees of specific transaction information or where a transmission customer voluntarily consents to disclosure of its information.[27]

The Revised Standards also contain posting requirements that are largely identical to those under the Order No. 2004 Standards of Conduct, except that the return to the employee functional approach limits the existing posting requirements to a narrower range of employee and affiliate information. A transmission provider is required to post the following information on its website: (1) the current version of its written procedures for compliance with the Revised Standards;[28] (2) information regarding its affiliates and their employees;[29] (3) specified employee information;[30] and (4) notice of each waiver of a tariff provision that it grants in favor of an affiliate, unless the waiver has been approved by the FERC.[31]

Order No. 717 generally retains the Order No. 2004 Standards of Conduct's training and implementation procedures. Under the Revised Standards, transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission system and customer information (*e.g.*, shared employees) must receive training and copies of the written compliance procedures.[32]

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exchange (except in emergency circumstances, in which case a record must be made of the exchange as soon as practicable after the fact), which must be retained for five years and made available to the FERC upon request. *Id.* § 358.7(h).

25. *Id.* § 358.7(a)(1).

26. *Id.* § 358.7(a)(2).

27. *Id.* § 358.7(b) & (c).

28. *Id.* § 358.7(d).

29. This affiliate information includes (1) the names and addresses of all its affiliates that employ or retain marketing function employees, (2) a complete list of the employee-staffed facilities that are shared by any of the transmission provider's transmission function employees and marketing function employees; and (3) information pertaining to potential merger partners that may employ or retain marketing function employees, which must be posted within seven days after the potential merger is announced. *Id.* § 358.7(e).

30. This employee information includes (1) the job titles and job descriptions of its transmission function employees; and (2) a notice and specified employee information for any transfer of a transmission function employee to a position as a marketing function employee (or vice versa), which must remain on its website for at least ninety days. *Id.* § 358.7(f).

31. *Id.* § 358.7(i).

32. *Id.* § 358.8(c).

2. Merger Policy: FPA Section 203 Supplemental Policy Statement

On July 20, 2007, the FERC issued its "FPA Section 203 Supplemental Policy Statement,"[33] which clarifies certain aspects of the FERC's policy regarding public utility mergers and the acquisition and disposition of utility securities and assets, including guidance concerning: (1) information that must be filed as part of FPA Section 203 applications for transactions that do not raise cross-subsidization concerns; (2) the types of applicant commitments and ring-fencing measures that, if offered, might address cross-subsidization concerns; (3) the treatment of "secondary market" securities transactions; (4) what constitutes a disposition of control of jurisdictional facilities for purposes of FPA Section 203; and (5) the FERC's Appendix A competitive analysis.

With respect to cross-subsidization issues under FPA Section 203, the Supplemental Policy Statement recognizes three "safe harbors" for transactions that are unlikely to raise cross-subsidization issues: (1) transactions that do not involve a franchised public utility with captive customers; (2) transactions subject to review by a state commission that adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or against encumbrances of utility assets for the benefit of unregulated affiliates; and (3) transactions involving only non-affiliates.[34] Instead of introducing federally mandated ring-fencing or other restrictions to protect against cross subsidization, the FERC will continue to examine proposed transactions on a case-by-case basis, including a review of whether the relevant state commissions have the authority to impose cross-subsidy protections or already have such protections in place.[35] The FERC reasoned that deference to state commissions in this situation is appropriate because retail customers typically represent the vast majority of load served by such franchised public utilities, and since ring-fencing measures typically affect the entire corporation, these measures protect both retail and wholesale customers.[36] The Supplemental Policy Statement also provides guidance to applicants that do not make the "safe harbor" demonstration or that do not demonstrate that cross-subsidy issues are not present.[37]

With respect to "secondary market" securities transactions,[38] the FERC clarified that neither public utilities nor public utility holding companies have an obligation to seek approval of a "disposition" of jurisdictional facilities for such

33. FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. 42,277 (Aug. 2, 2007) [hereinafter *Supplemental Policy Statement*]; *order on reconsideration and clarification*, FPA Section 203 Supplemental Policy Statement, 122 F.E.R.C. ¶ 61,157 (2008).

34. *Supplemental Policy Statement*, *supra* note 33, at 42,280-81.

35. *Id.* at 42,280.

36. *Id.* at 42,281.

37. The FERC suggests that, although not mandated by the FERC's regulations under FPA Section 203, one way to make the requisite demonstration would be to propose ring-fencing measures and then describes what it would consider an appropriate ring-fencing structure for internal corporate financings such as money pool or cash management transactions. The FERC emphasized, however, that these are simply examples of measures it would consider, and that it will evaluate proposals based on the facts and circumstances of each particular case. *Id.*

38. "Secondary market transactions" are purchases or sales of the securities of a public utility or its upstream holding company by a third-party investor, but do not include the securities' initial issuance or reacquisition by the issuer. *Id.* at 42,283.

trades under FPA Section 203(a)(1)(A).[39] The FERC notes that thousands of shares of the stock of a public utility or public utility holding company may be traded on a daily basis by non-public utility third parties, particularly if the stock is widely held and publicly traded, and neither a public utility holding company nor a public utility subsidiary of the holding company are parties to these transactions and cannot know in advance what trading will occur or whether direct or indirect "control" over the public utility is being acquired.[40]

The FERC also clarified what constitutes a passive investment not requiring Section 203 authorization. According to the Supplemental Policy Statement, and investment in a public utility that does not convey control will be considered to be passive investment not subject to section 203(a)(1)(A) if, among other things,

> (1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.[41]

The FERC also noted that it would apply a rebuttable presumption that a transfer of less than 10 percent of a public utility's holdings is not a transfer of control if:

> (1) [A]fter the transaction, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility; and
> (2) the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility.[42]

Finally, the Supplemental Policy Statement clarifies aspects of its Appendix A analysis, under which the FERC assesses a merger's effect on competition in wholesale electric markets. Among other things, the FERC clarified that it will continue to attribute contracted capacity to the purchaser if such a contract confers operational control over the generation to the purchaser and that it would require applicants to file purchase and sales data, including information on whether the terms and conditions of purchase contracts confer operational control over generation to the purchaser. Moreover, if an applicant fails its competitive analysis screen, the FERC stated that it will consider the merged firm's contractual positions as well as its physical control of generation in its market power analysis.[43]

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39. The FERC notes that if the acquiror of securities is a public utility holding company, however, it may have an obligation to file for approval under FPA Section 203(a)(2), and if the acquirer is another public utility, it may also have to file under FPA Section 203(a)(1)(C). *Id.* at 42,283, note 27.

40. *Id.*

41. *Id.* at 42,285-86.

42. *Id.* at 42,286.

43. *Id*. at 42,289.

3. Market-Based Rate Policy

a. Order No. 697-A

On April 21, 2008, the FERC issued Order No. 697-A,[44] which clarifies a number of issues regarding the FERC's market-based rate policies. First, the FERC provided a number of clarifications regarding its horizontal market power analysis, which consists of two generation market power screens: the Pivotal Supplier Analysis and the Wholesale Market Share Screen. Failure of either screen establishes a rebuttable presumption of horizontal market power and further analysis in the form of a Delivered Price Test is required to determine whether the seller in fact has market power. In Order No. 697-A, the FERC adopts a rebuttable presumption that the FERC-approved market monitoring and mitigation measures for markets administered by regional independent system operators and transmission organizations (ISOs/RTOs) sufficiently mitigate market power in those markets, even if a market-based rate seller fails one or both of the FERC's horizontal market power screens.[45]

The FERC also made two clarifications regarding the simultaneous transmission import limit (SIL) study used to calculate the amount of the sellers' and its competitors' capacity that can be imported into the relevant geographic market. First, the SIL study must account for all firm transmission reservations, transmission reliability margin, and capacity benefit margin.[46] Second, the FERC clarified that in the SIL Study the simultaneous transmission import capability should first be allocated to the seller's uncommitted remote generation and then to any uncommitted competing supplies.[47]

With respect to the FERC's vertical market power analysis, the FERC offered the following guidance. The FERC clarified that, for the purposes of the barriers to entry element, the term "inputs to electric power production" includes "physical coal sources and ownership or control over who may access transportation of coal via barges and railcar trains."[48] The FERC also explained

44. Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 72 Fed. Reg. 39,904 (July 20, 2007), *clarified* 121 F.E.R.C. ¶ 61,260 (2007), *order on reh'g* Order 697-A, 73 Fed. Reg. 25,832 (May 7, 2008) [hereinafter *Order No. 697-A*], *clarified* 124 F.E.R.C. ¶ 61,055 (2008), *order on reh'g* Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008) [hereinafter *Order No. 697-B*].

45. *Order No. 697-A, supra* note 44, at 25,849. The effectiveness of existing ISO/RTO mitigation may be challenged in individual market-based rate proceedings. Any challenger would bear the burden of proof to show that ISO/RTO mitigation is insufficient. The FERC added, to the extent the Commission may have already considered and rejected the substance of such challenges, a party would be required to show changed circumstances to sustain its burden of proving that existing mitigation is inadequate. *Id.* at 25,850. The FERC also stated that, if a seller located in an ISO/RTO is found not to be adequately mitigated, the FERC may investigate in a Section 206 proceeding whether the existing ISO/RTO mitigation is just and reasonable in considering what mitigation it might impose, either for that seller or on an ISO/RTO-wide basis. *Id.*

46. *Id.* at 25,854.

