

REPORT OF THE COMPETITION & ANTITRUST COMMITTEE

This report summarizes antitrust and competition developments of particular interest to energy law practitioners that occurred in 2011.*

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I. COURT CASES

A. *Kay Electric Cooperative v. City of Newkirk*

In *Kay Electric Cooperative v. City of Newkirk*, the United States Court of Appeals for the Tenth Circuit reversed a lower court's determination that a municipality's refusal to supply monopoly sewage service to a new county jail, to be located outside the city,¹ unless the jail also received electricity service from the city's municipal utility rather than the competing electric cooperative, escaped antitrust condemnation under the state action doctrine.² The court stated that a municipality is entitled to immunity under the state action doctrine "only if there is a 'clear articulation of a state policy to authorize anticompetitive conduct' by the municipality."³ After reviewing what it characterized as the Supreme Court's "competing statements" concerning the clarity with which the legislature must articulate a policy to suppress competition, the Tenth Circuit stated that "we can say with certainty this much – a municipality surely lacks antitrust 'immunity' unless it can bear the burden of showing that its challenged conduct was *at least* a foreseeable (if not explicit) result of state legislation."⁴

In rejecting Newkirk's claim to immunity, the court examined several possible sources of authority to suppress competition but found all of them insufficient. It rejected a grant of authority in a municipality's corporate charter, *inter alia*, "to buy and sell property [or] to enter into joint ventures," because "simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully."⁵ In other words, "an enabling law permitting a city to run a business" is not enough to obtain state action immunity.⁶ The court also rejected a state's authorization of some forms of anticompetitive conduct by a municipality as authorization for all forms of such conduct.⁷

The court observed that "when asking whether the state has authorized the municipality's anticompetitive conduct we look to and preference the most specific direction issued by the state legislature on the subject."⁸ Here, the court found that Oklahoma's Rural Electric Cooperative Act spoke most directly to the issue and specifically protected the right of an electric cooperative to continue serving in competition against a municipality, including in areas served by the cooperative that a municipality had annexed, as was the case here.⁹ The court also concluded that Oklahoma's Electric Restructuring Act, providing for retail

1. *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041-42 (10th Cir. 2011). The Competition and Antitrust Committee's 2010 Report discussed the district court's decision. *Report of the Competition & Antitrust Committee*, 32 ENERGY L.J. 159, 166-67 (2011) [hereinafter *2011 Report*] (discussing *Kay Elec. Coop. v. City of Newkirk*, 2010 U.S. Dist. LEXIS 84131 (W.D. Okla. Aug. 16, 2010)).

2. *Kay Elec. Coop.*, 647 F.3d at 1041-42 (First articulated in *Parker v. Brown*, 317 U.S. 341 (1943), the state action doctrine provides that, as a matter of federal-state comity, courts will not apply the Sherman Act to certain state-imposed restraints of trade.).

3. *Id.* at 1042 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)).

4. *Id.* at 1043 (emphasis in original).

5. *Id.*

6. *Id.* at 1045-46.

7. *Id.* at 1043-44.

8. *Id.* at 1044.

9. *Id.*

electric competition, “expresses a policy preference for competition in electricity generation and supply,” even if such competition had not yet emerged on the scale envisioned by the legislature.¹⁰ The court further noted “competition is already a manifest reality between cooperatives and municipalities in Oklahoma.”¹¹

B. Federal Trade Commission v. Phoebe Putney Health System, Inc.

In a second appellate decision addressing the state action doctrine, *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, the United States Court of Appeals for the Eleventh Circuit found that a municipal hospital authority’s acquisition of a second hospital, making the Authority the monopoly owner of the only two hospitals in the relevant geographic market, was protected from antitrust liability because of the state action doctrine.¹² The Hospital Authority of Albany-Dougherty County, created under Georgia law, had owned a hospital, Phoebe Putney Memorial Hospital, which it began leasing in 1990 to a non-profit entity formed by the Authority, Phoebe-Putney Health System, Inc.¹³ In December 2010, Phoebe Putney Health System proposed that the Authority acquire the only other competing hospital in the geographic market, Palmyra Park Hospital, Inc., from HCA, Inc., “a for-profit corporation [operating] hospitals in twenty states.”¹⁴ Phoebe Putney Health System would provide the Authority with the funds for the acquisition and would operate both hospitals under a new lease with the Authority.¹⁵ The Authority approved the plan.¹⁶

The Federal Trade Commission (FTC) initiated an administrative proceeding to determine whether the acquisition would violate section 7 of the Clayton Act¹⁷ and at the same sought to enjoin the transaction during the pendency of the administrative proceeding, pursuant to section 13(b) of the Federal Trade Commission Act.¹⁸ The district court for the Middle District of Georgia granted the defendants’ (the Authority, Phoebe Putney Health System, and HCA, Inc.) motion to dismiss the FTC’s suit for injunctive relief on grounds that the state action doctrine immunized the transaction from antitrust liability.¹⁹ The FTC then appealed to the Eleventh Circuit.

While agreeing that on the facts alleged by the FTC the transaction would likely substantially lessen competition through creation of a monopoly,²⁰ the court of appeals affirmed the district court’s conclusion that the Authority’s acquisition was protected from antitrust immunity under the state action

10. *Id.* at 1045.

11. *Id.* (emphasis omitted).

12. *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011).

13. *Id.* at 1373.

14. *Id.* at 1373-74.

15. *Id.*

16. *Id.*

17. 15 U.S.C. § 18 (2006).

18. 15 U.S.C. § 53(b) (2006).

19. *FTC v. Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d 1356, 1361 (M.D. Ga. 2011).

20. *Phoebe Putney*, 663 F.3d at 1375.

doctrine.²¹ The court rejected the FTC's contention that state action protection should not apply because the transaction was, in substance, the transfer of Palmyra hospital from one private entity to another, which the private entities had engineered and then presented to the public Authority for its blessing.²² The court said that under the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, it "may not 'deconstruct[]' . . . the government's decision-making process" or "'prob[e] . . . the official 'intent' to determine whether the government's decision-making process has been usurped by private parties."²³

Turning to the state action analysis, the court stated that "[t]he Authority's immunity . . . turns on whether the state has authorized the Authority's acquisition of Palmyra and, in doing so, clearly articulated a policy to displace competition."²⁴ It first found that Georgia law contemplated the Authority's acquisition and leasing of Palmyra.²⁵ It then found that "acquisitions [that] could consolidate ownership of competing hospitals, eliminating competition between them" was a "foreseeable result" of the state law.²⁶ It thus concluded "the acquisition of Palmyra and its subsequent operation at the Authority's behest by [Phoebe Putney Health System] are authorized pursuant to a clearly articulated state policy to displace competition."²⁷

C. *Montana Consumer Council v. Federal Energy Regulatory Commission*

In October, the Ninth Circuit issued the latest Appellate Decision affirming the Commission's market based rate (MBR) program.²⁸ In July 2007, the Federal Energy Regulatory Commission (FERC or Commission) issued Order No. 697 adopting modifications to its then existing MBR program.²⁹ Under that program, sellers of wholesale electricity, after being "pre-screened" to determine that they lacked both horizontal (energy generation) and vertical (transmission ownership) market power, are permitted to file rate tariffs allowing them to negotiate prices with buyers (*i.e.* market rather than FERC established prices) for the sale of their services.³⁰ Pre-screening involves the satisfaction of an "uncommitted market share screen" (*i.e.* threshold of less than 20% of uncommitted generation) and a "pivotal supplier screen" (*i.e.* seller's generation is not needed as sufficient other generation is available in the market to satisfy purchaser's demand).³¹ Neither satisfaction nor failure to satisfy the screens, however, is determinative, and either the seller or its purchasers may present other evidence to establish the presence or absence of market power (typically a

21. *Id.* at 1378.

22. *Id.* at 1376 n.12.

23. *Id.* (quoting *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 377 (1991)).

24. *Id.* at 1376 (footnotes omitted) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)).

25. *Id.* at 1376-77.

26. *Id.* at 1377.

27. *Id.* at 1378.

28. *Montana Consumer Council v. FERC*, 659 F.3d 910, 922 (9th Cir. 2011).

29. Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,252, 72 Fed. Reg. 39,904 (2007) (codified at 18 C.F.R. pt. 35).

30. *Id.* at P 9.

31. *Id.* at P 13.

