ANTITRUST CLAIMS: A NOVEL LINE OF ATTACK BY GROUPS OPPOSING NATURAL GAS INFRASTRUCTURE PROJECTS

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The Sierra Club and other environmental groups have made little secret of their opposition to the continuing use of fossil fuels and to the development of infrastructure to support that use. A new wrinkle in their multifront attack on fossil fuel-related projects can be seen in a series of recent filings with federal regulatory agencies asserting that two natural gas pipeline projects violate the antitrust laws. Although styled as "complaints," the filings do not initiate an adjudicatory proceeding in the usual sense of a complaint but rather appear to be requests for enforcement or competition advocacy actions by federal antitrust agencies. The challenged projects are joint ventures of energy utility companies and the natural gas supplied by each will serve their respective natural gas or electricity retail distribution affiliates. The claims that this structure is anticompetitive are novel and face substantial obstacles under established antitrust law.

OVERVIEW OF THE ANTITRUST CLAIMS

The recent antitrust challenges to pipeline projects first surfaced with respect to the Atlantic Coast Pipeline (ACP) project, which includes 600 miles of new pipeline, three compressor stations, and related facilities across West Virginia, Virginia, and North Carolina. ACP is owned by subsidiaries of four utility companies, affiliates of which will purchase some of the gas supplied by the pipeline. Sierra Club argues that this structure is anticompetitive because it will stifle the development of renewable energy alternatives for use in generating electricity and limit ACP's incentive to complete the project efficiently, thereby unnecessarily increasing costs for retail customers.

Sierra Club has also asserted an antitrust theory against the NEXUS project, which involves the construction of 256 miles of new pipeline, four compressor stations, and related facilities across Pennsylvania, West Virginia, Ohio, Michigan, and Ontario. NEXUS is a joint venture between two utility companies. Sierra Club claims that one of the companies is monopolizing electricity generation because its natural gas supply will be sourced from the NEXUS project, the cost of which it can then pass on to its Michigan retail customers through its preexisting regulated monopoly over a segment of the retail market. Sierra Club also argues that the project is anticompetitive because it is more costly than other alternatives for supplying increased energy demand.

THE THEORIES ASSERTED FACE SIGNIFICANT CHALLENGES UNDER ESTABLISHED ANTITRUST PRINCIPLES

The antitrust laws impose specific requirements designed to assure that claims truly assert harm to competition in a well-defined market. It is not sufficient to make assertions of harm to the interests of a specific market participant or to a policy goal unrelated to the goals of the antitrust laws to encourage free and fair competition and the generally resulting lower prices and increased output.[1] A full antitrust analysis would exceed the bounds of this alert, but a few initial observations can be made.

First, many of the antitrust arguments Sierra Club advances are based on the assertion that these pipeline projects do not make economic sense and that the utilities must therefore have some separate anticompetitive motive. However, there are numerous other pipelines under construction in the same general geographic area, as might be expected given the boom in natural gas production over the last decade. This suggests both that there is a good economic case for construction of new natural gas transportation capacity, and that control of a single pipeline would not allow its owners to control any properly defined market. Antitrust agencies and courts will not second guess reasonable business decisions being made in the marketplace.[2]

Second, in claims such as these, antitrust complainants are required to identify some relevant antitrust market that would be monopolized as a result of activity they challenge. The complainants in the recent filings against the pipelines either do not do so, or attempt to define markets based on the activities of a single market participant, which is generally disfavored under the antitrust laws.[3]

Finally, theories of economic harm must take account of the heavy regulation of energy markets at the state and federal level. Such regulation, for example, prohibits a utility from passing on costs to retail customers that are not prudently incurred. An antitrust theory based on a utility's asserted intention to do just that could be viewed as implausible.

IMPLICATIONS

Environmental organizations have shown a willingness to use every potential legal means to stop or delay natural gas development activities and other energy infrastructure projects. Such is the avowed goal of the Sierra Club's "Beyond" campaign.[4] Antitrust represents a new line of attack in this ongoing effort. Monitoring of developments in this area, and access to sound antitrust analysis and advice in the event of a challenge, is thus necessary for market participants seeking to protect these projects.

Notes:

[1] *See, e.g.,* Cargill v. Montfort of Colorado, Inc., 479 U.S. 104, 109 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,429 U.S. 477, 489 (1977) (holding that an antitrust plaintiff must show not just an injury caused by the challenged conduct, but an antitrust injury; i.e., an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful").

[2] *See, e.g.*, Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, "The Consumer Reigns: Using Section 2 to Ensure a 'Competitive Kingdom'", Opening Session, Hearings on Section 2 of the Sherman Act Sponsored by the Federal Trade Commission and the Antitrust Division, U.S. Department of Justice, at 10, 12 (2006) ("[A]ny legal framework needs to avoid second-guessing business judgments that were objectively reasonable at the time that they were made," and courts and agencies must "tak[e]care to ensure not to chill procompetitive behavior.").

[3] *See, e.g.,* Queen City Pizza, Inc. v. Domino's Pizza, Inc., 129 F.3d 724 (3d Cir. 1997) (rejecting market of "pizza ingredients and supplies used by Domino's pizza stores").

[4] *See* http://content.sierraclub.org/naturalgas/(describing efforts to end natural gas production and liquefied natural gas exports).

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