47. The FERC provided the following hypothetical example of how to perform this type of SIL study:

[I]f the SIL limit is 200 MW, the seller and its affiliates' uncommitted generation capacity in first-tier markets is 150 MW, and competing uncommitted generation capacity in first-tier markets is 350 MW, then to properly perform the indicative screens the seller's uncommitted generation capacity in the relevant market is increased by 150 MW and competing supply in the relevant market is increased by 50 MW. *Id.* at 25,854-55, note 208.

48. *Id.* at 25,859.

that sellers are not required to account for Financial Transmission Rights in their vertical market power analysis.[49]

Order No. 697-A also made a number of changes to the FERC's affiliate rules. First, the FERC codified into its market-based rate regulations the Order No. 707[50] definition of "affiliate," which adopts separate distinct definitions of affiliate for entities that are exempt wholesale generators (EWGs) and for those that are not, based on the definition in the now repealed Public Utility Holding Company Act of 1935.[51] Second, the FERC replaced the more restrictive, two-way information sharing restriction adopted in Order No. 697 for exchanges between a franchised public utility with captive customers and its market-regulated power sales affiliate with a one-way information sharing restriction (more or less identical to the "No-Conduit Rule" under the Revised Standards), so that a franchised public utility with captive customers is prohibited from sharing market information with a market-regulated power sales affiliate, but there is no corresponding restriction on information sharing flowing from the market-regulated power sales affiliate.[52] Third, the new affiliate restrictions codified in Section 35.39 of the FERC's regulations[53] supersede sellers' previously approved codes of conduct, and, in the event of any conflict the codified restrictions take precedence over previously approved codes of conduct.[54] Fourth, the FERC clarified that a franchised public utility with market-based rate authority does not require separate FPA Section 205 authorization for sales to an affiliated franchised public utility, as it would if it were going to make sales to an affiliate other than a franchised public utility.[55]

Order No. 697-A granted rehearing regarding the FERC's default mitigation policy for long-term sales, defined as sales of one year or greater, and explained that the FERC will allow mitigated sellers to make case-by-case demonstrations that they do not possess market power with respect to long-term contracts. In doing so, the FERC explained that the indicative screens and the Delivered Price Test only detect whether a seller exercises market power in the short-term.[56]

b. Order No. 697-B

On December 18, 2008, the FERC issued Order No. 697-B, which offered additional clarifications regarding the FERC's market-based rate policies. When performing the screen analysis for a given geographic market (*i.e.*, a balancing authority area), market-based rate sellers must consider imports of their own and affiliated generation from adjacent, first-tier markets. In Order No. 697-B, the FERC clarified that sellers must allocate their seasonal and longer transmission reservations to themselves from the calculated SIL only up to the uncommitted

49. *Id.* at 25,858.

50. Cross-Subsidization Restrictions on Affiliate Transactions, Order No. 707, 73 Fed. Reg. 11,013 (Feb. 21, 2008).

51. *Order No. 697-A*, *supra* note 44, at 25,860 (because these definitions were revised by Order No. 697-B, they are not provided here).

52. *Id.* at 25,867.

53. 18 C.F.R. § 35.39 (2009).

54. *Order No. 697-A*, *supra* note 44, at 25,868.

55. *Id.* at 25,865.

56. *Id.* at 25,872.

first-tier generation capacity owned, operated, or controlled by the seller and its affiliates.[57]

The FERC also revised its definition of "affiliate." The FERC's market power analysis treats a seller and its "affiliates" as being under common control and attributes to a seller all the generation, transmission facilities, and inputs to electric power production that are owned or controlled by its affiliates.[58] In Order No. 697-B, the FERC changed its longstanding policy of applying a stricter definition of "affiliate" for EWGs than for non-EWGs,[59] which had been reaffirmed in Order No. 697-A, as discussed above. In Order No. 697-B, the FERC adopted a single definition of "affiliate," which establishes a rebuttable presumption at the ten percent ownership threshold for both EWGs and non-EWGs.[60]

In performing market power screens, sellers must include all generation owned or controlled by the seller and its affiliates. The FERC clarified in Order No. 697-B that it will require a seller that owns a generation facility, but claims that it does not control the facility, *e.g.*, due to a contractual arrangement that transfers control, to seek a "letter of concurrence" from other affected parties that identifies the degree to which each party controls a facility and to submit these letters with its filing and clarified that it will only rely on the seller's assertion of a lack of control of a generating facility that it owns if a letter of concurrence from other affected parties is submitted by the seller with its filing.[61]

The FERC imposes mitigation on sellers that are found, or presumed, to have market power in a given market by requiring them to charge cost-based rates in that market. With respect to sales at the metered boundary between a market in which a seller has market power and one in which it does not, in Order No. 697-B the FERC revised the standard market-based rate tariff provision to state that "if the Seller wants to sell at the metered boundary of a mitigated balancing authority area at market-based rates, then neither it nor its affiliates

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57. *Order No. 697-B*, *supra* note 44, at 79,614; *See infra*, note 59.

58. *Id.*

59. Specifically, an entity was considered to be an affiliate of an EWG if it held a voting interest of five percent or more in the EWG. For non-EWGs, the Commission established a rebuttable presumption that two entities were affiliated with each other if one held a voting interest of 10 percent or more in the other, or if a third entity owned 10 percent or more of each non-EWG entity. *See, e.g., Morgan Stanley Capital Group, Inc*., 72 F.E.R.C. ¶ 61,082 (1995).

60. 18 C.F.R. § 35.36(a)(9) (2009). The definition of "affiliate" in Section 35.36(a)(9) of the FERC's regulations includes additional elements, as set forth below:

(9) Affiliate of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

61. *Order No. 697-B*, *supra* note 44, at 79,615.

can sell into that mitigated balancing authority areas from the outside."[62] This provision is intended to prevent an affiliate of a mitigated seller from selling power that was purchased at a market-based rate at the metered boundary back into the balancing authority area in which the seller has been found, or presumed, to have market power.[63]

4. Wholesale Competition In Regions With Electric Organized Markets: Order No. 719

On October 17, 2008, the FERC issued Order No. 719,[64] which adopted measures to improve the operation of organized wholesale electric markets in the following areas: (1) demand response and market pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of ISOs and RTOs to stakeholders and customers. Order No. 719 became effective December 29, 2008, (60 days after publication in the Federal Register).

Order No. 719 seeks to eliminate barriers to demand response and encourage the use of market prices to elicit demand response through adoption of the following requirements. First, ISOs/RTOs must accept bids from demand response resources for certain ancillary services on terms comparable to those submitted by other resources.[65] Second, during system emergencies ISOs/RTOs must eliminate penalties for purchasing less energy in the real-time market than in the day-ahead market.[66] Third, ISOs/RTOs must permit retail aggregators to bid demand response on behalf of their retail customers directly into the organized energy market on the same terms as other demand response bidders, unless prohibited from doing so by state or local regulators.[67] Fourth, ISOs/RTOs must modify the market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage, while at the same time maintaining reliability and mitigating market power.[68] The FERC did not mandate the method by which an ISO or RTO must achieve this "scarcity" pricing objective but suggested four approaches that an ISO or RTO may use to develop market rule changes to be filed with the FERC.[69] In addition, ISOs/RTOs must study and report to the FERC whether further reforms are necessary to eliminate barriers to demand response in organized markets.[70]

With respect to long-term power contracting, Order No. 719 requires ISOs/RTOs to dedicate a portion of their websites for market participants to post

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62. *Id.* at 79,623.

63. *Id.*

64. Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008) [hereinafter *Order No. 719*].

65. *Order No. 719, supra note* 64, at 64,101.

66. *Id.*

67. *Id.*

68. *Id.*

69. The four suggested approaches are: (1) the ISO/RTO would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) the ISO/RTO would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) the ISO/RTO would establish a demand curve for operating reserves; and (4) the ISO/RTO would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. *Id.* at 64,126.

70. *Id.* at 64,101-02.

offers to buy or sell power on a long-term basis.[71] The ISO/RTO is not responsible for the content of such bids and offers.