Delivered Price Test (DPT)).³² Where market power is present, it may be mitigated, or cost-based rates may be used. To maintain their ability to sell at market-based-rates, sellers must file an updated market power analysis satisfying the above standards every three years, must provide quarterly reports of all transactions and the contract terms under which their sales are made, and must notify the FERC within thirty days of any change in status that might affect their eligibility to use such rates.³³

Numerous Consumer Groups, including three State Attorneys General, the National Association of State Utility Consumer Advocates and a number of its members, Industrial Customer Advocates, Public Citizen, and others, opposed continuation or sought significant modification of the MBR policy before the FERC.³⁴ When the FERC rejected their position, these Groups requested rehearing.³⁵ They argued that (1) the FERC, by relying solely on the market (*i.e.* bilateral negotiations) to regulate rates, violated its Federal Power Act (FPA) obligation to ensure that rates are “just and reasonable” and (2) that the MBR policy abrogated a number of important rate determination-related consumer protections explicitly required by the FPA in section 824d.³⁶

In Order 697-A, the FERC again rejected their arguments.³⁷ It noted that its MBR program had been affirmed as a reasonable implementation of the “just and reasonable” FPA standard by both the Ninth and D.C. Circuits and that the Courts had also recognized that the FPA provided it with discretion in the structuring of consumer protections (*i.e.* notice, suspension, and refunds) under FPA section 824.³⁸ Finally, it rejected arguments that its MBR program relied solely on market forces to determine rates, noting its pre-screening process and also Regional Transmission Organization (RTO) and Independent System Operator (ISO) monitoring and market power corrective programs.³⁹ Finally, the FERC denied that it should be required to make an explicit finding that a market is competitive before authorizing MBR within that market, stating that its pre-screening process achieves the same result.⁴⁰

In *Montana Consumer Counsel*, the Ninth Circuit was asked to reverse the FERC on each of the matters described above.⁴¹ Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, whereby a reviewing court must grant “deference” and approve “a permissible construction” of a statute adopted by the

32. *Id.*

33. *Id.* at P 3.

34. *Id.* at PP 938-75.

35. *See, e.g.*, Request for Rehearing and Clarification of the National Rural Electric Cooperative Association, FERC Docket No. RM04-7-001 (July 23, 2007).

36. *Id.* at 4-16 (citing 16 U.S.C. § 824(c), (d) (2006)).

37. Order No. 697-A, *Order on Rehearing and Clarification*, F.E.R.C. STATS. & REGS. ¶ 31,268, 73 Fed. Reg. 25,832 (2008) (codified at 18 C.F.R. pt. 35).

38. *Id.* at PP 394-499 (citing California *ex rel.* Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004); Public Util. Dist. No. 1 of Snohomish Cnty. v. FERC, 471 F.3d 1053 (9th Cir. 2006); Elizabethtown Gas Co, v. FERC, 10 F.3d 866, 869 (D.C. Cir. 1993)).

39. *Id.* at PP 348-346.

40. *Id.* at P 448.

41. *Montana Consumer Counsel v. FERC*, 659 F.3d 910, 915-920 (9th Cir. 2011).

Agency charged with administering it, it refused to do so.⁴² The Court further noted that, in *California ex rel. Lockyer*, it had previously rejected such a “facial” challenge to the FERC’s MBR program and that that program contained equivalent monitoring, reporting, and consumer protections as compared to those in effect at the time of the *Lockyer* decision.⁴³ Thus, the Court concluded that no basis existed for it to alter its previous acceptance of the FERC’s MBR program, stating:

(“Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [the just and reasonable] requirement.”) . . . FERC has confirmed that it will monitor the data to ensure that the reported transactions are consistent with the data expected of a competitive, unmanipulated market. FERC is able to evaluate the reported data to determine whether the average prices charged by a seller are comparable to the average prices that would be charged in a competitive market where no sellers were able to exercise market power. . . . By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.⁴⁴

Although it rejected Consumer Appellants “facial” challenge to the MBR program, the Court noted, “Petitioners and other parties are free to challenge FERC’s implementation of its market-based rates policy in an as-applied challenge.”⁴⁵ Moreover, it noted that the Supreme Court, as explicitly stated in the latter’s decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, has not yet rendered final, judicial determination of the lawfulness of the FERC’s market-based-tariff program.⁴⁶

D. *Simon v. Keyspan Corporation*

In *Simon v. Keyspan Corp.*,⁴⁷ the plaintiff Charles Simon, a retail customer of Consolidated Edison Company (Con Ed), brought a class action against Keyspan Corporation and Morgan Stanley Capital Group Inc. alleging violations

42. *Id.* at 922 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). *Chevron* further requires that the Court first find that the statute is ambiguous on the matters to be decided, a finding made by the Ninth Circuit. *Id.* at 921.

43. *Id.* at 916 (citing *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004)). The Court also cited the D.C. Circuit’s acceptance of the lawfulness of the FERC MBR program, noting approvingly its statement that “what matters is whether an individual seller is able to exercise an anti-competitive market power, not whether the market as a whole is structurally competitive,” thereby rejecting a principal argument of the Consumer Appellants that the FERC had failed to conduct any “empirical analysis” or offer “substantial evidence” that markets were competitive and would drive rates to reasonable levels. *Id.* (quoting *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009)).

44. *Id.* at 919 (quoting *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998)). The Court further rejected Consumer Appellants argument that the MBR policy abrogated FPA section 824(d) mandated consumer protections, such as notice of rate increases, suspension, and the refund procedure, affirming the FERC’s determination that the FPA grants it broad discretion in construing and applying those requirements, and that, under *Chevron*, the FERC’s application of them in the MBR program was a permissible one. *Id.* at 920-22. In a closing footnote to its opinion, the Court repeated: “We leave open the possibility that Petitioners or other parties will succeed in an as-applied challenge to FERC’s implementation of the order.” *Id.* at 923 n.6.

45. *Id.* at 920 n.5.

46. *Id.* at 920 (citing *Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 538 (2008)).

47. *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120 (S.D.N.Y. 2011).

of the sections 1 and 2 of the Sherman Act,⁴⁸ section 7 of the Clayton Act,⁴⁹ as well as New York state law violations.⁵⁰ Simon sought damages associated with higher rates in the New York City market for installed electric generation capacity that were allegedly caused by Keyspan's economic withholding (*i.e.*, bidding at supra-competitive levels) of its own capacity bid into that market.⁵¹ On March 22, 2011, United States District Judge Shira A. Scheindlin dismissed Simon's claim on grounds that he did not have "antitrust standing" to bring the claim and, alternatively, that the claim was precluded by the "filed rate doctrine."⁵² She subsequently denied Simon's motion for reconsideration on similar grounds.⁵³

In order to have antitrust standing, the court stated that a plaintiff must have suffered "antitrust injury," *i.e.*, "injury that 'is of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.'"⁵⁴ In other words, the loss must "'stem[] from a competition-reducing aspect or effect of the defendant's behavior.'"⁵⁵ In addition, the court said that the plaintiff must be a "proper party," a determination that is based on the balance of a number of non-dispositive factors, including:

- (1) [T]he causal connection between the alleged antitrust violation and the harm to the plaintiff;
- (2) the existence of an improper motive;
- (3) whether the injury was of a type that Congress sought to redress with the antitrust laws;
- (4) the directness of the connection between the injury and alleged restraint in the relevant market;
- (5) the speculative nature of the damages;⁵⁶ and
- (6) the risk of duplicative recovery or complex apportionment of damages.

Simon argued that he had antitrust standing because he fell under the so-called "cost-plus contract" exception, referred to in a number of Supreme Court decisions, to the direct purchaser requirement.⁵⁷ Under this exception, an indirect purchaser may not be precluded from seeking antitrust damages where the direct purchaser is "'insulated from any decrease in its sales as a result of attempting to pass on the overcharge [from the anticompetitive conduct], because its customer is committed to buying a fixed quantity regardless of price.'"⁵⁸ The court rejected Simon's claim that he fell under the "cost-plus exception," because Simon's monthly purchases were not fixed in advance, but "rather [] like all other Con Ed consumers, Simon was billed each month for the

48. 15 U.S.C. §§ 1, 2 (Supp. 2010).

49. 15 U.S.C. § 18 (Supp. 2010).

50. N.Y. GEN. BUS. LAW §§ 349(a), 340 (McKinney 2011).

51. *Keyspan*, 785 F. Supp. 2d at 130-32. The Committee's 2011 Report described the settlement of the DOJ's allegations of violations of section 1 of the Sherman Act, 15 U.S.C. § 1, by Keyspan Corporation resulting from its financial swap agreements and bidding practices in the New York City installed capacity market. *2011 Report, supra* note 1, at 163-65.

52. *Keyspan*, 785 F. Supp. 2d at 137, 139.

53. Order Denying Motion for Reconsideration, *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120 (S.D.N.Y. May 27, 2011), 2011 WL 2135075 [hereinafter Order Denying Motion].

54. *Keyspan*, 785 F. Supp. 2d at 133 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

55. *Id.* at 134 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)).

56. *Id.*

57. *Id.* at 136 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 218 (1990)).

