

Energy Antitrust: The Year In Review And What Lies Ahead

By **Darren Tucker, Jason Powers and Lindsey Vaala**

(January 20, 2021, 5:54 PM EST)

Antitrust enforcement and litigation in the energy industry remained steady in 2020, despite unprecedented challenges imposed by the COVID-19 pandemic. On the merger enforcement front, the Federal Trade Commission brought four energy-related actions.

The U.S. Department of Justice Antitrust Division did not file any merger enforcement actions, but obtained a guilty plea in an investigation involving the U.S. Department of Energy's Strategic Petroleum Reserve. Energy-related private litigation was robust, including several manipulation cases and continued filed-rate-doctrine litigation.

As 2021 unfolds and the new administration takes over, we anticipate an increase in enforcement in the energy sector and more broadly. On the nonmerger side, criminal antitrust enforcement has been at historic lows for the past few years.

We anticipate the new administration will seek to reverse that trend, and return to prior levels of investigatory and enforcement activity in all sectors. The unique economic circumstances created by the COVID-19 pandemic may spark conduct that leads to future enforcement actions as well as heightened private litigation.

Merger Enforcement

The total number of transactions reported under the Hart-Scott-Rodino Antitrust Improvements Act across all industries in 2019 — the most recent year for which statistics are available — was 2,089, a slight decrease from a decade-high 2,111 transactions in 2018.

At 127, the number of reportable energy transactions in 2019 declined slightly from the prior year, both in absolute terms and in terms of the percentage of all notified transactions across industries.

In the past decade, energy mergers have accounted for 6% of all merger enforcement actions, with just over 2% of all energy transactions resulting in an enforcement action. In 2019, over 10% of reported energy transactions led to an initial merger investigation, while 2% of these transactions led to in-depth



Darren Tucker



Jason Powers



Lindsey Vaala

second request investigations.

In 2020, the DOJ did not bring any merger enforcement actions involving the energy industry, while the FTC brought four cases:

- In February, the FTC issued an administrative complaint and federal court complaint seeking a preliminary injunction to block a joint venture between Peabody Energy Corp. and Arch Coal Inc. that would combine coal mining and sales operations for coal mines located in the Southern Powder River Basin. The FTC estimated that the parties' combined share of the basin's coal reserves and coal production would exceed 60%. Finding the joint venture likely to substantially lessen direct competition, the district court granted the injunction, and the joint venture partners abandoned the deal.
- In June, the FTC issued a complaint and proposed consent agreement in connection with Tri Star Energy LLC's acquisition of retail fuel outlets from Hollingsworth Oil Co. The FTC alleged that the transaction would substantially lessen competition in certain local retail fuel markets in Tennessee. The commission approved a final consent order in August requiring Tri Star to divest several retail fuel assets.
- In July, the FTC filed a complaint in federal court alleging that Alimentation Couche-Tard Inc., or ACT, violated the terms of a February divestiture order requiring the sale of certain retail fuel stations in Minnesota and Wisconsin to approved buyers by a certain deadline. The divestiture related to ACT's previous acquisition of nearly 400 fuel stations across ten states. The FTC also filed a simultaneous settlement in which ACT agreed to pay a \$3.5 million civil penalty for the violation.
- In August, the FTC issued an administrative complaint and proposed consent agreement relating to the \$400 million acquisition of retail fuel outlets by Arko Holdings Ltd. from Empire Petroleum Partners LLC. Alleging the acquisition would substantially reduce the number of competitors for the retail sale of gasoline and diesel fuel in certain local markets in four states, the FTC sought divestiture of some retail stations to independent buyers. The commission approved the final consent order in October.

That the FTC pursued divestitures in the Tri Star and Arko Holdings matters, and enforced the divestiture order against ACT, is consistent with the agencies' increased commitment to structural remedies. The preference for structural rather than conduct remedies is a trend we expect will continue under the Biden administration.

In September 2020, the DOJ released its new Merger Remedies Manual, which replaces the 2004 Policy Guide to Merger Remedies. The 2020 manual demonstrates a continued strong focus on structural remedies, and makes clear that the circumstances under which the DOJ views conduct remedies as appropriate are very narrow.

Nonmerger Enforcement

The DOJ's Antitrust Division's only new energy-related case in 2020 resulted not in antitrust charges, but in allegations of a fraud conspiracy.

In September, Cajan Welding & Rentals Ltd., a Louisiana-based company, pled guilty to conspiring to

defraud the government and to violate the Procurement Integrity Act by improperly obtaining and using nonpublic pricing and cost information to secure lucrative subcontracts to provide maintenance services for the DOE's strategic petroleum reserve.