Order No. 719 also requires ISOs/RTOs to adopt measures to enhance the independence of ISO/RTO market monitoring units (MMU) and to increase the transparency of such market monitoring activities. First, the MMU should report to the board of directors instead of the ISO/RTO management.[72] Second, an ISO/RTO must provide its MMU with access to market data, resources, and personnel sufficient to carry out the MMU's duties.[73] Third, Order No. 719 modifies the market power mitigation and tariff administration responsibilities of MMUs. MMUs will continue to implement retrospective mitigation measures (*e.g.*, calculation of after-the-fact mitigation true-ups for billing purposes and settlement price adjustments), whereas the ISO/RTO will be responsible for prospective mitigation, thereby precluding MMUs from affecting market outcomes and avoiding conflicts of interest.[74] Fourth, Order No. 719 requires ethical standards to be in place for the MMU and its employees. Finally, in Order No. 719 the FERC mandates that the MMU functions should include responsibility for: identifying ineffective market rules and market designs and recommending proposed rules and tariff changes; reviewing and reporting (on a quarterly and annual basis) on the performance of the wholesale markets;[75] and notifying FERC's Office of Enforcement (OE) Staff of a broader range of instances in which a market participant's behavior requires investigation.[76]

Finally, Order No. 719 establishes new criteria designed to ensure that an ISO/RTO is responsive to its customers and stakeholders, including requiring ISOs/RTOs to provide stakeholders direct access to the board of directors. In Order No. 719, the FERC states that it will evaluate ISO/RTO reforms to increase responsiveness based on inclusiveness, fairness in balancing diverse interests, representation of minority positions, and ongoing responsiveness.[77] The FERC directs each ISO and RTO to initiate a stakeholder process to consider the reforms required by Order No. 719 and to submit a compliance filing within six months after the Federal Register publication demonstrating how its existing practices are already sufficient to meet these above-referenced requirements in the four main areas or describe its plan to achieve compliance.[78]

II. JUDICIAL DECISIONS

A. *In re Western States Wholesale Natural Gas Antitrust Litigation I*

In *In re Western States Wholesale Natural Gas Antitrust Litigation*,[79] the court granted plaintiff natural gas consumers' motion to alter or amend judgment

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71. *Id.* at 64,102.

72. *Id.*

73. *Id.*

74. *Id.*

75. These reports are to be made available to the ISO/RTO, the FERC, and other interested entities, including state commissions, state attorneys general and market participants.

76. *Id.*

77. *Id.*

78. *Id.*

79. 2007 WL 2178054 (D. Nev. July 27, 2007) [hereinafter *Western States I*].

under Fed. R. Civ. P. 59(e), and denied defendant natural gas sellers' motion to dismiss plaintiffs' antitrust claims as barred by the Filed Rate Doctrine.

In doing so, the court reversed its decision in *In re Western States Wholesale Natural Gas Antitrust Litigation,*[80] which had granted defendants' motion to dismiss on the basis of the Filed Rate Doctrine, finding that it had erred in making a factual determination that defendants held blanket marketing certificates and engaged in sales for resale within the FERC's jurisdiction.[81] Plaintiffs' complaint did not allege that defendants made sales for resale within the FERC's jurisdiction, but it did allege that defendants' sales of natural gas included their own or affiliates' production and thus would have qualified as "first sales" under the Wellhead Decontrol Act (WDA),[82] which are not subject to the FERC's jurisdiction.[83] The court also rejected defendants' argument that plaintiffs' complaint, by alleging that defendants engaged in "wash trades" and "churning," conceded that their sales were sales for resale because such sales for resale were not necessarily FERC-jurisdictional.[84]

The court found that the plaintiffs' claims did not violate the Filed Rate Doctrine because the "damage calculation will not require the Court to determine what a just and reasonable rate would have been in the natural gas market absent Defendants' alleged misconduct."[85] Plaintiffs had brought their claim under a Kansas antitrust statute, which allows plaintiffs to recover "the full consideration or sum paid by such person for any goods, wares, merchandise and articles. . . ."[86] The court interpreted this provision to allow plaintiffs to establish injury by presenting "[e]vidence of price control, price artificiality, or Plaintiffs' financial decisions. . .," and thus did not require the court to determine whether prices were just and reasonable or the "but-for competitive price" in contravention of the Filed Rate Doctrine.[87] While the plaintiffs' complaint did allege that they were injured by having to pay higher prices for natural gas than they would have in the absence of the alleged antitrust violations, the court rejected defendants' argument to dismiss on this ground because plaintiffs' complaint also alleged that they had been injured as a result of being "deprived of the right to make risk management, resource allocation and other financial decisions in a full and free competitive market for natural gas."[88]

Finally, the court rejected defendants' argument that their affiliation with FERC-jurisdictional natural gas pipelines and local distribution companies established that their sales were FERC-jurisdictional and therefore antitrust claims against them based on these FERC-jurisdictional sales were barred by the Filed Rate Doctrine.[89] Again, the court emphasized that plaintiffs' complaint

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80. 471 F. Supp. 2d 1076 (D. Nev. 2006).

81. *Western States I*, 2007 WL 2178054, at *2.

82. Natural Gas Wellhead Decontrol Act of 1989, Pub. L. 101-60, 103 Stat. 157 (1989).

83. *Western States I*, 2007 WL 2178054, at *2-3.

84. *Id.* at *3.

85. *Id.* at *6.

86. *Id.* (*quoting* KAN. STAT. ANN. § 50-115 (2007)).

87. *Id.* at *7.

88. *Id.*

89. *Id.* at *8-9.

alleged that defendants' sales included "first sales" from their own or their affiliates' production, which falls outside the FERC's jurisdiction.[90]

B. *In re Western States Wholesale Natural Gas Antitrust Litigation II*

In *In re Western States Wholesale Natural Gas Antitrust Litigation*,[91] the Court of Appeals for the Ninth Circuit reversed and remanded a decision by the District Court of Nevada that granted defendant natural gas sellers' motion to dismiss plaintiff natural gas consumers' state and federal antitrust claims as barred by the Filed Rate Doctrine. Relying on its recent decision in *E. & J. Gallo Winery v. EnCana Corp.*[92] (discussed in Section C, *infra*), the court emphasized that the Filed Rate Doctrine does not bar claims based on retail rates.[93] Because plaintiffs' complaint alleged that all of their purchases of gas were for consumption, the court found that the district court erred in granting defendants' motion to dismiss based on the Filed Rate Doctrine.[94]

The court also rejected defendants' argument that antitrust claims against them were barred by the Filed Rate Doctrine because they were affiliates of natural gas pipelines subject to the FERC's jurisdiction. Construing plaintiffs' complaint in the light most favorable to plaintiffs, the court concluded that some of these sales might have been of the pipeline's own production or sales of Mexican or Canadian origin and would therefore have been "first sales" under the WDA, which are not subject to the FERC's jurisdiction.[95] The court further suggested that certain defendants might have engaged in false reporting of transactions to publishers of indices, in which case the Filed Rate Doctrine would not bar claims based on such conduct.[96]

Finally, the court rejected defendants' argument that their settlement agreements with the FERC demonstrated that the FERC has jurisdiction over their natural gas transactions and that claims based on these transactions were barred by the Filed Rate Doctrine.[97] In particular, the court found that the FERC's finding that defendant Reliant's sales were not "first sales" because Reliant was an affiliate of an interstate pipeline was erroneous because an interstate pipeline affiliate could engage in first sales of its own production or gas of Mexican or Canadian origin.[98] The court concluded that the FERC's determination of Reliant's jurisdictional status contradicted the plain language of the WDA, and was therefore not owed deference under the *Chevron* doctrine.[99]

90. *Id.* at *9.

91. 248 Fed. Appx. 821 (9th Cir. 2007) [hereinafter *Western States II*].

92. 503 F.3d 1027 (9th Cir. 2007).

93. *Western States II*, *supra* note 91, at 822.

94. *Id.*

95. *Id.*.

96. *Id.*at 822-23.

97. *Id.* at 823 (citing *Reliant Energy Service*, 105 F.E.R.C. ¶ 61,008, *reh'g dismissed* , 105 F.E.R.C. ¶ 61,253 (2003) and *Duke Energy North America, L.L.C.*, 105 F.E.R.C. ¶ 61,307, *reh'g dismissed*, 106 F.E.R.C. ¶ 61,177 (2004)).

98. *Id.*

99. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

C. E. & J. Gallo Winery v. EnCana Corp.

In *E. & J. Gallo Winery v. EnCana Corp.*,[100] the court affirmed the district court's decision in *E. & J. Gallo Winery v. EnCana Corp* ,[101] which held that (1) the Filed Rate Doctrine bars challenges to market-based rates for FERC-jurisdictional natural gas; (2) factual issues precluded summary judgment for defendants on the grounds that the Filed Rate Doctrine bars claims based on rates reported in indices to which customer's retail rates were pegged; and (3) the Filed Rate Doctrine does not bar claims based on rates derived from transactions that are not subject to the FERC's jurisdiction.

According to the court, the primary issue in this case was whether the Filed Rate Doctrine "can bar damage claims based on an index that represents market-based wholesale rates, but that is not a rate itself."[102] The court's analysis of this issue was preceded by a lengthy analysis of whether market-based rates for non-"first sales" constituted filed rates for which damages claims were barred by the Filed Rate Doctrine. The court concluded that challenges to market-based rates for FERC-jurisdictional natural gas are barred by the Filed Rate Doctrine, relying heavily on its previous decisions holding that challenges to electric market-based rates are barred by the Filed Rate Doctrine.[103]

The court first noted that the Filed Rate Doctrine bars claims in which retail purchasers' "damages arose from upstream FERC-approved wholesale rates" that were passed through to retail rates.[104] Accordingly, to the extent that plaintiff's "challenge to the indices is a challenge to those market-based wholesale rates subject to FERC's jurisdiction that are included in the indices," plaintiff's claim was barred by the Filed Rate Doctrine.[105]

With respect to the indices in question, the court first noted that there was evidence that these indices included non-FERC-jurisdictional transactions, including "first sales," as well as a number of either falsely-reported or fictitious transactions.[106] The court concluded that "[m]isreported rates and rates reported for fictitious transactions are not FERC-approved rates" and that the Filed Rate Doctrine does not bar claims based on such rates.[107] The court ultimately found that "to the extent the indices are comprised of rates that are not FERC-authorized rates, the Filed Rate Doctrine does not bar Gallo's claim that such rates are unfair and led to unfair retail rates paid by Gallo."[108] The court held that for defendant EnCana to avail itself of the Filed Rate defense, "EnCana would have had to establish that all transactions in the indices were transactions

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100. 503 F.3d 1027 (9th Cir. 2007) [hereinafter *Gallo*].

