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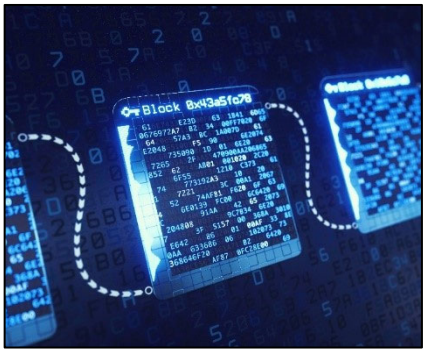
Shipping Industry Proposal Highlights Benefits and Antitrust Risks Associated with Blockchain

By Peter J. Levitas, Matthew Tabas, and Mathieu M. Coquelet Ruiz, Arnold & Porter Kaye Scholer

On February 6, 2020, the Federal Maritime Commission ("FMC") allowed the Shipping Act (the "Act") review period to expire in connection with an agreement among several shipping companies to share information through a blockchain platform,[1] clearing the way for its implementation.[2] Once an agreement filed with the FMC becomes effective, the Act provides immunity from the antitrust laws to the parties to the agreement for the activities covered by the agreement.[3]

The shippers' plan relies on a blockchain platform to share information, documents, and data to more efficiently manage the maritime cargo supply chain. While a blockchain platform may reduce friction in complicated supply chains, like any other system that allows marketplace rivals to share information, it may also create—for companies that cannot avail themselves of an antitrust immunity—the risk of antitrust scrutiny regarding potential unlawful coordination or exclusionary conduct that violates the U.S. antitrust laws.[4] Companies that are considering



setting up or joining a blockchain platform should carefully consider any potential antitrust risk and take steps to mitigate that risk and reduce the possibility of investigations or lawsuits based on use of blockchain.

Blockchain Technology

In general, blockchain technology shares encrypted information ("blocks") through a peer-to-peer network and aggregates that information into a shared ledger ("a chain," made up of multiple "blocks").

Each block in the chain has several features: (i) it stores information about a specific transaction (such as the date, time, participants, or

[1] The companies participating in the agreement are A.P. Moller-Maersk ("Maersk"), CMA CGM SA, Hapag-Lloyd AG, MSC Mediterranean Shipping Co. SA and Ocean Network Express Pte. Ltd.

[2] The TradeLens Agreement, FMC Agreement No. 201328, https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/26452

[3] The Act is applicable to the industry of international liner shipping, and creates a regulatory regime, separate from traditional antitrust laws, under which collective carrier or MTO activity is evaluated, both when the agreement is initially filed and thereafter, for any adverse impact on competition in the trade. *See* FMC Strategic Plan, FY 2018-2022, p. 9 (https://www.fmc.gov/wp-content/uploads/2018/08/FY2018-2022InitialDraftStrategicPlan.pdf). The antitrust immunity is part of the Act's stated purpose to "promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace." 46 U.S.C. § 40101(4).

[4] The rise of blockchain platforms has been closely followed by antitrust regulators. In March 2018, the U.S. Federal Trade Commission announced the creation of an internal "FTC Blockchain Working Group." *See* "It's Time for a FTC Blockchain Working Group," Fed. Trade Comm'n (Mar. 16, 2018), https://www.ftc.gov/news-events/blogs/techftc/2018/03/its-time-ftc-blockchain-working-group.

any other information shared by the parties); (ii) it allows the transaction to be verified by a decentralized peer-to-peer network of computers; and (iii) it receives a unique code (called a "hash") that distinguishes it from other blocks. When a new block is added to the chain (or ledger), that block becomes available for anyone (public ledger) or any network member (permissioned ledger) to view. The information recorded in the ledger is permanent and cannot be altered.

The most well-known example of this technology is the cryptocurrency Bitcoin, which uses blockchain technology to bypass central banks or a single administrator, and allows users to exchange value directly.[5] Over the years, blockchain and derivative technologies have extended beyond cryptocurrency and benefitted supply chain and other services in health care, shipping insurance, and other sectors where it is critical to track and record information about pricing, units, or other key specifications.

Pro-Competitive Uses of Blockchain Technologies

Blockchain technology may create procompetitive synergies by reducing transaction friction through the elimination of an intermediary and the addition of a more secure and efficient transaction system. As a result, a number of industries with complex supply chains and a need for secure systems have explored the use of blockchain technology. For example, several diamond companies have agreed to use a blockchain platform to establish the provenance, authenticity, and traceability of their products throughout the entire supply chain.[6] Walmart and IBM are testing the use of blockchain technology to create a food traceability system, which in theory would reduce the time needed to trace the provenance of several products from seven days to just 2.2 seconds.[7] The U.S. Food and Drug Administration has issued an initiative for the creation of a digital system for tracking and verifying prescription drugs by 2023,[8] and blockchain is one of the systems currently being tested. Separately, IBM, Walmart, KPMG, and Merck are jointly developing a blockchain-based track and trace system for pharmaceutical shipments.[9]

The Shipping Act and the Shippers' Blockchain Proposal

The Act creates a separate regulatory regime for coordinated activity by ocean common carriers or marine terminal operators: certain agreements are required to be filed with the FMC[10] and, once these agreements become effective under the Act, other federal antitrust statutes do not apply as long as the regulated entities comply with the statutory and regulatory prescriptions of the Act, subject to

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[5] How does Bitcoin work?, Bitcoin.org, https://bitcoin.org/en/how-it-works

[6] https://www.tracr.com/

[7] Shiraz Jagati, Walmart Forays Into Blockchain, CoinTelegraph (Sep. 3, 2019), https://cointelegraph.com/news/walmarts-foray-into-blockchain-how-is-the-technology-used.