58. *Id.* at 136 (quoting *Illinois Brick*, 431 U.S. at 736).

specific amount of electricity he consumed.”⁵⁹ Because he could reduce his consumption in response to a price increase and thus affect the amount of overcharge he would absorb, Simon could not claim to fall within the “cost-plus” exception.⁶⁰ In ruling on Simon’s motion for reconsideration, the court stated, “[the] Court remains dubious that Con Ed [the direct purchaser] is a complete pass-through entity and did not sustain any direct antitrust injury of its own.”⁶¹

The court also ruled, in the alternative, that Simon would be unable to pursue his claims, even if he did have standing because of the filed rate doctrine, which “bars both federal and state claims where the challenged rates were either fixed or accepted by FERC.”⁶² Here, the court said that Simon challenged, as supracompetitive, the FERC-approved rates for installed capacity and that only the FERC could alter or refund the rates.⁶³

In his motion for reconsideration, Simon, *inter alia*, argued that the filed rate doctrine does not apply to market-based rates and “that the Supreme Court ha[d] never applied the . . . doctrine to bar federal antitrust claims in the context of the [FPA].”⁶⁴ The court rejected these contentions as well, concluding that “courts have uniformly held that prices that comply with [market-based rate] tariffs, such as KeySpan’s [market-based rate tariff], are ‘filed rates’ deserving of protection under the filed rate doctrine,”⁶⁵ and that “the Second Circuit has held that the filed rate doctrine applies to *any* claim that impermissibly requires a court to perform an agency’s rate-making function.”⁶⁶

As a result of the court’s order denying the plaintiffs’ motion of reconsideration, the plaintiffs sought appellate review from the Second Circuit.⁶⁷ The plaintiffs have requested that the Second Circuit vacate the district court’s dismissal of the case, arguing that the filed rate doctrine, which limits claims against rates reviewed by a regulator, does not apply.⁶⁸ The plaintiffs have argued that the prices charged by KeySpan are not filed with the FERC but instead are charged on a market-based rate basis.⁶⁹ Additionally, the plaintiffs have challenged arguments by KeySpan and Morgan Stanley that the plaintiff has no standing to assert antitrust claims in federal court. Presently, that case is pending. Following the submission of initial briefs, the defendants filed responses to which the plaintiffs replied in November 2011.⁷⁰

59. *Id.* at 137.

60. *Id.*

61. Order Denying Motion, *supra* note 53, at *1.

62. *Keyspan*, 785 F. Supp. 2d at 138 (citing *Montana-Dakota Utils. Co. v. Northwest Pub. Serv. Co.*, 341 U.S. 246 (1951)).

63. *Id.* at 139.

64. Order Denying Motion, *supra* note 53, at *5.

65. *Id.* at *2.

66. *Id.* at *5 (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 58-59 (2d Cir. 1998)).

67. Notice of Appeal, *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120 (S.D.N.Y. June 3, 2011).

68. Brief for Plaintiff-Appellant, *Simon v. Keyspan Corp.*, No. 11-2265-cv (2d Cir. Sept. 14, 2011).

69. *Id.* at 27.

70. Brief for Defendant-Appellee, *Simon v. Keyspan Corp.*, No. 11-2265-cv (2d Cir. Oct. 28, 2011).

E. United States v. Exelon Corporation

On April 28, 2011, Exelon Corporation entered into a merger agreement with Constellation Energy Group, Inc.⁷¹ On December 21, 2011, the United States Department of Justice (DOJ) filed an antitrust complaint alleging that the merger would likely harm competition and increase prices in wholesale electricity markets overseen by PJM Interconnection LLC (PJM) in the Mid-Atlantic.⁷² At the same time, the DOJ filed a Proposed Final Judgment in which Exelon and Constellation agreed to divest certain generation assets to remedy the alleged harm to competition.⁷³

According to the DOJ's Complaint, the merged firm would sell wholesale electricity in all or parts of fourteen states extending from Illinois in the west to North Carolina and New Jersey in the east.⁷⁴ The Complaint focused on two geographic markets in PJM: (1) PJM Mid-Atlantic North, covering "eastern Pennsylvania, eastern Maryland, Delaware, and the District of Columbia," and (2) PJM Mid-Atlantic South, covering eastern Pennsylvania, eastern Maryland, Delaware, the District of Columbia, and most of Virginia.⁷⁵ During times when transmission lines into these two markets are constrained, PJM is limited in its ability to call on generation plants located further west in PJM to serve electricity demand in these densely populated markets and must call on generation located in the markets to meet the demand.⁷⁶ Both Exelon and Constellation own or control generation in two markets.⁷⁷

The 2010 Horizontal Merger Guidelines (2010 Guidelines), issued by the DOJ and the FTC, use "the Herfindahl-Hirschman Index ("HHI") [as] a measure of market concentration."⁷⁸ Mergers that increase market concentration may be more likely to harm consumers by reducing competition.⁷⁹ Under the 2010 Guidelines, markets having HHIs "between 1,500 and 2,500 points [are] moderately concentrated," and mergers that increase market concentration by more than 100 points in such "markets potentially raise significant competitive concerns."⁸⁰

In PJM Mid-Atlantic North, "Exelon owns or controls approximately 18 percent of the generating capacity," and "Constellation owns or controls approximately 10 percent."⁸¹ Post-merger, Exelon would "control approximately 28 percent of the . . . generating capacity," and the merger would increase market concentration by nearly 400 points to about 1,600, as measured

71. Complaint ¶ 1, *United States v. Exelon Corp.*, No. 1:11-cv-02276 (EGS) (D.D.C. Dec. 21, 2011) [hereinafter Complaint], available at <http://www.justice.gov/atr/cases/f278400/278475.pdf>.

72. *Id.* ¶¶ 35-37.

73. Proposed Final Judgment at 2, *United States v. Exelon Corp.*, No. 1:11-cv-02276 (EGS) (D.D.C. Dec. 21, 2011) [hereinafter Proposed Final Judgment], available at <http://www.justice.gov/atr/cases/f278400/278482.pdf>.

74. Complaint, *supra* note 71, ¶ 2.

75. *Id.* ¶¶ 19, 22.

76. *Id.* ¶¶ 20-21, 23-24.

77. *Id.* ¶¶ 32-33.

78. *Id.* ¶ 31.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 32.

by the HHI.⁸² In PJM Mid-Atlantic South, “Exelon owns or controls approximately 14 percent of the generating capacity,” and “Constellation owns or controls approximately 9 percent.”⁸³ Post-merger, “Exelon would own . . . approximately 22 percent of the total generating capacity,” producing an HHI increase of approximately 250 points to about 1,800 HHI.⁸⁴

In addition to the potential competitive harm associated with Exelon’s owning a greater share of the generating capacity in the relevant markets, the DOJ alleged that Exelon, post-merger, would own a greater share of both higher cost peaking generating capacity and lower cost baseload generating capacity.⁸⁵ The higher cost peaking capacity could give Exelon the ability to raise market-clearing prices when it was needed to serve electricity demand during transmission constraints.⁸⁶ By withholding this capacity, Exelon could force PJM to call on more expensive generation, thus raising market-clearing prices.⁸⁷ At the same time, Exelon’s increased share of lower cost baseload generating capacity would give it an incentive to raise market-clearing prices because it would earn those higher prices on an expanded amount of baseload generation.⁸⁸ The DOJ concluded that Exelon’s increased ability and incentive to raise wholesale electricity prices, post-merger, violated section 7 of the Clayton Act by possibly, substantially lessening competition and raising prices.⁸⁹

To remedy the alleged harm to competition, Exelon and Constellation agreed to divest three coal-fired generating plants located in Baltimore, Maryland.⁹⁰ According to the DOJ, the divestitures would not only reduce market shares and concentration but also would “restore effective competition by depriving Exelon of key assets that would have made it profitable for it to withhold output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South.”⁹¹ Until the divestitures are completed, Exelon and Constellation also agreed to submit into PJM’s Day-Ahead Energy Market cost-based bids for certain of their generating units.⁹²

As of the end of 2011, the DOJ’s Complaint and the Proposed Final Judgment were pending before United States District Court for the District of Columbia.

F. *United States v. Morgan Stanley*

On September 30, 2011, the United States filed a complaint and a proposed stipulation and settlement in the Southern District of New York against Morgan Stanley in connection with the same behavior at issue in *United States v.*

82. *Id.*

83. *Id.* ¶ 33.

84. *Id.*

85. *Id.* ¶ 34.

86. *Id.* ¶ 35.

87. *Id.*

88. *Id.* ¶ 36.

89. *Id.* ¶¶ 37, 40 (citing Clayton Act § 7, 15 U.S.C. ¶ 18 (2006)).

90. Proposed Final Judgment, *supra* note 73, § IV.A.

91. Competitive Impact Statement at 13, *United States v. Exelon Corp.*, No. 1:11-cv-02276 (EGS) (D.D.C. Dec. 21, 2011), available at <http://www.justice.gov/atr/cases/f278400/278485.pdf>.

92. Hold Separate Stipulation and Order at § VI.A., *United States v. Exelon Corp.*, No. 1:11-cv-02276 (EGS) (D.D.C. Dec. 21, 2011), available at <http://www.justice.gov/atr/cases/f278400/278480.pdf>.

KeySpan.⁹³ As alleged in the complaint, Morgan Stanley was the counterparty to the financial derivative agreement entered into by KeySpan in 2006.⁹⁴

Due to Morgan Stanley's role in the financial derivative agreement, DOJ alleged that Morgan Stanley was also in violation of section 1 of the Sherman Act.⁹⁵ Accordingly, DOJ and Morgan Stanley sought court approval of a proposed settlement.⁹⁶ Under the terms of the proposed settlement, Morgan Stanley would disgorge \$4,800,000 in profits to the United States Treasury.⁹⁷ Presently, the proposed settlement is pending court approval. Judge Pauley, which was the presiding judge in *KeySpan*, was assigned as the presiding judge in *Morgan Stanley* on October 24, 2011.