101. 2005 WL 2435900 (E.D. Cal. Sept. 30, 2005).

102. *Gallo*, *supra* note 100, at 1035.

103. *Id.* at 1039-1041 (*citing* Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Energy L.P., 379 F.3d 641 (9th Cir. 2004); Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc., 384 F.3d 756 (9th Cir. 2004); and California *ex rel.* Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004)).

104. *Id.* at 1043-44.

105. *Id.*

106. *Id.* at 1045.

107. *Id.*

108. *Id.* at 1048.

under FERC jurisdiction."[109] Since EnCana could not do so, the court denied its motion for summary judgment.[110]

The court rejected defendants' argument that the WDA barred claims based on "first sales" because, in enacting the Natural Gas Policy Act of 1978 (NGPA)[111] (which excluded "first sales" from the FERC jurisdiction), Congress intended to preempt state regulation of "first sales." The court concluded that Congress's decision not to expressly preempt first sales from state and federal antitrust laws indicated a lack of intent to do so.[112] The court further noted that state and federal antitrust laws "complement[,] rather than undermine. . . Congress' intent to move toward a less regulated national natural gas market" in the WDA and NGPA "because they support fair competition."[113] According to the court, the withdrawal of FERC's authority to determine rates for first sales gives rise to the "inference, that normal market forces, including the tug and pull of private lawsuits, will hold sway."[114]

The court also rejected EnCana's argument that the Filed Rate Doctrine barred claims based on first sales under Section 601(b)(1)(A) of the NGPA,[115] which provides that "for purposes of sections 4 and 5 of the Natural Gas Act (NGA), any amount paid in any first sale of natural gas shall be deemed to be just and reasonable." The court first noted that Section 601(a) of the NGPA[116] provides that the NGA "shall not apply to any natural gas solely by reason of any first sale of such natural gas," which eliminates the FERC's general authority over first sales under the NGA.[117] According to the court, these two provisions can be read as "ensuring that [the] FERC will not exercise its rate-setting jurisdiction in a way that prevents regulated entities from recovering amounts paid in first sales" and thus prevents the FERC from creating "its own 'cost-trapping' scenario."[118]

D. *City of Moundridge v. Exxon Mobil Corp.*

In *City of Moundridge v. Exxon Mobil Corp.*,[119] the court granted in part and denied in part defendant natural gas sellers' motion to dismiss for failure to state a claim regarding plaintiff municipalities' allegations that defendant natural gas sellers conspired to artificially inflate the price of natural gas through their participation in the National Petroleum Council (NPC), an advisory committee to

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109. *Id.* at 1049.

110. While the court ultimately concluded that factual issues precluded summary judgment because the district court did not determine the exact nature of the transactions comprising the index on which plaintiff's rates were based. The court noted that "if the number of non-FERC-authorized rates included in the index was *de minimis* compared to the number of FERC-authorized rates, the impact of any manipulation of the non-FERC-authorized rates may have had a *de minimis* impact on the rates paid by Gallo." *Id.* at 1044-1045, note 13.

111. 15 U.S.C. §§ 3301-3432 (2006).

112. *Gallo*, *supra* note 100, at 1046.

113. *Id.* (*quoting* Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss., 474 U.S. 409 (1986)).

114. *Id*.

115. 15 U.S.C. § 3431(b)(1)(A) (2006).

116. 15 U.S.C. § 3431(a) (2006).

117. *Gallo, supra* note 100, at 1047.

118. *Id.*

119. 471 F. Supp. 2d 20 (D.D.C. 2007) [hereinafter *Moundridge*].

the United States Department of Energy. Specifically, plaintiffs' complaint alleged that defendants conspired to influence a report issued in 2003 (NPC Report). According to the plaintiffs, the NPC Report falsely stated that there is, and will continue to be, a shortage of natural gas in the United States and that higher prices were required to meet increasing demand.[120] Plaintiffs further alleged that defendants caused gas prices to reflect or surpass the projections in the NPC Report by reducing or excluding supplies from the market over a sustained period of time.[121]

The court held that plaintiffs stated a claim under Section 1 of the Sherman Act.[122] The court noted that plaintiffs had alleged that: (1) defendants conspired to fix prices through their participation in the NPC Report; (2) contrary to defendants' statements in the NPC Report, the data regarding total reserves and usage provided no evidence of a shortage of natural gas; (3) the NPC Report was an agreed-upon floor for prices; and (4) prices had not fallen below those agreed-upon prices.[123] The court held that, "[b]ased on this circumstantial evidence, plaintiffs have alleged an agreement that may constitute a violation of [Section 1] of the Sherman Act . . . ."[124] The court further noted that plaintiffs' allegations in their supplemental complaint regarding the high prices of natural gas in the futures market and the "staggering profits" reported by defendants "further create an inference that the defendants conspired to fix the price of natural gas."[125]

The court rejected defendants' argument that plaintiffs' claims were barred by the *Noerr-Pennington* doctrine.[126] According to the defendants, their participation in the NPC was protected by the *Noerr-Pennington* doctrine because the NPC Report constituted solicitation of governmental action with respect to the passage and enforcement of laws to promote the efficiency of markets.[127] In rejecting this argument, the court emphasized that the *Noerr-Pennington* doctrine "does not protect 'every concerted effort that is genuinely intended to influence government action.'"[128] Plaintiffs did not allege that the NPC as a whole, or all of its individual members, participated in the conspiracy or that "defendants raised the price of natural gas pursuant to a valid legislative or administrative directive."[129] As a result, the court found that plaintiffs' allegation that defendants attempted to inflate the price of natural gas artificially could be construed only as a purely private action, which does not enjoy *Noerr-Pennington* immunity.[130]

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120. *Id.* at 37.

121. *Id.*

122. 15 U.S.C. § 1 (2006).

123. *Moundridge, supra* note 119, at 40-41.

124. *Id.* at 41.

125. *Id.* at 40-41.

126. *See generally,* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) [hereinafter *Noerr*]; United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) [hereinafter *Pennington*]. The Noerr-Pennington doctrine immunizes from antitrust liability certain attempts to influence governmental action, even if the requested action would have anticompetitive effects.

127. *Moundridge*, *supra* note 119, at 38.

128. *Id*. (*quoting* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1988)).

129. *Id.* at 39.

130. *Id.*

The court granted defendants' motion and dismissed plaintiffs' claims of monopolization, attempted monopolization, and conspiracy to monopolize under Section 2 of the Sherman Act,[131] as well as price discrimination claims which had been brought under Section 2(a) of the Robinson-Patman Act.[132] The monopolization claims were rejected because the plaintiffs, while alleging concerted action, had failed to allege the necessary market domination by any particular defendant.[133] The court dismissed the price discrimination claims because plaintiffs had failed to allege several required elements, including any actual sale of natural gas by a defendant to a plaintiff.[134]

Finally, the court dismissed all claims against one defendant, Coral Energy Resources, L.P. (Coral), a natural gas marketer, because it did not sell its own production, so that all of its sales were wholesale, non-"first sales" and thus subject to the FERC's exclusive jurisdiction. For those reasons, all claims against Coral were barred by the Filed Rate Doctrine.[135]

E. Schafer v. Exelon Corp.

In *Schafer v. Exelon Corp.*,[136] the court granted the motion of defendant utilities and generators to dismiss plaintiffs' class action claims under federal and state antitrust laws. The plaintiffs alleged that defendants engaged in a conspiracy to rig the 2006 Illinois wholesale electric power auction (Illinois Auction).[137]

The utility defendants, Exelon Corp. and Commonwealth Edison Co., were subject to the jurisdiction of the Illinois Commerce Commission (ICC) and had retail rates on file with the ICC.[138] The auction was conducted pursuant to an Illinois state law, the Electric Service Customer Choice and Rate Relief Law of 1997,[139] which had frozen rates from 1997 through 2006, which allowed utilities to sell generating plants to affiliates or third parties, and required them to enter into contracts to buy wholesale power thereafter. The ICC approved the Illinois Auction to be run by an auction manager and supervised by an auction monitor.[140]

131. 15 U.S.C. § 2 (2006).

132. 15 U.S.C. § 13(a) (2006).

133. *Moundridge*, *supra* note 119, at 42.

134. *Id.* at 44.

135. *Id.* at 44-45.

136. *Schafer v. Exelon Crop.*, 619 F. Supp. 2d 499 (N.D. Ill. 2007) [hereinafter *Schafer*].

137. *Id.* at 511.

138. *Id.* at 516.

139. 220 ILL. COMP. STAT. 5/16-101-130 (1997).