[8] DSCSA Pilot Project Program, FDA (May 22, 2019) https://www.fda.gov/drugs/drug-supply-chain-security-act-dscsa/dscsa-pilot-project-program.

[9] Lukas Hofer, Pharmaceutical Industry and Blockchain – The Next Big Hit?, The Blockchain Land (Jun. 20, 2019) https://theblockchainland.com/2019/06/20/pharmaceutical-industry-blockchain-adoption/

[10] For marine terminal operators, this requirement covers agreements that authorize the parties to: (i) discuss, fix, or regulate rates; (ii) regulate other conditions of service; or (iii) engage in exclusive, preferential, or cooperative working arrangements. For common carriers, this requirement covers agreements that (i) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service; (ii) pool or apportion traffic, revenues, earnings, or losses; (iii) allot ports or restrict or regulate the number and character of sailings between ports; (iv) limit or regulate the volume or character of cargo to be carried; (v) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators; (vi) control, regulate, or prevent competition in international ocean transportation; or (vii) discuss and agree on any matter related to service contracts. *See* 46 CFR § 535.201

certain exceptions.[11] The Act also exempts carriers from certain private antitrust actions, such as actions for damages or injunctive relief under the Clayton Act,[12] and instead makes private claims actionable as Shipping Act violations.[13]

To gain the protections of the Act, carriers and terminal operators must file with the FMC the agreement detailing the terms and extent of the proposed cooperation. The FMC then has 45 days to seek an injunction in federal court if it finds the agreement would negatively affect competition.[14] If it does not do so, the filed agreement goes into effect and the provisions of the Act apply to the filed agreement, thereby exempting the agreement from federal antitrust scrutiny. Antitrust immunity under the Act extends only to the boundaries of the agreement reviewed by the FMC; other joint activities undertaken by the parties to the agreement might still be subject to antitrust enforcement, and non-regulated entities that participate to the agreement are not covered by the antitrust immunity.[15]

The parties to the proposed blockchain platform filed their agreement with the FMC on December 23, 2019.[16] Under that agreement, a blockchain platform, TradeLens, developed by IBM and Maersk, allows shippers, shipping lines, freight forwarders, port and terminal operators, and others to (i) exchange documents and data; (ii) track the physical progress of cargo through the supply chain; (iii) store documents and share those documents with permissioned parties in the supply chain; and (iv) access user interfaces for viewing event data, milestones, and documents, and managing users and access permission.[17]

The FMC let the 45-day waiting period expire without seeking an injunction, which allowed the agreement to become effective as of February 6, 2020. Although the companies are now permitted to use the blockchain platform to exchange information about supply chain events, the FMC will monitor the companies' compliance with the agreement to ensure they do not violate the Act.[18]

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[11] 46 U.S.C. § 40307. The antitrust immunity does not apply to all concerted actions, such as group boycotts or discriminatory rate-setting (46 U.S.C. § 41105). Note that filed agreements are reviewed by a team of FMC economists, attorneys, and transportation analysts using "antitrust law and economic models to evaluate the potential competitive impact of a proposed agreement and to advise the [FMC] of potential issues or actions before a pending agreement becomes effective" (Federal Maritime Commission, Strategic Plan FY 2018-2022).

[12] 46 U.S.C. § 40307(a), 46 U.S.C. § 40307(d).

[13] Pursuant to 46 U.S.C. § 41301(a), any person may file with the FMC a sworn complaint alleging a violation of the Act.

[14] 46 U.S.C. § 40304.

[15] *See* TradeLens Agreement, section 5.6

[16] FMC Agreement No. 201328, https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/26452

[17] https://www.tradelens.com/

[18] Parties to an agreement identified in 46 CFR § 535.702(a)(1) or 46 CFR § 535.704 are required to submit quarterly monitoring reports to the FMC for as long as the agreement remains in effect. *See* 46 CFR § 535.701. The monitoring reports shall contain information and data on the agreement, such as market share, revenues, vessel capacity, vessel capacity utilization, cargo volume and revenue, or top 10 liner commodities. *See* 46 CFR §535.703. Agreements subject to the filing of periodic monitoring reports are: (i) agreements that contain the authority to discuss or agree on capacity rationalization agreement (46 CFR §535.702(a)(1)); (ii) agreements where parties hold a combined market share, based on cargo volume, of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement, when the agreement contains any of the following authorities: (a) the discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or (d) the discussion of, or agreement on, any service contract matter (46 CFR §535.702(a)(2)); and (iii) agreements among parties with market share below 35 percent as required by the FMC (46 CFR § 535.704).

Once the agreement is effective, the FMC may bring a civil action in the United States District Court for the District of Columbia to enjoin the operation of the agreement if the implementation of the agreement in practice reduces competition (e.g., by producing an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, or by substantially lessening competition in the purchasing of certain services).[19]

Private parties may also file with the FMC a sworn complaint alleging a violation of the Act and seeking reparations.[20] Formal complaints[21] are assigned to an Administrative Law Judge and adjudicated pursuant to the FMC's Rules of Practice and Procedure.[22] The Administrative Law Judge will make initial or recommended decisions to the FMC, which will include a statement of findings and conclusions, and the appropriate rule, order, sanction, relief, or denial thereof.[23] The decision of the Administrative Law Judge will become final, unless, within twenty-two days from the date of service of the decision, either party files a memorandum excepting to any conclusions, findings, or statements contained in such decision, or the FMC makes a determination to review.[24]

Blockchain technology is still evolving, but at its core it is a device to share information efficiently…

The Antirust Risks Posed By Blockchain Technologies

The use of blockchain technologies to share information among competitors can create risk, whether as a violation of the Shipping Act in the case of shippers or a violation of the antitrust laws, and thus companies using blockchain should plan and implement any use carefully.