II. COMPETITION-RELATED FERC ORDERS

A. *PJM Power Providers v. PJM Interconnection, L.L.C.*

For many years the Commission has grappled with defining, identifying, and mitigating the exercise of market power. This challenge has arisen in centralized electricity markets operated within RTOs and decentralized markets where bilateral trading is the norm. The consolidated case – *PJM Power Providers v. PJM Interconnection, L.L.C.* (P3 Complaint) and *PJM Interconnection, L.L.C.* (PJM Tariff Filing) – presents one of the most controversial instances in which the FERC has addressed the issue of buyer market power and RTO rules for defining, identifying, and mitigating it.⁹⁸ The catalyst for the P3 Complaint and PJM Tariff Filing is legislation enacted in New Jersey in 2011 governing the procurement of up to 2,000 MW of generation, to be offered into PJM's capacity markets at prices low enough to guarantee clearing.⁹⁹ In 2010, Maryland's Public Service Commission promulgated a similar rule with a goal of procuring 1,800 MW of generation.¹⁰⁰ One reason offered for such initiatives is that PJM's Reliability Pricing Model (RPM) has attracted insufficient capacity in forward capacity markets, thus prompting state and local entities to act themselves to encourage the development of new resources.¹⁰¹

In early 2011, the P3 Providers – representing twelve member companies with generation and transmission in the PJM region – filed a complaint with the Commission requesting fast-track consideration and seeking revisions to the

93. Complaint, *United States v. Morgan Stanley*, No. 1:11-cv-06875 (WHP) (S.D.N.Y. filed Sept. 30, 2011), available at <http://www.justice.gov/atr/cases/f275700/275762.pdf>.

94. *Id.* ¶ 26.

95. *Id.* ¶ 38.

96. Proposed Settlement, *United States v. Morgan Stanley*, No. 1:11-cv-06875 (WHP) (S.D.N.Y. Oct. 3, 2011).

97. *Id.* at 2.

98. Complaint and Request for Clarification Requesting Fast Track Processing, FERC Docket No. EL11-20-000 (Feb. 1, 2011) [hereinafter P3 Complaint]; Revisions to the PJM Open Access Transmission Tariff, FERC Docket No. ER11-2875-000 (Feb. 11, 2011) [hereinafter PJM Tariff Filing].

99. 2011 N.J. Sess. Law Serv. Ch. 9 at sec. 3, § 18:3-98.3(c) (West).

100. Request for Proposals for Generation Capacity Resources Under Long-Term Contract, *In re Whether New Generating Facilities Are Needed to Meet Long-Term Demand for Standard Offer Service*, Md. PSC Case No. 9214 (Dec. 29, 2010).

101. *Id.* at 1-2.

Minimum Offer Pricing Rule (MOPR) for identifying and mitigating buyer market power in PJM's open access transmission tariff (OATT).¹⁰² In the complaint, P3 argues that their members will be adversely affected by depressed market clearing prices for capacity resulting from the New Jersey and Maryland legislation.¹⁰³ Shortly after P3 filed at the FERC, PJM filed revisions to its OATT seeking to simplify and update the MOPR to be more consistent with similar changes implemented by the New York Independent System Operator, Inc. and ISO New England Inc.¹⁰⁴ This section summarizes major issues raised in the P3 Complaint and the PJM Tariff Filing, and in the Commission's series of orders deciding the matter.¹⁰⁵ We also note that, at the time of this writing, P3 has filed a petition for review of the FERC's decisions in the D.C. Circuit.

1. The P3 Complaint

The P3 Complaint argued that the New Jersey law would create an "out of market" subsidy for generation procured under the plan (for up to 15 years) and bid in to the PJM capacity market.¹⁰⁶ Such a development would distort incentives for new entry and contradict the fundamental purpose of capacity markets, ultimately eliminating competitive entry. P3 argued that the exercise of buyer market power created by the legislation is not adequately addressed by the MOPR mechanism under the PJM OATT, thus resulting in an unjust, unreasonable, and discriminatory tariff scheme under the FPA.¹⁰⁷ P3 made a number of proposals to modify the MOPR. Among the components of the tariff to be eliminated were the sunset provision and exemptions for resources deemed not to be "net buyers," self-supply, certain state-sponsored projects, and Planned Generation Capacity Resources.¹⁰⁸ A central focus of the P3 proposal, however, went to the "core mechanics"¹⁰⁹ of the MOPR which, P3 argued, failed to adequately identify and mitigate price suppression resulting from the exercise of buyer market power.¹¹⁰

The first part of the existing MOPR is a conduct screen to determine if a resource should be mitigated.¹¹¹ The screen identifies for mitigation generation resources that bid below the economic thresholds for new resources. An offer is mitigated if it is "less than 80% of the real, levelized net cost of new entry" based on the appropriate asset class or, if no class exists, 70% of the new entry

102. P3 Complaint, *supra* note 98, at 77.

103. *Id.* at 3-4.

104. PJM Tariff Filing, *supra* note 98.

105. The P3 Complaint, PJM Tariff Filing, intervenor pleadings, and the Commission orders address a multitude of issues. This summary does not purport to cover all of these or to identify the specific source of each concern. It is designed as a broad overview of the issues raised in the consolidated proceeding.

106. P3 Complaint, *supra* note 98, at 57.

107. *Id.* at 58. The P3 Complaint anticipated the primary arguments opposing the P3 proposals, including that mitigating buyer market power will: "(1) increase costs . . . , (2) interfere with state resource planning decisions, and (3) prevent states from contracting for new" capacity for reliability purposes. *Id.* at 8.

108. *Id.* at 41-54. P3 also proposed a set of issues that could be deferred for consideration by the Commission. *Id.* at 54-56.

109. *Id.* at 21.

110. *Id.*

111. *Id.* at 13.

costs of a combustion turbine.¹¹² Since the screen caps the market price below the cost of new entry – potentially allowing uneconomic price suppression – P3 proposed to modify the conduct screen to cap the market price at 100% of the benchmark value for the cost of new entry.¹¹³ A resource bidding below the 100% threshold, however, could go unmitigated if it demonstrates full, nominal, levelized unit-specific costs or “that it has not received any discriminatory payments [(termed a “non-subsidy off-ramp”)] at the time of the auction.”¹¹⁴

The second step in the current MOPR is an impact screen for offers that fail the conduct screen by repeating the auction (with mitigated offers) to measure the effect of an uneconomic offer on market prices.¹¹⁵ The impact screen is passed unless the effect is large.¹¹⁶ P3 proposed to eliminate the impact screen because, they argued, it allows for undue price suppression.¹¹⁷ Offers failing the conduct screen would therefore be mitigated regardless of their effect on market clearing prices.¹¹⁸ Finally, under the current MOPR, if both the conduct and impact screens are failed – and an “incentive” or “net-short” test confirms that the seller has an incentive to depress prices below market clearing – the offer is mitigated to a competitive level for one auction.¹¹⁹ P3 proposed, among other things, that mitigation would continue until the resource has proved economic or cleared at least two capacity auctions.¹²⁰

2. The FERC’s Decision

The Commission issued three orders and held one technical conference in the consolidated P3 Complaint and PJM Tariff Filing matter in 2011.¹²¹ In large part, the Commission accepted PJM’s proposed modifications to the MOPR provision in the OATT, many of which are similar to those proposed by P3.¹²² However, it rejected in large part various issues and arguments offered by intervenors and granted very limited rehearing.¹²³ The filings raise a number of important technical and policy questions regarding the definition, identification, and mitigation of buyer market power in wholesale electricity markets. They can be grouped into a number of categories: (1) calculation of benchmark values in the MOPR; (2) the elements of an effective MOPR; (3) exemptions to the MOPR; and (4) the Commission’s role in adjudicating disputes arising under the MOPR.

112. *Id.*

113. *Id.*

114. *Id.* at 13-14, 29.

115. *Id.* at 14.

116. *Id.* (Under the impact screen, offers are mitigated “if there is at least a \$25/MW-day or 20 to 30% change in clearing prices.”).

117. *Id.* at 36.

118. *Id.* at 14.

119. *Id.* at 15.

120. *Id.* at 37-38.

121. *PJM Interconnection, L.L.C.*, 135 F.E.R.C. ¶ 61,022 (2011) [hereinafter *April 12 Order*]; *PJM Interconnection, L.L.C.*, 135 F.E.R.C. ¶ 61,228 (2011); *PJM Interconnection, L.L.C.*, 137 F.E.R.C. ¶ 61,145 (2011) [hereinafter *November 17 Order*].

122. *April 12 Order*, *supra* note 121, at P 3.