The DOJ obtained an additional corporate settlement to resolve antitrust and fraud claims in a matter revealed in 2018 involving alleged bid rigging for fuel supply contracts to U.S. military bases in South Korea by Jier Shin Korea Co. Ltd. A DOJ press release announcing the settlement called it the "final chapter" in the multiyear investigation, which has netted more than \$200 million in civil penalties and nearly \$150 million in criminal fines.

Congress permanently reauthorized the Antitrust Criminal Penalty Enhancement and Report Act, or ACPERA. Originally passed in 2004, ACPERA provides strong incentives for companies considering whether to self-report anticompetitive misconduct in exchange for leniency under the Antitrust Division's corporate leniency program. Under ACPERA, a successful leniency applicant may also qualify for mitigation of onerous civil liability and penalties stemming from the same misconduct.

The Antitrust Division's Procurement Collusion Strike Force, or PCSF, capped a busy inaugural year with an expansion and the appointment of a permanent director and assistant director. Focused on detecting and deterring collusion impacting the government contracting process, PCSF has trained more than 8,000 government employees to identify red flags in procurement.

Reportedly involved in more than two dozen grand jury investigations, PCSF matters account for nearly one-third of the Antitrust Division's current case load. PCSF obtained its first indictment in October 2020, bringing charges against an engineering company and former executive for allegedly conspiring to rig bids for construction-related contracts in North Carolina funded by federal and state dollars.

The FTC did not bring any nonmerger civil antitrust cases in the energy sector in 2020. Notably, the commission is gearing up for a 2021 U.S. Supreme Court fight regarding its authority to obtain restitution in civil enforcement actions brought under Section 13(b) of the FTC Act. In July 2020, the Supreme Court granted certiorari in AMG Capital Management LLC v. FTC; oral argument is expected early this year.

Private Litigation and DOJ Amicus Participation

While the courts are only beginning to see indications of what litigation may arise out of the unprecedented market dislocations wrought by the pandemic on the energy industry, some judicial decisions in 2020 serve as a reminder that, in the years to come, courts may carefully enforce the boundaries around competition law.

Courts grappling with antitrust injury and standing in market manipulation cases rejected claims by plaintiffs who did not directly participate in markets affected by coordinated conduct, or when plaintiffs alleged manipulative but not anticompetitive conduct. Courts may face similar issues in the near future.

In June 2020, the Supreme Court declined to review the dismissal of Prime International Trading Ltd. v. BP PLC, which put to rest claims by a group of futures and derivatives traders alleging that sellers of Brent crude oil manipulated prices to affect the dated Brent assessment, the world's leading benchmark assessment of North Sea crude oil, and boost profits on derivatives linked to the assessment.

The district court held the plaintiffs, who did not participate in the physical market for Brent crude or

the market for derivatives directly pegged to the dated Brent assessment, had not alleged an antitrust injury and lacked standing to bring their claims. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal in 2019.[1]

Also in June, a federal district court dismissed a putative class action brought by the city of Long Beach, California, alleging Total Gas & Power North America Inc. and certain affiliates traded natural gas futures contracts at four hubs in the southwestern U.S. in a manner intended to manipulate indices for Total's benefit.[2] The district court granted a motion to dismiss for failure to state an antitrust claim.

Concluding that the market effect was derived not from the defendants' size or market power, but from strategically timed trades that any market participant could have made, the court found Long Beach had not alleged anticompetitive trading or any resulting antitrust standing. A Second Circuit appeal is pending.

In August, commodity trader Mish International Monetary Inc. brought antitrust class action claims arising out of widely publicized negative crude oil prices.[3] Mish International alleges a conspiracy by Vega Capital Group LLC and unnamed investors to manipulate and fix West Texas Intermediate crude oil futures prices on the New York Mercantile Exchange on April 20 and April 21, 2020 — when WTI light sweet crude oil futures traded at negative prices for the first time — allegedly netting defendants as much as \$500 million. Vega Capital's motion to dismiss for failure to state a claim is pending.

Litigation continued over the scope of the filed-rate doctrine, a powerful defense for entities regulated by the Federal Energy Regulatory Commission. Defendants scored a win in the long-running PNE Energy Supply LLC litigation,[4] when the U.S. Court of Appeals for the First Circuit affirmed dismissal of wholesale electricity purchasers' claims that natural gas retailers restricted supply to drive up prices.