Anticompetitive Foreclosure

Use of blockchain technology can create antitrust risk if the blockchain rules exclude competitors or create or enhance market power by favoring some participants over others. For example, where a transaction will be added to the blockchain only if a sufficient number of participants agree that the transaction is valid, issues could arise if certain participants prioritize the validation of their transactions or boycott transactions by other participants.

Similarly, in blockchains where discrepancies in the chain are resolved by designated blockchain participants, as opposed to via an objective consensus mechanism, issues could arise if the designated participants resolve these discrepancies in way that disadvantages rival competitors.[25] To limit potential risk, the blockchain arrangement should have well-defined, objective and reasonable criteria for membership, removal of members, and approval of transactions. These criteria should be uniformly and consistently enforced, with reasonable opportunities to appeal any adverse decision of the organization.

Additionally, parties to an agreement are required to file minutes of agreement meetings, for as long as an agreement remains in effect, if the agreements authorize discussion or agreement on the following activities: (i) rates or charges in tariffs or service contracts; (ii) pooling or apportionment of cargo traffic; (iii) discussion of revenues, losses or earnings; (v) any service contract matter, including voluntary service contract guidelines (46 CFR § 535.704).

[19] 46 U.S.C. § 41307(b)(1) empowers the FMC to bring an action "at any time after the filing or effective date of an agreement." *See also* Federal Maritime Commission, Strategic Plan FY 2018-2022.

[20] 46 U.S.C. § 41301(a).

[21] Except for claims of $50,000 or less, for which an informal complaint, handled by a settlement officer for resolution using informal procedures, may be filed (46 CFR § 205).

[22] 46 CFR § 502.61(a).

[23] 46 CFR § 502.223.

[24] 46 CFR § 502.227.

[25] Colin Thompson, "Private Blockchain or Database? How to Determine the Difference," The Blockchain Review (Oct. 4, 2016).

Improper Exchange of Information

An agreement to share information via blockchain technology can also create antitrust risk if it allows for anticompetitive information sharing or improper coordination. Because it rests on the sharing of permanently accessible information, a blockchain creates particular risk if the information being shared is competitively sensitive.

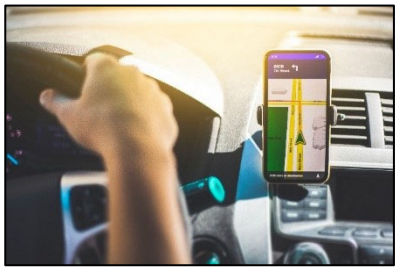
To address this risk, any competitors who are planning to share information through a blockchain arrangement should ensure that the information being shared is not competitively sensitive (for example, information regarding current or future price, margin, quantity, output, development plans, customer specifications, or employee benefits). If such information is necessary for the blockchain to function effectively, network participants should implement methods to limit one competitor's access to another competitor's sensitive information through encryption, by setting up appropriate firewalls, or by restricting access to this information to designated employees.

Conclusion

Blockchain technology is still evolving, but at its core it is a device to share information efficiently and, as such, offers significant potential benefits as well as potential risk. Even those companies that gain antitrust immunity under the Act must be careful to implement blockchain properly and without harming competition given the Act's prohibition against engaging in anticompetitive behavior. Careful compliance efforts may mitigate the risk associated with blockchain, and allow users to gain the benefits of the technology while avoiding potentially costly and time-consuming enforcement investigations or litigation.

Seattle, Uber and the State-Action Immunity Doctrine

By Robert Corp and Perry Rowthorn, Shipman & Goodwin LLP



On April 10, 2020, the City of Seattle, the U.S. Chamber of Commerce and an Uber subsidiary agreed to dismiss what remained of a three-year court battle over a Seattle collective-bargaining ordinance aimed at ride-sharing companies.[1] The outcome casts doubt on whether drivers for ride-sharing companies, who work as independent contractors, have any path to unionization, even at local levels. The suit followed Seattle's 2015 legislation, the first of its kind, allowing drivers on platforms like Uber and Lyft to collectively bargain for pay and other working conditions. Rasier, a wholly-owned subsidiary of Uber (for convenience, hereinafter "Uber"), and the Chamber of Commerce sued, alleging that the ordinance violated the Sherman Act by allegedly allowing independent contractor for-hire drivers to form a cartel and collude on pricing for their services.

In early 2017, Uber and the Chamber of Commerce brought separate lawsuits, which were subsequently consolidated. Seattle moved to dismiss, arguing that it was shielded from liability due to antitrust immunity under the state-action doctrine.[2] The City cited the Supreme Court's language in *Parker v. Brown*[3] while arguing "the federal antitrust laws should not be read 'to restrain a state or its officers or agents from activities directed by its legislature.'"[4]

Judge Lasnik of the U.S. District Court for the Western District of Washington granted Seattle's motion to dismiss in August 2017.[5] In that decision, the Court examined the ordinance under the *Midcal* test, which only applies state-action immunity from antitrust liability if a challenged regulation is (i) "clearly articulated and affirmatively expressed as state policy," and (ii) "actively supervised by the State itself."[6]

Examining the first prong of the *Midcal* test, the district court held that the Washington State statutes on which Seattle relied clearly delegated authority to the City to regulate the for-hire transportation industry and authorized Seattle "to use anticompetitive means in furtherance of the goals of safety, reliability, and stability."[7] The court went on to determine that the structure of the ordinance was such that the City was and would be actively supervising the conduct as required by the second *Midcal* prong.[8] Based on its finding that the City's role in enacting and enforcing the ordinance was immune from suit under federal antitrust laws because of state-action immunity, the federal antitrust claims were dismissed.[9]