123. Almost seventy interventions were filed in the proceeding. The filings of the intervenors may be found in Docket ER-11-2875-000 on the FERC’s eLibrary system.

a. Calculation of Benchmark Values

The first category of issues relates to the calculation of benchmark or threshold values used in the MOPR. In its interim order, the Commission accepted PJM's approach to discard out-of-date net cost of new entry (CONE) values in the MOPR and instead use values consistent with PJM's Variable Resource Requirement (VRR) Curve guidelines.¹²⁴ Among other changes, the cost of new entry would be calculated using a nominal levelized model instead of the existing real levelized approach.¹²⁵ The net CONE value is important because it sets a reference value against which a capacity offer is compared for purposes of determining if it is uneconomic.¹²⁶

Intervenors offered various arguments opposing the revised approach, all of which were rejected by the Commission.¹²⁷ These concerns ranged from the adequacy or use of: (1) the approach as a proxy for competitive price;¹²⁸ (2) values for calculating energy and ancillary service revenue offsets;¹²⁹ (3) historical versus forward-looking costs;¹³⁰ to (4) real versus nominal levelized values.¹³¹ Many of these issues were raised again by intervenors for rehearing. The Commission denied those requests, except for the issue of using real versus nominal levelized values for unit-specific costs.¹³² It noted that the PJM approach was a just and reasonable administrative method for calculating MOPR reference values and "parallel to the need to establish a method of evaluating and mitigating generation sell offers that may be too high due to the exercise of seller market power."¹³³

Similar issues arise in regard to PJM's proposal to revise the percentage threshold for mitigating sell offers in the conduct screen. Like the P3 proposal, PJM proposed an increase in the threshold below which a sell offer is mitigated to 90 percent of net CONE for combined cycle and combustion turbine plants.¹³⁴ The implication of this change is that the previous, lower threshold poses "an unreasonable tolerance for below-cost offers that can evade the MOPR."¹³⁵ The Commission stated that the PJM proposal "reasonably balances the need to prevent uneconomic entry, the inherent vagaries of cost estimation, and the administrative burden[]." ¹³⁶ In the interim order – and again in its final order – the Commission rejected intervenors' arguments that the proposed threshold is

124. *Id.* at P 43.

125. *April 12 Order, supra* note 121, at P 43. This includes: "updating gross CONE values for CT and CC plants; . . . tracking changes in construction costs; . . . calculating the energy and ancillary services revenue offsets; [and] recognizing locational differences in capital costs." *Id.*

126. *Id.*

127. *Id.* at PP 37-42.

128. *Id.* at P 41.

129. *Id.* at P 40.

130. *Id.* at PP 39, 41.

131. *Id.* at P 38.

132. *November 17 Order, supra* note 121, at PP 73-74.

133. *Id.* at P 24.

134. *April 12 Order, supra* note 121, at P 53.

135. *Id.* at P 67.

136. *Id.* at P 66.

either too high or too low and thus creates barriers to entry or allows for the exercise of buyer market power, respectively.¹³⁷

b. Elements of the MOPR to Be Eliminated

A second category of issues raised in the consolidated proceeding pertains to the elements of the MOPR that should be eliminated.¹³⁸ For example, the PJM proposal eliminated the impact test, with the result that if only the conduct screen is failed, then a sell offer is mitigated.¹³⁹ PJM argued that “such a revision is warranted because even a small change in the clearing price from a below-cost offer, if it deters entry or spurs retirement, can harm competition.”¹⁴⁰ The proposal thus simultaneously tightened the screen and eliminated the need to re-run the auction with a mitigated price. Among the intervenor arguments for retaining the impact test is that it prevents over-mitigation and associated chilling of new entry, particularly by new technologies.¹⁴¹ The Commission rejected arguments opposing the elimination of the impact screen in the interim and final orders noting, among other reasons, that there is no impact screen equivalent in mitigating seller market power.¹⁴²

The PJM proposal also eliminated the net-short requirement, explaining that under the existing MOPR, a seller with an incentive to make an uncompetitive offer can structure new entry so that price suppression is possible without triggering it.¹⁴³ The Commission accepted the proposal, noting that the existing net-short provision focuses on entities purchasing substantially more capacity than they sell, but allows other buyers not in a net-short position to evade the MOPR, including entities acting on behalf of a buyer or under the terms of a power purchase agreement with a new entrant.¹⁴⁴ In doing so, the Commission rejected intervenor arguments that other ways are available to refine the net-short requirement or that eliminating the requirement would lead to over-mitigation.¹⁴⁵ These rehearing concerns were also rejected in the final order.

c. Exemptions

A third major category of issues pertains to generation resources that are exempted from mitigation under the MOPR. These exemptions cover not only certain types of resources but also those developed for particular reasons. The PJM Tariff Filing proposed essentially to eliminate the exemption for a planned resource under a state legislative or regulatory mandate that is designed to resolve a project capacity shortfall.¹⁴⁶ In its interim order, the Commission accepted PJM’s proposal, noting that: “[t]he mounting evidence of risk from what was previously only a theoretical weakness in the MOPR rules that could

137. *Id.* at PP 68-71.

138. The PJM proposal also eliminated the sunset provision. *Id.* at P 179.

139. *Id.* at PP 94, 101.

140. *Id.* at P 93.

141. *Id.* at PP 97-99.

142. *Id.* at P 105.

143. *Id.* at P 87.

144. *Id.*

145. *Id.* at P 90.

146. *Id.* at PP 124-125.

allow uneconomic entry has caused us to reexamine our acceptance of the existing state exemption.”¹⁴⁷

Not surprisingly, intervenors objected to the proposal to eliminate the state mandate exemption, with the New Jersey Rate Board of Public Utilities, New Jersey Rate Counsel, and Maryland Public Service Commission expressing particular concern.¹⁴⁸ The basis for the objections ranged from the legality of the Commission’s action, to a disregard of state resource needs and priorities, to the proper FPA vehicle for removing the exemption (*e.g.*, section 205 or 206).¹⁴⁹ The Commission explained its rationale for removing the state mandate exemption. First, it noted that the modifications to the MOPR do not interfere with state or local policy decisions to stimulate new entry, that uneconomic entry can produce unjust and unreasonable rates, and attempts to depress market prices thus fall within its jurisdictional purview.¹⁵⁰ Second, the Commission explained that the state exemption is inconsistent with the intent of the MOPR, could lead to underinvestment in capacity and actually trigger the need for future subsidies, and is not inconsistent with its statutory responsibility to ensure just and reasonable rates.¹⁵¹

d. Commission’s Role in Adjudicating Rejected Sell Offers

A final category of issues raised by the P3 Complaint and PJM Tariff Filing pertains to the Commission’s role in adjudicating sell offers that are rejected under the MOPR mechanism. In its filing, PJM proposed to clarify the process under which a sell order that has been rejected as outside the parameters of costs for an asset class would be justified through a showing to the Commission. “[S]uch a filing [would] be made pursuant to FPA section 206.”¹⁵² The Commission rejected PJM’s proposal, noting that parties should first have the opportunity to justify offers to the PJM independent market monitor (IMM), and then with PJM (if the IMM’s finding is adverse), before filing with the Commission, thus allowing for a less burdensome process.¹⁵³ The Commission dispensed with intervenor objections over vesting the IMM with too much authority and potential reasons not related to costs that might justify the acceptance of a rejected sell offer.¹⁵⁴

e. Other Issues

The PJM Tariff Filing proposed other changes to the MOPR that were accepted by the Commission. Among these modifications were adding wind and solar to the existing list of resources (nuclear, coal, integrated gasification combined cycle, and hydroelectric) that are allowed to bid at a price of zero

147. *Id.* at P 139.

148. *Id.* at PP 128-138.

149. *Id.*; *November 17 Order*, *supra* note 121, at PP 79-86.

150. *April 12 Order*, *supra* note 121, at PP 141-42. The Pennsylvania Public Utility Commission noted in its pleading that the mitigation of buyer power does not encroach on state ability to ensure resource adequacy inside its own borders. *Id.* at P 137.

151. *November 17 Order*, *supra* note 121, at P 97.

152. *April 12 Order*, *supra* note 121 at PP 109-10.

153. *Id.* at PP 119, 121.

154. *Id.*

under the MOPR.¹⁵⁵ The Commission rejected concerns on rehearing that different treatment of some resources under the MOPR amounts to undue discrimination.¹⁵⁶ The Commission also deferred consideration of New Entry Price Adjustment to a later stakeholder process and denied rehearing on the issue.¹⁵⁷

PJM also proposed to clarify “that self-supply bidding as a Planned Generation Resource is subject to the MOPR.”¹⁵⁸ This proposal was met with objections from intervenors regarding how it would apply to load-serving entities.¹⁵⁹ The Commission granted rehearing and established a technical conference on the issue in the summer of 2011 but allowed the proposal to stand in its final order.¹⁶⁰ Finally, in regard to the duration of the mitigation, PJM proposed that the MOPR apply to Planned Generation Capacity Resource through a cycle of two successive base residual auctions after the resource clears.¹⁶¹ However, the Commission rejected the proposal, instead deciding in the interim order (and affirming in the final order) that the MOPR should apply “until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost.”¹⁶²

B. Duke Progress Merger Order

On April 4, 2011, Duke Energy Corporation (Duke) and Progress Energy, Inc. (Progress) (together, the Applicants) filed an application with the Commission seeking authority to merge.¹⁶³ Under their proposal, Progress would become a wholly owned subsidiary of Duke, and Duke would assume approximately \$12.2 billion of Progress’s net debt.¹⁶⁴ Following the merger, the combined company would have a value of \$65 billion and control 57 gigawatts of generating capacity in the United States.¹⁶⁵

On September 30, 2011, the Commission issued an order (*September 30 Order*) authorizing the proposed merger on the condition that the Applicants adopt measures to mitigate potential market power problems in markets in the Carolinas.¹⁶⁶ The Commission’s analysis turned on its view of the impact that the merger would have on horizontal market power in two markets: the Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Carolina Power & Light (Progress Energy Carolinas-East) balancing authority areas.¹⁶⁷ While the

155. *Id.* at P 152.