140. *Schafer*, *supra* note 136, at 513. On March 16, 2007, the Illinois Attorney General filed a complaint with FERC in Docket No. EL07-47-000, alleging that the wholesale rates resulting from the auction were unjust and unreasonable, requesting an investigation of possible collusion and anticompetitive behavior, and seeking revocation of market-based rate authority for sellers found to have engaged in wrongdoing. The parties subsequently entered into a settlement, which was contingent upon the approval of the Illinois General Assembly. On July 26, 2007, the General Assembly passed legislation approving the settlement, and it was signed by the Governor of Illinois on August 28, 2007. As a result, the FERC dismissed the complaint on October 4, 2007. *See, Illinois ex rel. Attorney General Madigan v. Exelon Generation Co.*, 121 F.E.R.C. ¶ 61,015 (2007). Although the dismissal order did not discuss the details of the settlement, the legislation provided that an electric utility could "recover its full costs of procuring electric supply for which it contracted before the effective date of [the legislation and] . . . [a]ll such [costs] shall be deemed to have been prudently

The court held that plaintiffs' claims were barred by the Filed Rate Doctrine.[141] The court noted that the FERC had approved the auction structure; the FERC had approved and accepted for filing the market-based rate tariff of each wholesale defendant; and the utilities' generation affiliates, Exelon Generating Co. and Ameren Energy Marketing Co., had filed applications and received authorization from the FERC to make wholesale sales to their affiliates through the Illinois Auction process if their bids were selected.[142] As such, the court concluded that the market-based rate tariffs "constitute FERC authorization of the market-based rates charged by each wholesale defendant, including the Illinois auction rates attacked here."[143]

The court further rejected plaintiffs' argument that they did not seek to challenge the reasonableness of the FERC-approved rates because plaintiffs sought damages based on "supra-competitive prices."[144] The court responded that these rates flowed from the retail tariffs filed with the ICC; the ICC had expressly approved the use of the Illinois Auction to procure wholesale power; and the wholesale rates resulting from the Illinois Auction "were passed on in retail electricity rates pursuant to the retail utility defendants' ICC-approved retail rates."[145]

The court also rejected the argument that the FERC lacked the authority to provide filed rate protection for the market-based rates resulting from the Illinois Auction and that the FERC orders approving the Illinois Auction were ultra vires.[146] According to the court, these arguments constituted a collateral attack on the FERC orders authorizing the Illinois Auction.[147] Under Section 313 of the FPA,[148] a party may challenge a FERC order only by seeking rehearing before the FERC and then petitioning a Court of Appeals for review, which plaintiffs (unlike the Illinois Attorney General) had failed to do.[149] Finally, the court noted that plaintiffs' complaint failed to meet the pleading requirements of Fed. R. Civ. P. 8 under the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,[150] because plaintiffs had failed to identify or describe any alleged parallel conduct.

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incurred." *Schafer*, *supra* note 136, at 513-514 (*quoting* Pub. Act 95-481, 220 Ill. Comp. Stat. 5/16-111.5(1)) (1997).

141. *Schafer*, *supra* note 136, at 517.

142. *Id.* at 512-515.

143. *Id*. at 514.

144. *Id.* at 515.

145. *Id*. at 516.

146. *Id.* at 515.

147. *Id.*

148. *Id.*

149. *Id.* at 516 (*citing* Sections 313(a) and (b) of the Federal Power Act, 16 U.S.C. § 825l (a) and (b) (2006), and City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958)).

150. 550 U.S. 544 (2007).

III. AGENCY INVESTIGATIONS

A. Energy Transfer Partners, L.P.

In *Energy Transfer Partners, L.P.*,[151] the FERC directed Energy Transfer Partners, L.P., along with certain affiliates and subsidiaries (collectively, ETP), to show cause why it should not be found to have manipulated natural gas markets in violation of the now repealed Market Behavior Rule 2,[152] why it should not be ordered to pay civil penalties of $82 million and disgorge unjust profits of nearly $70 million, and have its blanket marketing certificate revoked.[153] Specifically, the FERC alleged that ETP violated Market Behavior Rule 2 by manipulating wholesale natural gas prices at the trading hubs of Houston Ship Channel (HSC) and Waha, Texas.[154] The FERC claimed that, in nine months during the period from December 2003 through December 2005, ETP manipulated the *Platts Inside FERC* (IFERC) HSC index by selling fixed-price gas for less than a competitive price.[155] The allegedly manipulative fixed-price sales were executed during "bid week" (*i.e.*, the last five business days of the month) for delivery during the following month.[156] ETP reported these sales to IFERC, which used these sales to calculate the IFERC HSC index for the following month.[157]

The FERC alleged that ETP dominated sales of fixed-price gas at HSC, often comprising eighty percent or more of total sales[158] and ETP reported its fixed price sales at HSC to IFERC and thus was able to use its domination of the market to virtually set the IFERC HSC index.[159]

The FERC further alleged that ETP's trading suppressed the IFERC HSC index—and thereby widened the basis at HSC—by an amount ranging from $0.05 for gas for February 2005 delivery to $1.55 for gas for October 2005 delivery.[160]

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151. 120 F.E.R.C. ¶ 61,086 [hereinafter *Energy Transfer*]; *reh'g denied*, 121 F.E.R.C. ¶ 61,282 (2007); *reh'g denied*, 124 F.E.R.C. ¶ 61,149 (2008).

152. Market Behavior Rule 2 prohibited holders of natural gas blanket marketing certificates "from engaging in actions and transactions that are without a legitimate business purpose and that are intended to or foreseeably could, manipulate market prices, market conditions, or market rules for natural gas." 18 C.F.R. § 284.403(a) (2008) (repealed). Market Behavior Rule 2 has been repealed, and replaced by the FERC's current Anti-Manipulation Rule in Part 1c of the FERC's regulations. 18 C.F.R. Pt. 1c (2009). *See also* Prohibition of Energy Market Manipulation, Order No. 670, 71 Fed. Reg. 4,244 (2006) (promulgating Anti-Manipulation Rule) [hereinafter *Order No. 670*]. The FERC interpretation of what constitutes manipulative conduct thereunder remains relevant because the FERC stated in Order No. 670 that the specific prohibitions contained in Market Behavior Rule 2 are examples of manipulation prohibited under the FERC's currently-effective Anti-Manipulation Rule. *Order No. 670*, *supra*, at 4,254.

153. *Energy Transfer*, *supra* note 151, at 1. In *Energy Transfer*, the FERC also directed ETP pipeline subsidiaries to show cause why they had not violated the FERC's regulations prohibiting unduly preferential and/or and unduly discriminatory treatment of shippers and why they should not be assessed over $15 million in civil penalties. *Id.* at 2.

154. *Id.* at 34-35.

155. *Id*. at 39.

156. *Id.* at 5.

157. *Id.* at 6.

158. *Id.*

159. *Id*.

160. *Id*. at 39-40, Chart 1 (summarizing the FERC's estimates of the effect on the HSC basis and the IFERC HSC index of ETP's trading in the nine months when the alleged manipulation took place).

ETP allegedly benefited from suppressing the IFERC HSC index in two ways. First, ETP was consistently a net buyer of gas at the IFERC HSC index due to its contracts with producers that sold gas to ETP at the index price, plus or minus a certain adjustment, and the suppressed IFERC HSC index lowered the price of these net purchases.[161] Second, ETP took a position in a financial instrument, the HSC "basis swap",[162] that benefited from suppressing the IFERC HSC index.[163] The FERC estimated that ETP's total benefits from such trading exceeded $67 million, with the vast majority, over $40 million, from trading in gas for delivery in October 2005.[164]

In reaching its view that ETP had the ability to suppress prices at HSC, and that its trading in fact suppressed prices there, the FERC relied on ETP's large share of trades that HSC executed on the Intercontinental Exchange, Inc.'s (ICE) trading platform (above eighty percent in all but one of the nine months) and the decoupling of prices between HSC and other nearby pricing points in east and south Texas that historically traded at similar prices.[165]

In alleging that ETP had the requisite intent to manipulate prices at HSC, the FERC cited voice recordings of ETP executives and traders that, in the FERC's view, established that ETP intended to manipulate the index.[166] The FERC also considered the fact that ETP had taken short HSC basis swap positions in excess of what it needed to hedge its sales at HSC as evidence of manipulative intent because these positions would multiply the returns ETP would receive from further widening the HSC basis.[167] Finally, the FERC emphasized what it characterized as "[t]he deceptive manner in which [ETP] concealed its role as a large net purchaser."[168]

The FERC also alleged that ETP violated Market Behavior Rule 2 on two occasions in December 2005 by selling fixed price gas for next day delivery at the Waha, Texas trading hub to suppress the index published by *Gas Daily* at that point.[169] ETP allegedly sold fixed-price daily gas at Waha, while making offsetting purchases of the *Gas Daily* index, so that ETP's position was roughly

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161. *Id.* at 6.

162. In *Energy Transfer*, the FERC defined a basis swap as follows: A basis swap is a derivative instrument whose value is based on the difference between the New York Mercantile Exchange Natural Gas Futures Contract (NYMEX Contract) settlement price for a given month and the index at a specified location for that same month. The NYMEX Contract is a contract for the future delivery of gas at Henry Hub, a liquid trading point in Louisiana, which usually trades at a higher price than HSC. *Id.* at 7.

163. According to the FERC, "ETP took a 'short' position in HSC basis swaps, which means that it bet that prices at HSC would fall relative to the NYMEX Contract, *i.e.*, the spread between prices at these two points would widen." *Id.*

164. *Id.*

165. *Id.* at 39-40, Chart 1 (summarizing ETP's market share on ICE and divergence between HSC and other Texas pricing points).