Uber and the Chamber of Commerce immediately appealed to the U.S. Court of

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[1] Stipulation and Order for Dismissal Without Prejudice, *U.S. Chamber of Commerce v. City of Seattle*, No. 17-cv-00370-RSL (W.D. Wash. Apr. 10, 2020) (ECF No. 121).
[2] Defendants' Motion to Dismiss, *U.S. Chamber of Commerce v. City of Seattle*, No. 17-cv-00370-RSL (W.D. Wash. Mar. 21, 2017) (ECF No. 42) (hereinafter, "*Motion to Dismiss*").
[3] 317 U.S. 341, 350-51 (1943).
[4] Motion to Dismiss, at *11.
[5] *U.S. Chamber of Commerce v. City of Seattle*, 274 F. Supp. 3d 1155 (W.D. Wash. 2017).
[6] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (hereinafter, "*Midcal*").
[7] *Chamber of Commerce*, 274 F. Supp. 3d at 1163.
[8] *Id.* at 1167-69.
[9] *Id.* at 1169.

Appeals for the Ninth Circuit.[10] They argued that "[s]tate-action immunity is a narrow and 'disfavored' exception to the Sherman Act, 'given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws.'"[11] They urged the Ninth Circuit to find that neither of the necessary conditions for state-action immunity applied: Washington State law did not express a policy of permitting for-hire drivers to fix prices in their contracts and no state or city official actively supervised the collective-bargaining process.[12]

"It is implausible to read the Washington statute as intended to displace competition in the market for driver services."

The federal antitrust agencies, the Department of Justice and the Federal Trade Commission, filed an *amicus* brief supporting the appellants and opposing the City's ordinance.[13] While their brief recognized that Washington law delegates authority to municipalities to regulate for-hire transportation services, like Uber,[14] the agencies argued that "[i]t is implausible to read the Washington statute as intended to displace competition in the market for driver services."[15] The agencies argued that while state law authorized Seattle to regulate these services, it did not reflect an intent to remove competition with respect to negotiating driver contracts."[16] The agencies argued a municipality may displace competition "only if that anticompetitive restraint is the inherent, logical, or ordinary result of the exercise of authority delegated by the state."[17] They contended that standard had not been satisfied.[18]

On May 11, 2018, the Ninth Circuit ruled in favor of the appellants and reversed the district court's decision, finding that Seattle had not satisfied either element for state-action immunity.[19] It held that the Seattle's ordinance was not a "foreseeable" result of the transportation-related legislation passed by Washington State, causing it to fail the first prong of the *Midcal* test.[20] The Ninth Circuit also held that the ordinance had not met the active-supervision requirement of the second prong.[21] Seattle petitioned for a panel hearing or a rehearing en banc, but the petition was denied in September 2018.

Following remand to the district court, Seattle modified its ordinance to permit drivers for ride-hailing companies to collectively bargain for conditions and benefits other than pay.[22] Uber and the Chamber of Commerce, however, were unsatisfied with this modification and moved for summary judgment in February 2019, requesting that the district court enjoin the entire ordinance.[23] The parties spent the next year embroiled in discovery squabbles. Plaintiffs' summary judgment motion was still pending when the court

[10] Opening Brief of Appellants, *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640 (9th Cir. Oct. 27, 2018) (ECF No. 33).
[11] *Id*. at 21.
[12] *Id*. at 22.
[13] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640 (9th Cir. Nov. 3, 2018) (ECF No. 36).
[14] *Id*. at 5.
[15] *Id*. at 10.
[16] *Id*. at 8.
[17] *Id*. at 1.
[18] *Id*.
[19] *U.S. Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).
[20] *Id*. at 782-87.
[21] *Id*. at 787-90.
[22] Michelle Baruchman, *Battle Continues Over Pay, Collective Bargaining for Uber, Lyft Drivers in Seattle*, Seattle Times, Dec. 22, 2018, https://www.seattletimes.com/seattle-news/transportation/battle-continues-over-pay-collective-bargaining-for-uber-lyft-drivers-in-seattle/.
[23] Plaintiffs' Motion for Summary Judgment, *U.S. Chamber of Commerce v. City of Seattle*, No. 17-cv-00370-RSL (W.D. Wash. Feb. 15, 2019) (ECF No. 100).

approved the parties' stipulation of dismissal on April 10, 2020.

The City of Seattle, Uber and Lyft issued a joint press release on April 10, 2020, following the lawsuit's dismissal.[24] In that statement, Seattle noted that it will shift its focus to implementing its "Fare Share" plan—legislation it passed in 2019.[25] Among other provisions, the Fare Share plan requires that independent contractor for-hire drivers be paid at least the equivalent of Seattle's large employer minimum wage, plus benefits and expenses.[26] Both Uber and Lyft expressed their commitment to supporting Seattle and to working cooperatively to implement the plan with the hopes of avoiding any legal or ballot challenges to the Fare Share plan.[27]

As the "gig" economy expands, the line between state and local labor regulation and antitrust law will continue to be tested.

Whether Seattle and the ride-sharing services are able to amicably implement Seattle's Fare Share plan remains to be seen. The lengthy litigation related to Seattle bestowing collective bargaining rights on independent contractors drew national attention due in large part to the involvement of the federal antitrust agencies. As the "gig" economy expands, the line between state and local labor regulation and antitrust law will continue to be tested.

[24] City, U.S. Chamber of Commerce, Rasier LLC Agree to Dismiss Collective Negotiations Ordinance Lawsuit, Apr. 10, 2020, https://news.seattle.gov/2020/04/10/city-u-s-chamber-of-commerce-rasier-llc-agree-to-dismiss-collective-negotiations-ordinance-lawsuit/.