The plaintiffs alleged the defendants overscheduled transmission capacity on the Algonquin pipeline, and then withheld that transmission capacity from the market. The First Circuit relied on its 2019 decision in *Breiding v. Eversource Energy*, which rejected similar allegations.[5] As in *Breiding*, the First Circuit held the filed-rate doctrine barred the plaintiffs' claims, because the alleged violations were carried out through transactions subject to a FERC-approved tariff.

The DOJ's Antitrust Division in 2020 filed amicus briefs in significant energy-related litigations. In *NextEra Energy Capital Holdings Inc. v. Paxton*, the DOJ filed a brief on a dormant commerce clause issue presented in NextEra's U.S. Court of Appeals for the Fifth Circuit appeal from the dismissal of its claims against the state of Texas.[6]

NextEra alleges that a recently passed Texas state law — S.B. 1983, giving incumbent utilities the right of first refusal for state approval to construct new electricity transmission lines — discriminates against out-of-state energy providers. A district court, holding the law did not discriminate and did not affect interstate power transmission, dismissed NextEra's complaint. The DOJ argued to vacate and reconsider that dismissal. The Fifth Circuit's decision is pending.

In February 2020, plaintiffs asked the Ninth Circuit to reverse the dismissal of claims against Salt River Project Agricultural Improvement and Power District, an Arizona public utility that charged different rates and fees to electricity customers who also used self-generated solar energy.[7] The district court dismissed the complaint, finding that the plaintiffs' injuries were not alleged to stem from a restraint on competition.

Supporting the plaintiffs, the DOJ argued that the utility is using monopoly power in violation of antitrust law, by penalizing customers seeking to obtain energy from a rival power source. Arguments are expected in February.

In July 2020, at the invitation of the district court, the DOJ's Antitrust Division, in consultation with the FTC, the U.S. Department of Transportation and the Surface Transportation Board, filed an amicus brief in the *In re: Rail Freight Fuel Surcharge Antitrust Litigation*, ongoing since 2007,[8] to weigh in on the interpretation and application of a federal statute excepting certain communications about interline rail shipments from the scope of antitrust law.

Taking no position on the motions in the case, the DOJ argued for a reading of the statute that would exclude from antitrust scrutiny only communications between railroads that directly interline with one another regarding the particular interline route for which they partnered. A decision remains pending.

Looking Ahead to 2021

With a new administration will come new enforcement priorities. Nonmerger enforcement and private litigation in particular may see increased activity in the short term stemming from the COVID-19 pandemic, particularly as the effects of market dislocations from the pandemic come into focus. The DOJ's Procurement Collusion Strike Force, and the Antitrust Division generally, will be on high alert to uncover criminal conduct perpetrated during the unprecedented conditions of 2020.

Former Chief U.S. Circuit Judge Merrick Garland, recently announced as President Joe Biden's nominee for U.S. attorney general, has notable antitrust experience as a jurist, as well as from his time in private practice and former DOJ stints. The announcement of who will be selected to lead the DOJ's Antitrust Division has not been made yet. The rumored frontrunners all have previous experience in senior leadership positions within the division, and are not expected to pursue dramatic policy shifts.

Biden will have an opportunity to nominate two new FTC commissioners early in his term, as a result of FTC Chair Joseph Simons' resignation, effective Jan. 29, and the expected nomination of FTC Commissioner Rohit Chopra to be the new head of the Consumer Financial Protection Bureau. This means that the FTC will change from a Republican to a Democratic majority in the next few months.

Darren Tucker and Jason Powers are partners, and Lindsey Vaala is counsel, at Vinson & Elkins LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 784 F. App'x 4 (2d Cir. 2019), cert. denied, 141 S. Ct. 113 (2020).

[2] *City of Long Beach v. Total Gas & Power North America Inc.*, 465 F. Supp. 3d 416 (S.D.N.Y. 2020).

[3] *Mish International Monetary Inc. v. Vega Capital London Ltd.*, 1:20-cv-04577 (N.D. Ill.).

[4] *PNE Energy Supply, LLC v. Eversource Energy*, 974 F.3d 77 (1st Cir. 2020).

[5] *Breiding v. Eversource Energy*, 939 F.3d 47 (1st Cir. 2019).

[6] NextEra Energy Capital Holdings Inc. v. Paxton, No. 20-50160 (5th Cir.).

[7] Ellis v. Salt River Project, No. 20-15301 and 20-15476 (9th Cir.).

[8] Statement of Interest for the United States in Support of No Party Regarding the Meaning of 49 U.S.C. § 10706(a)(3)(B)(ii), In re Rail Freight Fuel Surcharge Antitrust Litigation, Dkt. 969, Case No. 07-mc-00489-PLF-GMH (MDL Docket No. 1869) (July 28, 2020 D.D.C.).