166. *Id.* at 51-54.

167. *Id.* at 64.

168. *Id.* at 63. The FERC characterized ETP's trading as follows: ETP instead engaged in a circuitous process of first selling the gas at a fixed price to suppress the IFERC HSC index and then buying the gas back at the reduced price levels. ETP's fixed-price sales artificially inflated the trading volume at HSC, falsely conveying the message to the market that HSC had excess supplies of gas. ETP's repeated sales of what amounted to the same gas set the IFERC HSC index at a price that did not reflect the true levels of supply and demand. *Id.*

169. *Id.* at 129.

flat.[170] According to the FERC, ETP traded in this manner to benefit its short position in Permian and Waha "index swaps."[171] According to the FERC, ETP cycled its fixed-price trades into gas prices using the *Gas Daily* index, which the FERC characterized as "misrepresenting itself to the marketplace as a net seller while actually having a flat position."[172]

On September 21, 2009, the FERC approved a settlement of the alleged violations involving manipulation in exchange for, among other things, a payment of $5 million in civil penalties and $25 million in disgorgement.[173]

B. Amaranth Advisors L.L.C.

In *Amaranth Advisors L.L.C.*,[174] the FERC directed Amaranth Advisors, L.L.C., along with certain affiliates and/or subsidiaries (collectively, Amaranth), along with certain individual traders, to show cause why they should not be found to have manipulated the price of FERC-jurisdictional transactions by means of trading in the New York Mercantile Exchange natural gas futures contracts (NYMEX Contract) for March, April, and May 2006 delivery. The FERC also directed Amaranth and certain traders to show cause why they should not be ordered to pay civil penalties of $232 million (including $30 million for the head trader and $2 million for another trader) and disgorge unjust profits of $59 million.[175]

According to the FERC, Amaranth traded NYMEX Contracts for these months in a manner that was intended to produce, and in fact produced, artificial "settlement prices"[176] by selling an extraordinary amount of these contracts during the settlement period. Amaranth did so, the FERC asserted, to benefit its much larger short positions in natural gas swaps traded on ICE and NYMEX.[177] The value of these swaps "*increased* as a direct result of the decrease in the settlement price" of the NYMEX Contract,[178] so that for every dollar Amaranth lost on its sales of the NYMEX Contract "it would gain several dollars on its

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170. *Id.*

171. According to the FERC, the short position in Waha index swaps "means that the holder, ETP, is buying Gas Daily index at Waha and selling the Inside FERC index at Waha. Thus, ETP's short index position profited from a falling GasDaily price." *Id.* at 137.

172. *Id*. at 136.

173. *Energy Transfer Partners, L.P.*, 128 F.E.R.C. ¶ 61,269 (2009).

174. 120 F.E.R.C. ¶ 61,085 (2007) [hereinafter *Amaranth*]; *reh'g denied*, 121 F.E.R.C. ¶ 61,224 (2007) [hereinafter *Amaranth Rehearing Order*]; *reh'g denied*, 124 F.E.R.C. ¶ 61,050 (2008).

175. *Id.* at 8.

176. The "settlement price" is the "volume-weighted average price of trades made during the 30-minute 'settlement period,' which is the last 30 minutes of trading on the termination day" of the futures contract for the next month delivery. *Id.* at 14. The "termination day" is the third-to-last business day of the month, and "the settlement period occurs from 2:00 p.m. to 2:30 p.m. on the termination day." *Id.*

177. For example, during the settlement period for the March 2006 NYMEX Contract on February 24, 2006, Amaranth sold its long position of 3,000 NYMEX Contracts, while letting its short position in March 2006 swaps of over 13,000 futures contract equivalents expire. *Id.* at 76-78. On March 29, 2006, Amaranth sold its long position of over 1,300 April 2006 NYMEX Contracts, while letting a short position in April 2006 swaps of over 17,000 futures contract equivalents expire. *Id.* at 86-89. On April 26, 2006, Amaranth placed orders to sell its long position of over 3,000 May 2006 NYMEX Contracts during the last eight minutes of trading, while letting a short position in May 2006 swaps of over 22,000 futures contract equivalents expire. *Id.* at 97-99.

178. *Id.* at 5.

derivative financial positions."[179] In finding this conduct to be manipulative, the FERC emphasized that Amaranth's trading in the NYMEX Contract would have been economically irrational, but for the larger swap positions.[180]

The FERC further alleged that Amaranth and its individual traders intentionally manipulated the settlement price of the NYMEX Contract and that this manipulation was "in connection with" three types of FERC-jurisdictional transactions.[181] First, the NYMEX Contract settlement price determines the price in FERC-jurisdictional "physical basis" transactions.[182] The price of a physical basis transaction is the NYMEX Contract settlement price for a given month "plus or minus a fixed amount representing the expected 'basis' (or differential for delivery at the delivery location versus Henry Hub) at the time of the transaction."[183] Thus, in the FERC's view, any manipulation of the NYMEX Contract settlement price would "inevitably result in a penny-for-penny change in the prices used in physical basis transactions."[184] A second and larger category of FERC-jurisdictional transactions affected were index transactions at locations where physical basis transactions constitute all or most of the bidweek transactions used to calculate the index at that point, in particular points in the Northeast, Mid-Continent, and the Gulf Coast.[185] Finally, the settlement price sets the price of physical gas for NYMEX Contracts that actually go to delivery.[186]

Amaranth and one of the individual traders named in the *Amaranth* show cause order have repeatedly raised jurisdictional challenges, both in the FERC show cause proceeding and at the district court level, alleging that the FERC lacked jurisdiction over Amaranth's trading activities and seeking to enjoin the FERC's enforcement action.[187] To date, none of these challenges have been successful.[188]

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179. *Id*.

180. *Id*. As the FERC explained: Concentrated selling of the [NYMEX] Contract to liquidate a long position (or buying to liquidate a short position) would normally reduce the value received, so that the overall payoff would always be less than that from a non-manipulative, price-taking strategy. However, such a strategy could be profitable to a trader who has set up its portfolio with *opposing* swap or physical positions that are much greater in scale (highly leveraged) than the [NYMEX] Contract position so as to benefit from these otherwise adverse movements in the [NYMEX] Contract. *Id.* at 62.

181. *Id.* at 6.

182. *Id.* at 20.

183. *Id*.

184. *Id.*

185. *Id.* at 22.

186. *Id*. at 26.

187. *See generally Amaranth Rehearing Order, supra* note 173. *See also* Hunter v. FERC, 569 F. Supp. 2d 12, 15-17 (D.D.C. 2008).

188. *Id.* (dismissing motion for declaratory judgment that the FERC lacked jurisdiction and holding that the FERC's enforcement action is subject to exclusive jurisdiction of Court of Appeals pursuant to Section 19 of the NGA); Hunter v. FERC, 527 F. Supp. 2d 9 (D.D.C. 2007) (dismissing motion for preliminary injunction enjoining the FERC's enforcement action); CFTC v. Amaranth Advisors, L.L.C., 523 F. Supp. 2d 328, 338 (S.D.N.Y. 2007) (dismissing motion for preliminary injunction enjoining the FERC's enforcement action and holding that the FERC's enforcement action is subject to exclusive jurisdiction of Court of Appeals pursuant to Section 19 of the NGA).

On August 12, 2009, FERC approved a settlement of the above violations with the Amaranth entities and one of the traders in exchange for, among other things, a payment of $7.5 million in civil penalties.[189]

C. *DC Energy, L.L.C. v. H.Q. Energy Services (U.S.), Inc.*

On September 26, 2007, the FERC issued an order[190] directing its Office of Enforcement (OE) to initiate a non-public investigation in response to a complaint filed by DC Energy, LLC (DC Energy) alleging that H.Q. Energy Services (U.S.), Inc. (HQ) manipulated the markets for energy and Transmission Congestion Contracts (TCCs)[191] administered by the New York Independent System Operator, Inc. (NYISO) and engaged in predatory pricing. On September 29, 2008, the FERC issued an order[192] dismissing the complaint based on OE Staff's findings that no violation of the FERC's anti-manipulation regulations had occurred. These findings are detailed in an OE Staff report attached to the order.[193]

OE Staff found that, HQ, the largest supplier of power to NYISO's Zone M, switched from its historical "price discovery" bidding strategy to a congestion-hedged "price taker" strategy in April 2007.[194] DC Energy alleged that HQ's original bidding strategy was a strategy to keep TCC prices low so that it could purchase TCCs at low cost, and that HQ's change in strategy in the energy market was intended to maximize its returns on its TCCs, even at the cost of sustaining losses in the energy market.

OE Staff concluded that HQ did not engage in fraudulent or manipulative conduct because HQ Energy's energy market price-taker bids and reliance on TCCs to hedge the risk of congestion were legitimate actions or transactions "explicitly contemplated in [FERC]-approved rules and regulations" of an

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189. *Amaranth Advisors, L.L.C.,* 128 F.E.R.C. ¶ 61,154 (2009). FERC has not settled with Amaranth's head trader. On February 12, 2009, the FERC rejected a settlement agreement negotiated by FERC Staff. While the terms of the proposed settlement have not been made public, the FERC stated that "Amaranth profited far in excess of the proposed settlement amounts as a direct result of alleged manipulation" and that, in light of "the gravity of the alleged violations, … the remedies offered in the [proposed] Settlement" were insufficient. *Amaranth Advisors L.L.C.*, 126 F.E.R.C. ¶ 61,112 at P 4 (2009).