[25] *Id*.

[26] *Id*.

[27] *Id*.

Antitrust Immunity for Hawaiian Airlines and Japan Airlines Joint Venture Rejected by U.S. Department of Transportation

By Diane C. Polletta and Jill M. O'Toole, Shipman & Goodwin LLP

On March 13, 2020, the U.S. Department of Transportation ("DOT") issued a final order rejecting Hawaiian Airlines and Japan Airlines' request for antitrust immunity for their expanded joint venture ("Final Order").[1] Hawaiian Airlines and Japan Airlines sought the expanded joint venture in order to coordinate their passenger services on routes between and within Hawaii and Japan, and beyond Japan to several other countries in Asia (the "Proposed Alliance"). After the DOT's tentative denial of the request for antitrust immunity on October 5, 2019 (the "Show Cause Order"), Hawaiian Airlines and Japan Airlines revised their submission in an effort to persuade the DOT to grant immunity.[2] With its Final Order, the DOT declined to reverse course.

There are 25 active immunized alliances operating today involving U.S. and foreign air carriers.[3] In the Japan-Hawaii market, large airlines networks, including United and ANA, as part of the Star Alliance, and Delta and Korean Air, as members of the SkyTeam Alliance, currently operate immunized joint ventures.[4] And within the last year, the DOT has granted antitrust immunity to two other airline alliances covering routes between North America and Australasia, and between the UK and North America.[5] With Hawaiian Airlines and Japan Airlines' application for antitrust immunity, however, the DOT remained skeptical of the Proposed Alliance's potential to create public benefits.

Under 49 U.S.C. §§ 41308 and 41309, U.S. and foreign air carriers may request that the DOT grant them antitrust immunity to operate international airline alliances, in order to coordinate fares, schedules, services, and capacity in the relevant market.[6] In reviewing proposed alliance agreements, the DOT conducts both a

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[1] The DOT's Final Order is available at https://www.regulations.gov/document?D=DOT-OST-2018-0084-0060.

[2] The DOT's Show Cause Order, issued on October 5, 2019, is available at https://www.regulations.gov/document?D=DOT-OST-2018-0084-0040.

[3] A list of airline alliances operating with active antitrust immunity can be found at https://www.transportation.gov/office-policy/aviation-policy/airline-alliances-operating-active-antitrust-immunity.

[4] *See id.*; *see also* Show Cause Order at 7.

[5] On July 19, 2019, the DOT issued a Final Order granting antitrust immunity to American Airlines and Qantas Airways to operate an alliance agreement between North America and Australasia. *See* July 19, 2019 Final Order, available at https://www.regulations.gov/document?D=DOT-OST-2018-0030-0144. And on November 21, 2019, the DOT issued a Final Order granting antitrust immunity to Delta, Air France, KLM, and Virgin for their updated alliance and joint venture covering routes between the UK and North America. *See* November 21, 2019 Final Order, available at https://www.regulations.gov/document?D=DOT-OST-2013-0068-0084.

[6] While the Department of Justice and Federal Trade Commission remain responsible for enforcing the antitrust laws, including in the airline industry, the DOT has the authority to grant antitrust immunity to U.S. and foreign airlines seeking to coordinate pricing and services for their international operations. In the absence of antitrust immunity, alliance partners who are competitors can still

competitive analysis under § 41309(b) and a public benefits analysis under § 41308(b). In its competitive analysis, the DOT determines whether the agreements would substantially reduce or eliminate competition in the relevant market and would thus be adverse to the public interest. The DOT "shall" approve the agreement if it finds that it is not adverse to the public interest.[7] In that event, the DOT next conducts a public benefits analysis to determine whether the public benefits of the proposed alliance, such as lower consumer prices, increased capacity, or expanded service offerings, justify a grant of antitrust immunity.

The DOT's October 2019 Show Cause Order approved the Proposed Alliance under § 41309(b), to the extent it was consistent with U.S. antitrust law. The DOT found that the Hawaii-Japan market was likely to remain competitive if the Proposed Alliance was approved, and thus that the Proposed Alliance was not adverse to the public interest.[8] Nonetheless, it declined to award antitrust immunity under § 41308(b), because it found that the proposed public benefits could be achieved without a grant of antitrust immunity.[9] Without antitrust immunity, Hawaiian Airlines and Japan Airlines may not coordinate on fares, schedules, and other competitively sensitive matters.

A grant of antitrust immunity under § 41308(b) must be deemed to be "required by the public interest." Hawaiian Airlines and Japan Airlines set forth a variety of public benefits they expected from the Proposed Alliance, including fare reductions resulting from coordinated pricing and scheduling, increased tourism to Hawaii, incentives for increased capacity, hundreds of thousands of new passengers per year resulting from the combined networks and increased capacity, and expanded codeshare opportunities allowing enhanced marketing of flights to consumers. In its Show Cause Order, however, the DOT tentatively determined that Hawaiian Airlines and Japan Airlines had failed to show that such enhanced public benefits required antitrust immunity.[10] It noted, for example, that Hawaiian Airlines already had "the ability and incentive to increase capacity" in response to market demand without antitrust immunity,[11] and that Japan Airlines "has not presented convincing evidence that it will utilize [antitrust immunity] to support the capacity growth of the alliance."[12] The DOT further noted that the airlines already maintained a codeshare relationship to sell tickets on each other's flights, and did not require antitrust immunity to expand their codeshare relationship.[13] Additionally, the DOT was skeptical about the airlines' opportunities to create public benefits through schedule coordination, improved connections, and reduced fares, given the nature of the Honolulu-Tokyo market, and the

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engage in codesharing (the practice of selling seats on flights operated by the partner airlines, with each airline using their own flight number) and other arms-length practices, but they may not jointly decide on fares, schedules, and other competitively sensitive matters.