156. *November 17 Order*, *supra* note 121, at PP 109-112.

157. *April 12 Order*, *supra* note 121, at P 205; *November 17 Order*, *supra* note 121, at P 122.

158. *April 12 Order*, *supra* note 121, at P 191.

159. *Id.* at PP 186-190.

160. *PJM Interconnection, L.L.C.*, 135 F.E.R.C. ¶ 61,228 (2011); *November 17 Order*, *supra* note 121, at P 204.

161. *April 12 Order*, *supra* note 121, at P 159.

162. *Id.* at P 176.

163. Application for Authorization of Disposition of Jurisdictional Assets and Merger Under Section 203 of the Federal Power Act, FERC Docket No. EC11-60-000 (Apr. 4, 2011).

164. News Release, Duke Energy, Duke Energy and Progress Energy to Merge (Jan. 10, 2011), *available at* <http://www.duke-energy.com/news/releases/2011011001.asp>.

165. *Id.*

166. *Duke Energy Corp.*, 136 F.E.R.C. ¶ 61,245 at P 1 (2011).

167. *Id.* at P 117.

Applicants argued that the generation capacity in these areas does not raise competitive concerns because it is devoted to serving retail and wholesale requirements customers, the Commission, citing persistent and systemic failures of the Competitive Analysis Screen in these areas, found that the proposed transaction would have an adverse effect on competition.¹⁶⁸ The Commission noted that the DPTs¹⁶⁹ submitted for these balancing authority areas contained severe failures of the screen, with many of these failures occurring when the markets were moderately or highly concentrated.¹⁷⁰ Therefore, the Commission directed the Applicants to propose measures to mitigate these screen failures within sixty days.¹⁷¹

In response, the Applicants filed a mitigation proposal in which they proposed to commit to offer certain quantities of energy from available generation into these markets at cost-based rates for a period of eight years.¹⁷² Specifically, the Applicants would have been required to offer 300 megawatts of energy per hour (MWh) during the summer and 225 MWh per hour during the winter in the Duke Energy Carolinas balancing authority area.¹⁷³ Likewise, they would have been required to offer 500 MWh of energy in the Progress Energy Carolinas-East balancing authority area during each hour of the summer.¹⁷⁴ Only those entities serving load located in these markets would have been eligible to purchase this energy under the proposal.¹⁷⁵ The Applicants also “propose[d] to engage an independent monitoring entity to ensure that they [were] in compliance with the [m]itigation [p]roposal.”¹⁷⁶ The Applicants maintained that their proposal would mitigate the screen failures identified by the Commission and would ensure that available energy would “be made available in the relevant [balancing authority areas], and that [the] Applicants [could] not economically or physically withhold such capacity from the market[s] in order to raise prices.”¹⁷⁷

On December 14, 2011, the Commission issued an order rejecting the Applicants’ compliance filing.¹⁷⁸ As an initial matter, the Commission found that the analysis provided by the Applicants was flawed because it assumed that all of the energy offered by the Applicants would “be sold in equal amounts to two entities that do not currently control any capacity” in the relevant balancing authority areas without providing any support for this assumption or considering alternative scenarios.¹⁷⁹ The Commission also stated that the proposal would not

168. *Id.* at P 145.

169. The Commission explained that every DPT “should address three scenarios: the base case, in which applicants should use appropriate forecasted market prices to model post-merger competition in the study area, and sensitivity analyses of the base case that measure the effect of increasing or decreasing the market prices relative to the base case.” *Id.* at P 118.

170. *Id.* at PP 136-137.

171. *Id.* at P 117.

172. *Duke Energy Corp.*, 137 F.E.R.C. ¶ 61,210 at PP 14-16 (2011).

173. *Id.* at P 15.

174. *Id.*

175. *Id.* at P 18.

176. *Id.* at P 21.

177. *Id.* at P 23.

178. 137 F.E.R.C. ¶ 61,210 at P 91.

179. *Id.* at P 68.

remedy the screen failures previously identified by the Commission because the proposal did not cede control over the Applicants' generation, would reduce the already small number of potential purchasers by limiting the use of the offered energy, and, by requiring the Applicants to only offer energy when generation was available and providing limited information about how the amount of energy available would be calculated, failed to provide certainty regarding the availability of energy.¹⁸⁰ The Commission also explained that the time period proposed by the Applicants seemed arbitrary and that the Applicants had failed to provide information sufficient for the Commission to conclude that the proposed monitor would exercise sufficient oversight.¹⁸¹ Accordingly, the Commission rejected the proposal. However, the Commission noted that its rejection of the proposal was without prejudice to the Applicants proposing revised mitigation "measures that remedy the screen failures identified in" the *September 30 Order*.¹⁸²

III. ANALYSIS OF HORIZONTAL MARKET POWER UNDER THE FEDERAL POWER ACT NOTICE OF INQUIRY

A. Background

In its 1996 Merger Policy Statement,¹⁸³ the Commission adopted the 1992 Horizontal Merger Guidelines (1992 Guidelines) of the DOJ and the FTC,¹⁸⁴ to analyze a proposed merger's competitive effects under section 203 of the Federal Power Act.¹⁸⁵ The FERC also adopted the 1992 Guidelines' concentration thresholds for its Appendix A analytic screen, which identifies section 203 mergers that the FERC believes do not harm competition.¹⁸⁶ In its market-based rate program, the FERC turned to the 1992 Guidelines' concentration thresholds to develop one of two preliminary screens (the wholesale market share indicative screen) and in developing the DPT analysis, which may be used to rebut a preliminary screen failure.¹⁸⁷

In August 2010, the DOJ and FTC issued revised Horizontal Merger Guidelines (2010 Guidelines), which differed markedly from the 1992 Guidelines.¹⁸⁸ The 2010 Guidelines were designed to reflect the current state of the antitrust agencies' merger analysis, which had evolved significantly since the

180. *Id.* at PP 80, 83.

181. *Id.* at P 89.

182. *Id.* at P 92.

183. Order No. 592, *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,044, at p. 30,111, 61 Fed. Reg. 68,595 (1996) (codified at 18 C.F.R. pt. 2), *reconsideration denied*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321 (1997).

184. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 1992 HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992, rev'd Apr. 8, 1997), available at <http://www.ftc.gov/bc/docs/hoirzmer.shtm> (1992 Guidelines).

185. Notice of Inquiry, *Analysis of Horizontal Market Power Under the Federal Power Act*, F.E.R.C. STATS. & REGS. ¶ 35,571 at P 1, 76 Fed. Reg. 16,394 (2011) [hereinafter NOI].

186. *Id.* at P 2.

187. *Id.* at PP 9-10.

188. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (2010 Guidelines).

1992 Guidelines, and to make the merger review process more transparent.¹⁸⁹ The 2010 Guidelines differ from the 1992 Guidelines in several notable ways, including the following: the 2010 Guidelines diminish the role of market definition; identify types of evidence of competitive effects; increase HHI “levels that indicate . . . a merger is likely to have adverse competitive effects;” discuss at length unilateral effects and empirical tools for assessing unilateral effects; and include new sections on partial acquisitions, powerful buyers, and merging buyers.¹⁹⁰

B. Notice of Inquiry

In response to the issuance of the 2010 Guidelines, the FERC issued a Notice of Inquiry (NOI) on March 17, 2011, seeking “comment on whether, and if so, how, the Commission should revise its approach for examining [competitive effects] under § 203 of the [FPA] to reflect the [2010 Guidelines] . . . , and what impact the 2010 Guidelines should have, if any, on the Commission’s analysis of . . . market power in its electric market-based rate program under § 205 of the FPA.”¹⁹¹ The NOI listed five general topics on which the FERC sought comment: (1) whether the FERC should adopt the approach of the 2010 Guidelines, placing “less emphasis on market definition and the use of prescribed formula” for assessing a merger’s competitive effects; (2) whether the FERC should adopt the revised HHI levels of the 2010 Guidelines to screen mergers; (3) whether the FERC should adopt any other elements of the 2010 Guidelines, (4) whether process differences between the FERC and the antitrust agencies affect the extent to which the FERC should adopt the 2010 Guidelines; and (5) whether the 2010 Guidelines should have an effect on the FERC’s market power analysis in its electric market-based rate program.¹⁹²

C. Comments

Seventeen comments were submitted in response to the NOI. Nearly one-third of submitted comments were from consultants, and nearly one-third were from formal or informal associations; and the remaining comments were submitted by a public service commission, a publicly-owned utility, a market monitor, a research and advocacy organization, and one of the antitrust agencies (the FTC).¹⁹³ Although the FTC submitted comments, the DOJ – the antitrust

189. See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES at v (2006), available at <http://www.justice.gov/atr/public/guidelines/215247.pdf>.

190. 2011 Report, *supra* note 1, at 168-170 (describing differences between 1992 and 2010 Guidelines).

191. NOI, *supra* note 185, at P 1.

192. *Id.* at PP 15-21.