190. *DC Energy, L.L.C. v. H.Q. Energy Servs., L.L.C.*, 120 F.E.R.C. ¶ 61,281 (2007).

191. TCCs are financial instruments that allow their holder to receive, or obligate the holder to pay, the difference in price between a source and a sink node. For example, a holder of a TCC with source A and sink B will be paid the difference in price between A and B if A's price falls below B's. Conversely, the holder would be obligated to pay the difference in price if A's price rose above B's.

192. *DC Energy, L.L.C. v. H.Q. Energy Servs., L.L.C.*, 124 F.E.R.C. ¶ 61,295 (2008).

193. FERC, NON-PUBLIC INVESTIGATION INTO DC ENERGY'S ALLEGATIONS OF MARKET MANIPULATION BY HQ ENERGY IN THE NEW YORK INDEPENDENT SYSTEM OPERATOR ENERGY AND TRANSMISSION CONGESTION CONTRACT MARKETS (Sept. 29, 2008).

194. According to the HQ OE Staff Report, a price discovery strategy is bidding at just below the expected clearing price with the result that the seller does not sell if the price is unexpectedly low. A price taker bids such that it always sells all that it offers. The price the price taker receives depends both on the price for the entire market and the capacity of the interface at which it sells. Interface capacity limits or congestion can drive the price at a particular interface below the overall market price. By purchasing TCCs for a particular interface, a seller can hedge against congestion at that interface, receiving the difference between the overall market price and the interface price from the holder of the other side of the hedge. In other words, an unhedged price taker receives the interface price while a (perfectly) congestion-hedged price taker receives the overall market price. *Id.* at 10-15.

applicable power market.[195] According to OE Staff, NYISO's FERC-approved market structure encourages market participants to bid their marginal cost, *i.e.*, to be price takers, and therefore "necessarily contemplates parties such as HQ Energy purchasing TCCs to hedge the risk of congestion that may result from price-taker bids."[196] OE Staff concluded that HQ changed its strategy in response to the entry of additional sellers in Zone M starting in late 2005 and an increase in HQ's supply of hydroelectric power in early 2007, rather than for some fraudulent or manipulative purpose.[197] OE Staff further found that HQ could expect to receive the market-clearing price, irrespective of the price it offered at Zone M, so that in those circumstances, offering power as a price taker would not have been contrary to HQ's economic interest.[198] OE Staff also found no evidence in support of DC Energy's claims that HQ was over-hedged (*i.e.*, that it had bought more TCCs than necessary, in the hopes that it would profit from increased congestion), which DC Energy claimed gave HQ the incentive and the leverage to increase congestion.[199] Finally, OE Staff concluded that there was no evidence that HQ intended to, or acted recklessly to, manipulate these markets and that, instead, HQ acted in an economically rational manner to execute a legitimate commercial strategy.[200]

D. New York In-City Installed Capacity Market Investigation

On July 6, 2007, the FERC issued an order instituting a paper hearing to consider proposed reforms to the New York City Installed Capacity (NYC ICAP) market administered by the NYISO and directed OE Staff to investigate whether any entity had manipulated this market.[201] In a report issued on March 7, 2008, OE Staff concluded that no violation of the FERC's Anti-Manipulation Rule had occurred and closed its investigation.[202]

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195. *Id.* at 16 (*quoting Order No. 670*, *supra* note 152, at 4,255).

196. *Id.*

197. *Id.* at 17-18.

198. *Id.* at 19.

199. *Id.* at 20-21.

200. *Id.* at 23.

201. *N.Y. Indep. Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,024 (2007). This proceeding commenced when NYISO filed proposed reforms to the NYC ICAP market, including the mitigation provisions that were adopted in 1998 in connection with Consolidated Edison, Inc.'s (ConEd) divestiture of most of its generation to KeySpan-Ravenswood, L.L.C. (KeySpan), multiple subsidiaries of NRG Energy Inc. (collectively, NRG), and Astoria Generating Company, L.P. (Astoria) (collectively, the Divested Generation Owners or DGOs). Because these divestitures resulted in a high degree of concentration in the NYC ICAP market, the FERC approved ConEd's mitigation proposal to require the divested units to bid their capacity into their capacity into auctions conducted by NYISO and to adopt a $105/kW-year offer and revenue cap on sales of ICAP from the divested units. *See N.Y. Indep. Sys. Operator, Inc.*, 122 F.E.R.C. ¶ 61,211 at 3 (2008) [hereinafter *NYISO*].

202. FERC, ENFORCEMENT STAFF REPORT FINDINGS OF A NON-PUBLIC INVESTIGATION OF POTENTIAL MKT. MANIPULATION BY SUPPLIERS IN THE N.Y CITY. CAPACITY MARKET (Feb. 28, 2008) [hereinafter *NYC ICAP OE Staff Report*]. On the same day, the FERC issued the *NYISO* order, which conditionally approved the NYISO plan to mitigate market power in the NYC ICAP market. The Antitrust Division of the Department of Justice (DOJ) also apparently conducted an investigation of the NYC ICAP market, although to date the DOJ has not issued any public documents regarding the investigation. Instead, the only information regarding the DOJ's investigation has been in public filings of entities that were the target of the investigation. *See, e.g.*, Nat'l Grid Annual Report and Accounts 2007/08 at 25, available at http://www.nationalgrid.com/NR/rdonlyres/99D89568-91DF-4B7D-9827-BC7053B4805B/26420/00_National_Grid_RA_2009.pdf (last visited Sept. 9, 2009).

The FERC directed OE Staff to initiate the investigation in response to allegations filed by parties to the paper hearing proceeding (including NYISO's independent market monitor) that suppliers in the NYC ICAP market had engaged in economic withholding by consistently offering capacity at their offer price caps.[203] These parties noted that, since the inception of the NYISO, NYC ICAP market prices had generally been at or near the DGOs offer price caps and that since 2003 the auction prices had been set by KeySpan at its price cap.[204] In the spring and summer of 2006, the NYISO control area added approximately 1,000 MW of NYC ICAP, but the increased capacity failed to drive down capacity prices, which, according to the complainants, was a result of economic withholding by the DGOs.[205]

OE Staff concluded that neither KeySpan, nor any of the other DGOs, had violated the FERC's Anti-Manipulation Rule.[206] OE Staff noted that NYISO's market rules required the DGOs to bid all of their capacity into the NYC ICAP auctions, so it would not have been possible for them to manipulate prices through physical withholding.[207] OE Staff rejected the allegations that the DGOs had manipulated the NYC ICAP market through economic withholding for two reasons: First, in approving ConEd's divestiture of generation to the DGOs, and the associated mitigation measures, the FERC anticipated that individual DGOs would have the capability and incentive to offer all of their capacity at their applicable bid caps, which would have the effect of setting the market-clearing price at those caps, until sufficient amounts of new capacity entered the NYC ICAP market.[208] OE Staff concluded that, as of 2006, sufficient capacity had not been added to the NYC ICAP market to change the market power issues contemplated at the time of ConEd's divestitures to the DGOs.[209] Second, OE Staff concluded that the DGOs had complied with NYISO's tariff requirements, in particular, they had never violated the offer caps or failed to satisfy the must-offer requirement.[210] Finally, OE Staff did not find any evidence of fraud or

203. *NYC ICAP OE Staff Report*, *supra* note 200, at 2. These parties further alleged that KeySpan had entered into a swap agreement with Morgan Stanley Capital Group Inc. (Morgan Stanley) whereby KeySpan benefited when the clearing price in the NYC ICAP market was higher than the price in the swap. Enforcement staff also learned that Morgan Stanley had entered into an offsetting swap with Astoria Generating Company Acquisitions (Astoria), another NYC ICAP supplier. The findings of the Office of Enforcement with respect to Astoria were equivalent to their findings for KeySpan. *Id.*10-12

204. *Id.*

205. *Id.* at 6-7.

206. *Id.*

207. OE Staff noted that economic withholding is not a per se violation of the FERC's anti-manipulation rule and that for economic withholding to constitute manipulation all the other elements of a manipulation claims must also be satisfied. *Id.* at 14.

208. *Id.*

209. *Id.* at 16. OE Staff noted that, even with the capacity additions in 2006, the total supply of capacity in the NYC ICAP market had not reached the point where it would have been economically rational for KeySpan to discontinue offering its capacity at its cap because, due to KeySpan's large market share, the majority of its divested capacity still had to be purchased for load-serving entities to satisfy their reliability requirements. KeySpan determined that, if it were to discount its offers, any potential reward from clearing more of its capacity at discounted prices was outweighed by the risk that some of its discounted capacity would remain unsold and the remainder of its capacity would clear at lower prices. *Id.*

210. *Id.* at 17.

deceit or that the DGOs' offering behavior did not have a legitimate business purpose.[211]

E. In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company

On March 1, 2006, Equitable Resources, Inc. (Equitable) and Dominion Resources, Inc. (Dominion) executed an agreement for Dominion's sale of Peoples Natural Gas Company (Peoples) to Equitable.[212] Equitable and Peoples distributed natural gas to overlapping service territories in Pennsylvania. In some areas, they were the only distributors of natural gas, while in other areas, they competed with additional distributors.