[7] 49 U.S.C. § 41309(b).

[8] *See* Show Cause Order, at 9-10. For example, the DOT found that the Proposed Alliance will account for roughly 49% of nonstop seats in the Honolulu-Tokyo market, with the Star Alliance accounting for 38% of nonstop capacity and the SkyTeam Alliance accounting for roughly 14%. *Id.* at 8. The DOT found that market shares of the three joint ventures "support[s] effective competition." *Id.*

[9] *See id*. at 15.

[10] *See id.*

[11] *See id*. at 11

[12] *See id*. at 12.

[13] *See id*.

parties' lack of integrated ticketing and reservation technology.[14]

In response to the Show Cause Order, Hawaiian Airlines and Japan Airlines modified the geographic scope and operations of their Proposed Alliance, and submitted a substantial amount of new information to address the DOT's concerns. For example, the parties expanded the geographic scope of the Proposed Alliance to include cities in India and Russia, and the Tokyo-Guam market; added Japan Airlines' low-cost subsidiary ZIPAIR to the Proposed Alliance; provided evidence that their current arms-length codeshare was not achieving expected results; and pointed to enhancements in their IT systems.

The DOT found the new submissions insufficient to warrant a grant of antitrust immunity. In its Final Order, the DOT concluded, "The joint applicants still have not demonstrated how the JV would function in terms of revenue sharing, pricing and marketing, even as they have added complexity to its scope and operations."[15] As a result, the DOT denied the request for antitrust immunity.

The DOT's rejection of antitrust immunity for the Proposed Alliance between Hawaiian Airlines and Japan Airlines comes on the heels of its recent approval of antitrust exemptions for two other airline alliances.[16] Thus, rather than revealing a changing view of antitrust immunity, the DOT's decision may simply reflect the specific features of the Hawaii-Japan market and shortcomings of the Proposed Alliance. Nevertheless, it will be worth watching the DOT's willingness to award antitrust immunity going forward.

[14] *See id*. at 13-14.
[15] Final Order, at 2.
[16] *See supra* n.5.

Fifth Circuit Confronts Key FTC Jurisdictional Questions in Closely-Watched Louisiana Real Estate Appraisers Board Case

By Ashley McMahon, McDermott Will & Emery LLP

In May 2017, the FTC filed an administrative complaint against the Louisiana Real Estate Appraisers Board ("Board") alleging that the Board unreasonably restrained price competition for appraisal services in Louisiana in violation of federal antitrust law.[1] The FTC alleges that the Board required appraisal fees to equal or exceed the median fees identified in survey reports commissioned and published by the Board, and then investigated and sanctioned companies that paid fees below those levels. The FTC argues that these practices effectively fixed minimum prices paid to residential real estate appraisers.

Procedural History

The Board moved to dismiss the complaint in November 2017 on the grounds that the Board is immune from federal antitrust law under the state action doctrine.[2] To support its position, the Board pointed to several steps taken by the state of Louisiana after the filing of the complaint to increase supervision over the Board's actions. Specifically, Louisiana issued an executive order modifying the Board's promulgation and enforcement of rules relating to the appraisal fee requirements. The Commission denied the Board's motion to dismiss on the basis of state action immunity in April 2018, finding that the Board did not demonstrate that the state actively supervised the promulgation of the reissued rules regarding appraisal fees or enforcement decisions.[3] The Commission explained that the active supervision requirement is "flexible and context-dependent," but requires "more substantive engagement by the State" than Louisiana provided the Board.[4]

The Board has asserted another immunity defense—the rarely-asserted regulatory compliance defense. The Board argued that it complied in good faith with federal and state regulatory obligations. In May 2019, the Commission ruled in the Board's favor, denying a Motion for Partial Summary Decision by the FTC.[5] The Commission explained that in "rare cases, regulation can completely shield a party from liability where conduct that is ordinarily unreasonable under the antitrust laws is rendered reasonable in light of regulatory orders or objectives."[6] For a successful defense, the

[1] Complaint, *In re Louisiana Real Estate Appraisers Board*, F.T.C. Docket No. 9374 (May 31, 2017). *Louisiana Real Estate Appraisers Bd. v. F.T.C.*, No. 18-60291 (5th Cir. filed Apr. 19, 2018).

[2] Mtn. to Dismiss, *In re Louisiana Real Estate Appraisers Board*, F.T.C. Docket No. 9374 (Nov. 27, 2017).

[3] Op. & Order of the Comm'n, *In re Louisiana Real Estate Appraisers Board*, F.T.C. Docket No. 9374 (Apr. 10, 2018).

[4] *Id.* at 2-3.

[5] Op. & Order of the Comm'n, *In re Louisiana Real Estate Appraisers Board*, F.T.C. Docket No. 9374 (May 6, 2019).