193. Of the submitted comments, five were from consultants: A. Joseph Cavicchi [hereinafter Cavicchi], John R. Morris, the Brattle Group [hereinafter Brattle], and the Berkeley Research Group [hereinafter Berkeley]; five were from various associations: Transmission Access Policy Study Group & Transmission Dependent Utility Systems [hereinafter TAPS & TDUS], Electricity Consumers Resource Council & National Association of State Utility Consumer Advocates [hereinafter ELCON & NASUCA], Electric Power Supply Association [hereinafter EPSA], and Edison Electric Institute [hereinafter EEI]; two were from energy and utility holding companies: PPL Companies [hereinafter PPL] and Entergy Services, Inc. [hereinafter Entergy]; one was from an independent, publicly owned utility the Modesto Irrigation District [hereinafter the Modesto Irrigation Dist.], one was from a public service commission the New York State Public Service Commission

agency with primary responsibility for analyzing electricity mergers – did not submit comments.

1. Decreased Emphasis on Market Definition and Prescribed Formula

A slight majority of comments that addressed the issue did not believe that the FERC should adopt the approach of the 2010 Guidelines and place less emphasis on market definition and the use of prescribed formula for considering a merger's competitive effects.¹⁹⁴ Among the reasons advanced by those opposed to adopting a more flexible approach to analyzing competitive effects were: (1) current FERC practice already reflects the 2010 Guidelines changes that were most relevant to electricity markets,¹⁹⁵ (2) current practice is effective and has not unfairly prohibited any mergers,¹⁹⁶ (3) current practice is predictable,¹⁹⁷ (4) FERC process is inconsistent with a more flexible approach,¹⁹⁸ and (5) changes to the 2010 Guidelines were motivated by concerns that do not apply to electricity markets.¹⁹⁹ Among the reasons advanced by those in favor of adopting a more flexible approach were: (1) over-reliance on prescribed formulas, like a concentration threshold, is prone to error in predicting a merger's competitive effects,²⁰⁰ (2) the FERC's current approach to identifying geographic markets needs to be improved,²⁰¹ (3) other market power metrics, in addition to concentration, should be part of the FERC's analysis,²⁰² (4) HHIs are not intended to be used as a rigid screen in merger analysis,²⁰³ and (5) bringing the FERC's analysis in line with that of the antitrust agencies would reduce the risk of inconsistent outcomes at the agencies and the FERC.²⁰⁴

[hereinafter NYPSC], one was from a market monitor Monitoring Analytics, LLC [hereinafter Monitoring Analytics], a research and advocacy organization the American Antitrust Institute [hereinafter AAI], and one was from an antitrust agency the Federal Trade Commission [hereinafter FTC]. These comments are available via the FERC's eLibrary by typing "RM11-14" in the docket number query in a general search.

194. Opposed to FERC's adoption of the 2010 Guidelines approach placing less emphasis on market definition and the use of prescribed formula were the following: TAPS & TDUS, ELCON & NASUCA, John R. Morris, Modesto Irrigation Dist., Entergy, EPSA, APPA & NRECA, and EEI. In favor were the following: FTC, Monitoring Analytics, A. Joseph Cavicchi, NYPSC, PPL, Brattle, and AAI.

195. ECLON & NASUCA, *supra* note 193, at 4.

196. Modesto Irrigation Dist., *supra* note 193, at 4; EPSA, *supra* note 193, at 5; EEI, *supra* note 193, at 5-8.

197. Entergy, *supra* note 193, at 2; EPSA, *supra* note 193, at 8; EEI, *supra* note 193, at 6-7.

198. EPSA, *supra* note 193, at 5-7.

199. APPA & NRECA, *supra* note 193, at 9-10 (arguing that concerns with differentiated products, which are not relevant to electricity markets, motivated a decreased emphasis on market definition and the use of prescribed formula).

200. FTC, *supra* note 193, at 5-7; PPL, *supra* note 193, at 8; Brattle, *supra* note 193, at 8 (noting that the Appendix A analysis is not always "conservative," as the FERC claims); AAI, *supra* note 193, at 15 (noting that supplementing concentration analysis with additional factors and evidence identified in the 2010 Guidelines would "greatly improve the accuracy of the [FERC's] decision-making.").

201. Monitoring Analytics, *supra* note 193, at 2; Cavicchi, *supra* note 193, at 5-6; PPL, *supra* note 193, at 11; Brattle, *supra* note 193, at 10-11; AAI, *supra* note 193, at 16.

202. Monitoring Analytics, *supra* note 193, at 3 (arguing that residual supplier ratios and other metrics are useful for evaluating a merger's effects).

203. NYPSC, *supra* note 193, at 3; PPL, *supra* note 193, at 5.

204. AAI, *supra* note 193, at 5 ("leaving the [FERC's] approach to merger review untouched will increase the potential for divergence between the FERC's and the antitrust agency's analysis, findings, and remedies."); FTC, *supra* note 193, at 1 ("Inconsistent approaches may make the antitrust review process longer, more confusing, and more costly than necessary.").

2. Adopting the 2010 Guidelines' HHI Thresholds

The comments were split evenly on whether the FERC should adopt the revised HHI levels of the 2010 Guidelines. Seven comments advocated adoption of the revised HHI levels, and seven advocated retaining the 1992 Guidelines' HHI levels.²⁰⁵ Among the reasons advanced in favor of adopting the 2010 HHI thresholds were: (1) the 2010 HHI thresholds more accurately identify anticompetitive concerns than the 1992 thresholds,²⁰⁶ (2) adoption of the 2010 HHI thresholds will allow for some consistency between the FERC and the antitrust agencies,²⁰⁷ and (3) even if the 2010 HHI thresholds permit anticompetitive mergers, regulatory oversight by the FERC will prevent an exercise of market power.²⁰⁸ Among the reasons advanced in favor of retaining the 1992 Guidelines levels were: (1) inelastic demand and other factors render electricity markets susceptible to an exercise of market power, which argues for conservative HHI thresholds,²⁰⁹ (2) existing HHI thresholds already are high enough, and perhaps too high to capture potentially anticompetitive mergers,²¹⁰ and (3) entry or efficiencies are unlikely to offset the adverse effects of an anticompetitive merger.²¹¹

3. Other Aspects of the 2010 Guidelines

Nearly one-half of the comments advocated adopting other aspects of the 2010 Guidelines.²¹² Several comments addressed the 2010 Guidelines' concern with partial acquisitions and its relation to a FERC rulemaking regarding the competitive assessment of acquisitions of minority interests.²¹³ Most comments addressing partial ownership issues urged the FERC to adopt an approach like that of the 2010 Guidelines; one comment, however, urged the FERC to reject

205. Comments advocating adoption of the 2010 Guidelines' HHI thresholds were submitted by: Cavicchi, John R. Morris, Entergy, PPL, EPSA, and EEI. Comments advocating retention of the 1992 HHI thresholds were submitted by: Monitoring Analytics, TAPS & TDUS, ELCON & NASUCA, NYPS&C, Modesto Irrigation Dist., APPA & NRECA, and AAI. Brattle suggested that adoption of the 2010 thresholds might be appropriate if the FERC adopted a more flexible framework for analyzing competitive effects. Brattle, *supra* note 193, at 11. Berkeley urged the FERC to study the effect of consummated mergers to determine whether the current HHI thresholds should be altered. Berkeley, *supra* note 193, at 5-6. The FTC urged the FERC not to adopt the increased HHI thresholds in the absence of the other revisions to the Merger Guidelines. FTC, *supra* note 193.

206. Cavicchi, *supra* note 193, at 4; Entergy, *supra* note 193, at 1-2; PPL, *supra* note 193, at 14-15; EPSA, *supra* note 193, at 8; EEI, *supra* note 193, at 17.

207. Cavicchi, *supra* note 193, at 4.

208. John R. Morris, *supra* note 193, at 23; Entergy, *supra* note 193, at 2; PPL, *supra* note 193, at 15-16; EPSA, *supra* note 193, at 9; EEI, *supra* note 193, at 17.

209. Monitoring Analytics, *supra* note 193, at 6-7; TAPS & TDUS, *supra* note 193, at 11; ELCON & NASUCA, *supra* note 193, at 4; NYPS&C, *supra* note 193, at 3-4.

210. APPA & NRECA, *supra* note 193, at 13 (noting that market power may be exercised at HHI levels well below 1000).

211. AAI, *supra* note 193, at 15.

212. Comments advocating adoption of other aspects of the 2010 Guidelines were submitted by: FTC, Monitoring Analytics, Cavicchi, TAPS & TDUS, ELCON & NASUCA, PPL, APPA & NRECA, and AAI.