On March 14, 2007, the Federal Trade Commission (FTC) filed an administrative complaint alleging that the sale agreement violated Section 5 of the Federal Trade Commission Act and that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The Pennsylvania Public Utility Commission approved the sale in April 2007, but litigation with the FTC continued. On January 15, 2008, Dominion and Equitable announced they were terminating their agreement because of the continued delay in achieving regulatory approval.[213]

IV. FEDERAL TRADE COMMISSION - MARKET MANIPULATION

A. Anti-Manipulation Provisions of the Energy Independence and Security Act of 2007

The Energy Independence and Security Act of 2007 (EISA)[214] was signed into law December 19, 2007. EISA Section 811 provides that:

> It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.[215]

EISA Section 812 prohibits any person from reporting information that is:

> [R]elated to the wholesale price of crude oil, gasoline, or petroleum distillates to a Federal department or agency, if (1) the person knew, or reasonably should have known, [that] the information [was] false or misleading;. . .[and] [(3)] intended [such] false or misleading information to affect data compiled by the department or

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211. *Id.* In this regard, OE Staff stressed that market participants had always been aware that DGOs were permitted to offer at their caps and set the market-clearing price, and the terms of the Morgan Stanley swap had been publicly disclosed. *Id.*

212. In the matter of Equitable Resources, Inc., Consolidated Natural Gas Co., and The Peoples Natural Gas Co., Docket No. 9322, File No. 061-0140 (F.T.C. March 1, 2006). This agreement included Equitable's purchase of Dominion's Hope Gas Company in West Virginia. The FTC did not file a complaint on this sale. This part of the agreement was also terminated in Jan. 2008, at which time the West Virginia Public Service Commission approval of the sale was still pending.

213. Press Release, Equitable Resources, Dominion, Equitable Terminate Agreement for Sale of Peoples, Hope Gas Utilities (Jan. 15, 2008), http://ir.eqt.com/releasedetail.cfm?ReleaseID=287239.

214. Pub. L. No. 110-140, 121 Stat. 1723 (Dec. 19, 2007), Title VIII, Subtitle B. (codified at 42 USC §§ 17301-17305).

215. EISA § 811 (codified at 42 U.S.C. § 17301).

> agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.[216]

EISA gives the FTC new authority to assess a civil penalty against "any supplier" that violates EISA Section 811 or 812 of up to $1,000,000 per violation.[217] Civil penalties are imposed through the same process as are penalties under the Federal Trade Commission Act, which means that matters will be brought initially before an administrative law judge.[218] Section 813 further provides that the violation of these provisions "shall be treated as an unfair or deceptive act or practice proscribed under a rule issued under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B))."[219]

B. FTC Rule Prohibiting Market Manipulation in the Petroleum Industry

On August 12, 2009, the FTC published in the *Federal Register* a final rule implementing EISA Sections 811 and 812.[220] The FTC explained that the final rule is based on the nearly identical anti-manipulation provisions found in the Securities Exchange Act of 1934[221] (Exchange Act) (as well as the anti-manipulation provisions of the Energy Policy Act of 2005[222] (EPAct 2005), and the Commodity Exchange Act[223] (CEA)), but that the FTC has exercised its discretion under EISA Section 811 to tailor the rule to account for the significant differences between the wholesale petroleum markets and the securities markets.[224]

The FTC Anti-Manipulation Rules make it unlawful for:

> [A]ny person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, to: (a) knowingly engage in any act, practice, or course of business – including the making of any untrue statement of a material fact – that operates or would operate as a fraud or deceit upon any person; or (b) Intentionally fail to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product.[225]

The FTC Anti-Manipulation Rule generally follows the same approach as Securities and Exchange Commission (SEC) Rule 10b-5 and the FERC's Anti-Manipulation Rule in defining the elements of a manipulation claim.

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216. EISA § 812 (codified at 42 U.S.C. § 17302).

217. EISA § 814(a) (codified at 42 U.S.C. § 17304(a)).

218. Section 813 specifically provides that subtitle B "shall be enforced by the Federal Trade Commission in the same manner, by the same means, and with the same jurisdiction" as though "all applicable terms of the Federal Trade Commission Act [FTC Act] were incorporated into and made a part" of Subtitle B. EISA § 813 (codified at 42 U.S.C. § 17303).

219. EISA § 813 (codified at 42 U.S.C. § 17303(b)).

220. Final Rule, Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686 (Aug. 12, 2009) [hereinafter *FTC Anti-Manipulation Rule*]. Prior to issuance of the FTC Anti-Manipulation Rule, the FTC sought public comment on an advanced notice of proposed rulemaking and a separate notice of proposed rulemaking. See Advance Notice of Proposed Rulemaking, Prohibitions On Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 25,614 (May 7, 2008); Notice of Proposed Rulemaking, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007, 73 Fed. Reg. 48317 (Aug. 19, 2008).

221. 15 U.S.C. § 78j(b) (2006).

222. 16 U.S.C. § 824v (2006).

223. 7 U.S.C. § 2(a)(1)(A) (2006).

224. *FTC Anti-Manipulation Rule*, *supra* note 218, at 40,689-90.

225. 16 C.F.R. § 317.3 (2008).

Specifically, proof of a manipulation violation under the general anti-fraud provision in Section 317.3(a) requires the FTC to show that an entity: (1) engaged in manipulative conduct, (2) with the requisite scienter, and (3) in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates.[226] Conduct that would violate the general anti-fraud provision includes: "false public announcements of planned pricing or output decisions; false statistical or data reporting; false statements made in the context of bilateral or multilateral communications that result in the dissemination of the false information to the broader market; and fraudulent or deceptive conduct such as wash sales."[227]

The FTC adopts a somewhat higher standard for establishing a violation of Section 317.(3)(b). First, the FTC adopts a higher *scienter* standard, namely, that the actor must have (a) intentionally omitted material information and (b) must have done so "with the further intent to make the statement misleading."[228] Second, there must be a potential adverse market impact from the omission, *i.e.*, the omission must distort or be likely to distort market conditions for the product.[229] To prove this element, the FTC must establish only that the omission "threatens market integrity"[230] or is "likely to make market data less reliable."[231] The FTC does not have to prove that there was any specific price effect from the omission.[232]

EISA Section 811 prohibits manipulation of markets for crude oil, gasoline, or petroleum distillates at wholesale, and the FTC Anti-Manipulation Rule defines these terms as follows:

> (a) Crude oil means any mixture of hydrocarbons that exists: (1) In liquid phase in natural underground reservoirs and that remains liquid at atmospheric pressure after passing through separating facilities; or (2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.[233]
> (b) Gasoline means: (1) Finished gasoline, including, but not limited to, conventional, reformulated, and oxygenated blends; and (2) Conventional and reformulated gasoline blendstock for oxygenate blending."[234]
> (e)Petroleum distillates means: (1) Jet fuels, including, but not limited to, all commercial and military specification jet fuels, and (2) Diesel fuels and fuel oils, including, but not limited to, No. 1, No. 2, and No. 4 diesel fuel, and No. 1, No. 2, and No. 4 fuel oil.[235]

226. *FTC Anti-Manipulation Rule*, *supra* note 218, at 40,693.

227. *Id*. at 40,695. The rule does not adopt any specific conduct obligations on market participants, such as requirements to supply products, provide access, or disclose information.

228. *Id*. at 40,698.

229. *Id*. at 40,693. The FTC specifically declined to require a specific showing of adverse market impact under the general anti-fraud provision in Section 317.3(a) because "there is no economic justification for over fraud or deception," whereas there may be a legitimate purpose for not disclosing information, provided that such omissions are not intended to mislead. *Id*. at 40,695.

230. *Id*. at 40,699.

231. *Id*.

232. *Id*.

233. 16 C.F.R. § 317.2(a) (2009).

234. 16 C.F.R. § 317.2(b) (2009).

235. 16 C.F.R. § 317.2(e) (2009).

> (f)Wholesale means: (1) All purchases or sales of crude oil or jet fuel; and (2) All purchases or sales of gasoline or petroleum distillates (other than jet fuel) at the terminal rack level or upstream of the terminal rack level.[236]

Section 811 of the EISA, unlike EPAct 2005, also has an antitrust savings clause, which states that "[n]othing in this part shall be construed to modify, impair, or supersede the operation of any of the antitrust laws."[237] Congress also tried to bar any preemption defense for state law claims. Section 815(c) provides that "[n]othing in this part preempts any State law."[238] In short, Congress appears to have allowed all antitrust laws and state laws to be enforced simultaneously with this law. Accordingly, the FTC Anti-Manipulation Rule "does not . . .preempt the laws of any state or local government,"[239] except in the event of a conflict, and further provides that a state or local law is not in conflict "if it affords equal or greater protection from the prohibited practices" set forth in the rule.[240]

236. 16 C.F.R. § 317.2(f) (2009).
237. EISA § 815(b) (codified at 42 U.S.C. § 17305(b)).
238. *Id.* at § 815(c) (codified at 42 U.S.C. § 17305(c)).
239. 16 C.F.R. § 317.4 (2009).
240. *Id.*

COMPETITION & ANTITRUST COMMITTEE