[6] *Id.* at 5 (citing *Mid-Texas Commc'ns Sys., Inc. v. Am Tel. & Tel. Co.*, 615 F.2d 1372, 1390 (5th Cir. 1980)).

defendant must show that it had "a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority"[7] and that its actions were "taken because of the regulatory obligations, rather than business considerations."[8] Furthermore, the Commission noted that the regulatory compliance defense is "separate and distinct" from implied antitrust immunity, and courts have allowed the regulatory compliance defense even when they have rejected arguments of implied antitrust immunity.[9]

Pending Appellate Review Could Further Entrench Circuit Split

After the denial of its motion to dismiss, the Board appealed to the U.S. Court of Appeals for the Fifth Circuit seeking immediate review. The Board asked the Court to reconsider the state action defense and the Commission's skepticism of the level of state supervision over the Board. The Fifth Circuit dismissed the petition for review for lack of jurisdiction, and denied a petition for rehearing. The Board then brought the action to the U.S. District Court for the Middle District of Louisiana under an Administrative Procedure Act challenge to the Commission's proceedings, arguing that the Court should resolve the applicability of the state action doctrine. The district court consented and stayed the administrative proceeding in July 2019.
In September 2019, the FTC appealed to the Fifth Circuit. The issue is jurisdictional; The FTC argues that the FTC Act only allows for appeals of final agency orders, not motion to dismiss decisions. The Board has argued that the collateral order doctrine applies, allowing for immediate appeal. The Board argues that if the collateral order doctrine does not apply, the FTC will be allowed to forum-shop cases involving state boards, bringing cases before the Commission to avoid collateral review of denials of state action immunity defenses, and that the immunity question should be decided first to prevent the distraction of state officials. The FTC argues that only final agency orders are appealable and that the FTC Act uses Congress's word choice of "cease and desist order," which the denial of the motion to dismiss is not. Moreover, the FTC argues that the case would still require administrative proceeding to determine whether the Board had established the immunity defense.

This jurisdictional question is not new—there is a current circuit split on whether state action immunity denial decisions are appealable under the collateral order doctrine.[10] The issue went to the Supreme Court as part of Salt River Project Agricultural Improvement and Power District's litigation with SolarCity Corp., but the case was dismissed before the issue could be decided.[11] In that case, SolarCity alleged that Power District set prices that disfavored solar power providers in order to entrench its monopoly. In its review of whether a dismissal decision on state action doctrine grounds could be immediately appealed, the Ninth Circuit sided with the Fourth and Sixth Circuits—and against the Eleventh and Fifth Circuits—in holding that the collateral order doctrine does not allow an immediate appeal of an order denying a motion to dismiss based on state action immunity.

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[7] *Id.* at 6 (quoting *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir. 1981)).
[8] *Id.* (citing *S. Pac. Commc'ns Co., v. Am Tel. & Tel. Co.*, 740 F.2d 980 (D.C. Cir. 1984); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1138 (7th Cir. 1983)).
[9] Id. (citing *Phonetele*, 664 F.2d at 742; *MCI Commc'ns*, 708 F.2d at 1138; *Mid-Texas Commc'ns Sys.*, 615 F.2d at 1380-81).
[10] Compare *Martin & Mem. Hosp. at Gulfport*, 86 F.3d 1391, 1395–95 (5th Cir. 1996) and *Commuter Transp. Sys. Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289–90 (11th Cir. 1986) with *SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District*, 859 F.3d 720, 722 (9th Cir. 2017), *S. Car. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 441–47 (4th Cir. 2006), and *Huron Valley Hosp. Inc. v. City of Pontiac*, 792 F.2d 563, 567–68 (6th Cir. 1986).
[11] *SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District v. Tesla Energy Op., Inc. fka SolarCity Corp.*, 138 S.Ct. 1323, (Mar. 22, 2018).

The case before the Fifth Circuit has been fully briefed. Oral argument was held in early May. The Fifth Circuit's decision is likely to create important precedent as to what constitutes a final agency decision for purposes of appeal.

Grid Lock(-In): Dormant Commerce Clause Presents No Challenge to State Right of First Refusal Laws for Incumbent Electrical Transmission Line Owners

By John J. DiMarco and Jill M. O'Toole, Shipman & Goodwin LLP

States hoping to maintain the status quo of their electrical transmission and distribution operators with incumbent right of first refusal laws have received a boon so far in 2020 with favorable decisions out of the U.S. District Court for the Western District of Texas and the U.S. Court of Appeals for the Eighth Circuit. Both decisions reveal a strong deference to states in developing the rules related to siting, permitting, and constructing electrical transmission lines. In February, Judge Lee Yankel of the Western District of Texas dismissed a dormant Commerce Clause challenge to a right of first refusal law, Texas Senate Bill 1938 ("SB 1938"), in the *NextEra* litigation.[1] SB 1938 amended the Texas Utility Code and gave existing owners of transmission facilities in Texas "a preference to build, own, and operate . . . new lines. . . ."[2] About a month later, in late March, the Eighth Circuit issued its much-anticipated opinion in *LSP Transmission*[3] that affirmed the dismissal of a dormant Commerce Clause challenge to a similar Minnesota law granting a right of first refusal to incumbent transmission line owners. Additional proceedings are anticipated in both cases.

Dormant Commerce Clause

The dormant Commerce Clause is the negative interpretation of the Constitution's positive grant of power to Congress to regulate interstate commerce in the Commerce Clause. The Supreme Court has long held—and recently reaffirmed—that the Commerce Clause prohibits state laws that unduly restrict interstate commerce.[4] This prevents states from adopting protectionist measures and preserves a national market for goods and services.[5]

States hoping to maintain the status quo of their electrical transmission and distribution operators . . .have received a boon…

Plaintiffs-Appellants in *NextEra* and *LSP Transmission* are out-of-state and non-incumbent electrical service companies. They allege that the right of first refusal laws adopted by the states of Texas and Minnesota prohibit them from