213. Notice of Proposed Rulemaking, *Control and Affiliation for Purposes of Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, F.E.R.C. ST&S. & REGS. ¶ 32,650, 75 Fed. Reg. 4,498 (2010) (to be codified at 18 C.F.R. pts. 33, 35). Comments addressing partial acquisitions issues were submitted by: FTC, EPSA, TAPS & TDUS, APPA & NRECA, and AAI.

the 2010 Guidelines' approach.²¹⁴ Several comments urged the FERC to expand the kinds of evidence that should be considered under an Appendix A analysis.²¹⁵ Other comments suggested the FERC consider adopting the 2010 Guidelines' approach to powerful buyers and monopsony power.²¹⁶

4. Effect of Process on Adoption of 2010 Guidelines

Among the comments addressing whether differences in process between the FERC and the antitrust agencies affect the extent to which the FERC should adopt the 2010 Guidelines, several stated that differences made it difficult for FERC to fully adopt the 2010 Guidelines.²¹⁷ Some comments suggested that the statutory timeframe within which the FERC must decide to grant or deny a merger application and the FERC's on-the-record decision-making process made it difficult for the FERC to adopt a more flexible approach to analyzing competitive effects, which may take a substantial amount of time and involve extensive communication between the FERC and merging utilities.²¹⁸ Other comments, however, argued that the FERC's process was sufficiently flexible that the FERC could adopt elements of the 2010 Guidelines in its review of a merger's competitive effects.²¹⁹

5. Effect of 2010 Guidelines on Market-Based Rate Program

Among the comments addressing the issue, there was roughly an even split between those advocating change and those advocating no change to the FERC's analysis of horizontal market power in its electric market-based rate program as a result of changes in the 2010 Guidelines.²²⁰ Among the reasons advanced in favor of change were: (1) the same sources and types of information identified in the 2010 Guidelines are relevant to an accurate assessment of market power,²²¹ (2) an increase in market share thresholds would reduce the likelihood of "false

214. EPSA, *supra* note 193, at 9-13 (arguing that a focus on control rather than a case-by-case analysis of the competitive effects of partial ownership is appropriate).

215. Comments arguing for expanding the Appendix A analysis were submitted by: Monitoring Analytics, *supra* note 193, at 7-8 (urging the FERC to consider expand the scope of competitive analyses under Appendix A to include, among other things, analysis of consummated mergers, evidence of loss of head-to-head competition, and residual supplier analysis); PPL, *supra* note 193, at 16 (arguing for adoption of the 2010 Guidelines categories and sources of evidence that help predict a merger's competitive effects); APPA & NRECA, *supra* note 193, at 21-22 (suggesting that the FERC should, to the extent feasible, adopt additional analytical tools for predicting a merger's competitive effects); AAI, *supra* note 193, at 15-18.

216. FTC, *supra* note 193, at 8; AAI, *supra* note 193, at 21-24.

217. Comments from PPL, EPSA, APPA & NRECA, and EEI stated that differences in process would affect the extent to which FERC should adopt the 2010 Guidelines. Comments from FTC, ELCON & NASUCA, and AAI stated that differences in process would not affect the extent to which FERC should adopt the 2010 Guidelines.

218. EPSA, *supra* note 193, at 7; EEI, *supra* note 193, at 10-14.

219. AAI, *supra* note 193, at 6 (differences in process "pose little impediment to revising the FERC's merger regulations to include important changes reflected in the 2010 Guidelines").

220. Comments from FTC, EPSA, AAI, and EEI stated that the FERC's analysis of market power in its electric market-based rate program should change. Comments from Monitoring Analytics, ELCON & NASUCA, and APPA & NRECA stated that the market power analysis should not change. No other comments directly addressed this issue.

221. FTC, *supra* note 193, at 10; PPL, *supra* note 193, at 26 (arguing for a more fact-specific inquiry following an initial screen failure).

positives,” *i.e.*, finding market power when there is none,²²² (3) the current market power analysis is inconsistent with the legal and economic principles underlying the 2010 Guidelines, which may serve as a guide to market-based rate requirements,²²³ and (4) the FERC process for analyzing market-based rate applications renders infeasible the adoption of the 2010 Guidelines as a means of assessing market power.²²⁴ Among the reasons advanced in favor of no change were: (1) the current screens are appropriately conservative, as electricity markets still are characterized by factors that render them susceptible to an exercise of market power,²²⁵ and (2) the current HHI thresholds of the DPT are not inconsistent with the 2010 Guidelines, which identify a 2500 HHI level as the outermost limit of a moderately concentrated market.²²⁶

IV. COMPETITION ISSUES RELATED TO KEYSTONE XL PIPELINE

Keystone XL is a pipeline being developed by TransCanada Corporation to increase its capacity to ship oil produced from Canadian oil sands to refineries in the United States. Because it will cross the international border, it requires a Presidential Permit from the U.S. State Department to proceed.²²⁷ The project has engendered stiff opposition from environmental groups, who claim that extracting petroleum from oil sands causes serious damage to the local environment and generates excessive carbon emissions and that its transport through the United States poses unacceptable spill risk to environmentally sensitive areas, especially in the Sandhills area of Nebraska and near the Oglalla Aquifer.²²⁸ In November 2011, the State Department announced that it would delay acting on the Permit application until at least 2013 so that it could “undertake an in-depth assessment of potential alternative routes [for the pipeline] in Nebraska.”²²⁹

While the preponderance of the opposition to the project is on environmental grounds, there have been objections based on competitive impacts as well. One argument, put forward in a letter from Senator Ron Wyden (D. Ore.) to the Chairman of the FTC, is that there is evidence that “at least seven Canadian oil shippers have agreed to incur increased near-term shipping costs on the new pipeline in order to impact the market supply in the existing markets so

222. EPSA, *supra* note 193, at 14.

223. AAI, *supra* note 193, at 25.

224. EEI, *supra* note 193, at 20-21.

225. Monitoring Analytics, *supra* note 193, at 9 (noting that “wholesale electricity markets are still subject to the significant barriers to entry, limited substitutes, lack of storage and inelastic demand that the [FERC] originally cited as the rationale for a conservative set of screens”); ELCON & NASUCA, *supra* note 193, at 6.

226. TAPS & TDUS, *supra* note 193, at 13-14; APPA & NRECA, *supra* note 193, at 27.

227. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (2004).

228. See generally U.S. DEP’T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT (Aug. 26, 2011), available at <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.ns?Open>.

229. Press Release, U.S. Dep’t of State, Office of the Spokesperson, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information (Nov. 10, 2011), available at <http://www.state.gov/r/ps/2011/11/176964.htm>.

as to drive up the overall price of their product for U.S. refiners.”²³⁰ While Senator Wyden states that “the full nature of the arrangements agreed upon by the Canadian shippers is unclear,” his letter cites 2009 testimony before the National Energy Board of Canada to show that the shippers intend to use the proposed pipeline to bypass refineries in the Midwest and deliver oil directly to the Gulf Coast.²³¹ According to the letter, “[t]his will have the effect of manipulating supply levels allowing prices of oil refined in [the Midwest] to rise and ultimately benefitting the Canadian companies with higher prices.”²³² The FTC has not announced whether it will conduct an investigation based on Senator Wyden’s allegations.

A State Department staff memo written two months after the Wyden letter takes a contrary view of the implications of the pipeline for the Midwest market. That memo states that the pipeline will simply relieve a situation of crude oil oversupply that has existed in the Midwest due to transportation constraints.²³³ As the constraints disappear, “price discounts currently enjoyed by Midwest refiners would diminish.”²³⁴ The memo adds that this would produce a market that is more competitive, not less, since the existing transportation constraints “give Midwest refiners a crude price advantage that is not justified by long-term transportation costs.”²³⁵ It also asserts that Midwest consumers have not benefitted from the discounts enjoyed by the refiners, but those consumers will benefit from lower prices as refinery volumes in the Gulf Coast increase.²³⁶

Another competition-based argument in opposition to the pipeline is that it will enhance the ability of Gulf Coast refiners to exercise market power.²³⁷ The essence of this argument is that the refiners could use increased flows of Canadian crude, together with imports from South America and the Middle East, to build their crude inventories, leading to depressed prices for domestic crude relative to prices in the rest of the world.²³⁸ This, in turn,

will likely slow exploration spending in the Gulf of Mexico and in shale areas such as Eagle Ford in Texas and Bakken in North Dakota. In addition, the price suppression will slow or stop investment in oil sands projects in Alberta. The result will be non-OPEC production in 2020 that is lower than it might have been otherwise and greater world dependence on OPEC.²³⁹

230. Letter from Sen. Ron Wyden to Jonathon Leibowitz, Chair, FTC at 1 (Apr. 6, 2011), *available at* <http://wyden.senate.gov/download/?id=9abe39f1-3e6f-4b6e-b0be-853c94e3f775>.

231. *Id.* at 1-2.

232. *Id.* at 2.

233. Memorandum from Carmine DiFiglio, Deputy Assistant Sec’y for Policy Analysis, Office of Policy and Int’l Affairs, U.S. Dep’t of Energy, to Keith J. Benes, Attorney-Adviser, U.S. Dep’t of State, at 3 (June 22, 2011), *available at* <http://republicans.energycommerce.house.gov/Media/file/PDFs/20120701DOE.pdf>.

234. *Id.* at 3-4.

235. *Id.*

236. *Id.*

237. PHILIP K. VERLEGER, PK VERLEGER LLC, THE KEystone XL PIPELINE: OPEC’S TROJAN HORSE? (2011), *available at* http://www.pkverlegerllc.com/assets/documents/Keystone_as_Trojan_Horse1.pdf.

238. *Id.* at 11.

239. *Id.*

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