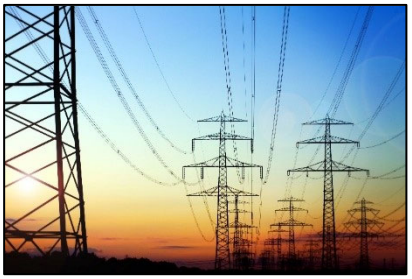
[1] *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 1:19-CV-626-LY (W.D. Tex. Feb. 26, 2020).
[2] *NextEra*, slip op. at *5-6. Plaintiffs also challenged the constitutionality of the contested law under the Contracts Clause. The district court dismissed that claim as well.
[3] *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020).
[4] *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (collecting cases).
[5] *See id.*

competing for new electrical transmission line construction projects. To succeed in their dormant Commerce Clause challenge, they needed to demonstrate that the challenged state laws are discriminatory on their face or in their purpose and effect making them *per se* invalid. Alternatively, even if not directly discriminatory, they could still show the laws are unconstitutional if they impose burdens on interstate commerce that are clearly excessive in relation to the putative local benefits—the so-called *Pike* test.[6]

NextEra

The *NextEra* court's decision announced five reasons why SB 1938 does not run afoul the dormant Commerce Clause. *First*, the court found that SB 1938 does not regulate interstate commerce, only the construction and operation of transmission lines within Texas.[7] In reaching that conclusion, the court rejected the plaintiffs' analogy to cases involving the "flow of goods" in which the Supreme Court struck down laws that facially discriminate against the distribution of goods in interstate commerce.[8] *Second*, relying on the Supreme Court's 1997 decision in *General Motors Corp. v. Tracy*,[9] the court gave controlling weight to the monopoly market, which is the electrical transmission and distribution market in Texas.[10] Thus, under *Tracy*, the court reasoned it was entitled to give greater weight to laws, like SB 1938, that regulate the monopoly market for reasons such as avoiding any jeopardy and disruption to providing electricity service and to ensure reliable service.[11] *Third*, the court found SB 1938 does not discriminate between similarly situated in-state and out-of-state transmission line providers and only grants *incumbent* transmission line providers with a right of first refusal.[12] *Fourth*, applying the Fifth Circuit's multi-factor analysis, and evaluating the legislative history, the court found no discriminatory purpose behind SB 1938.[13] *Finally*, the court held that SB 1938 passes the Supreme Court's *Pike* test finding no excessive burden on interstate commerce relative to the local benefits of reliable electricity supply.[14]

NextEra is currently on appeal to the Fifth Circuit, with challenges to each of the district court's holdings. Appellants contend that the district court wrongly concluded the Supreme Court's *per se* invalidity precedent is limited to the "flow of goods" in commerce, identifying electrical transmission lines as classic instrumentalities of commerce and arguing the principles of non-discrimination apply equally to services. Appellants also dispute the applicability of *Tracy*, arguing, in substance, it is limited to its facts—the application of different sales tax in two different markets. They challenge the court's reasoning that SB 1938 equally discriminates against similarly situated in-state and out-of-state operators identifying the law's preference for those companies with existing facilities in Texas. Finally, Appellants argue that the issues of the law's discriminatory purpose and burden on interstate commerce are too fact intensive to decide on a motion to dismiss. Appellants seek reversal and remand to the district court to decide their motion for a preliminary injunction that the district court dismissed after granting the defendants' motion to dismiss.[15]



In seeking affirmance, Appellees largely buttress the reasoning in the district court's

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[6] This balancing test comes from the Supreme Court case, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[7] *NextEra*, slip op. at *10.
[8] *Id.*
[9] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997).
[10] *NextEra*, slip op. at *10.
[11] *Id.* at *10-11.
[12] *Id.* at *11.
[13] *Id.* at *11-12.
[14] *Id.* at *12-13.
[15] Appellants' Brief, *NextEra Energy Capital Holdings, Inc. v, Walker*, No. 20-50160 (5th Cir. Mar. 18, 2020).

opinion demonstrating that the law is not facially discriminatory, does not have a discriminatory purpose or effect, and does not burden commerce more than the local benefits it provides.

Building off its statement of interest filed at the district court, the United States, through the Department of Justice Antitrust Division, filed a neutral *amicus* brief in the appeal. Underlying the passage of SB 1938, and similar right of first refusal laws passed in other states, is the issuance of Order 1000 by the Federal Energy Regulatory Commission ("FERC"). Order 1000 removed incumbent right of first refusals from the tariffs and agreements governing federally regulated independent system operators and regional transmission organizations. According to the United States, "FERC eliminated federal [right of first refusal regulations] . . . finding they restricted competition, were not just and reasonable, and created the potential for under discrimination and preferential treatment."[16] Notably, Order 1000 left in place state authority over construction of new transmission facilities, but foreshadowed potential dormant Commerce Clause issues if states backfilled federal right of first refusal regulations with statutory replacements. Accordingly, the United States argues in its *amicus* brief that it believes the district court failed to consider the in-state presence requirement of SB 1938, misapplied *Tracy*, and did not evaluate the alleged burdens SB 1938 imposes as required by *Pike*.

Appellees filed their brief on April 22, 2020. Appellants filed their reply on April 29, 2020. The court scheduled oral argument for June 2020.

LSP Transmission

Midway through the appellate briefing of *NextEra*, the Eighth Circuit issued its opinion in *LSP Transmission*. In *LSP Transmission*, the Eighth Circuit affirmed the district court's dismissal of a dormant Commerce Clause challenge to Minn. Stat. § 216B.246, subdiv. 2, another statutory right of first refusal law, that provides an "incumbent electric transmission owner" the "right to construct, own, and maintain an electric transmission line" that "connects to facilities owned by that incumbent electric transmission owner." Minnesota passed its statutory right of first refusal law in response to the FERC's issuance of Order 1000 removing the federal right of first refusal for incumbents. The district court upheld the law, finding that the Supreme Court's *Tracy* decision foreclosed the challenge.[17] The district court also held that, if *Tracy* does not foreclose the challenge, then the plaintiffs' argument still fails because the law applies equally to all incumbents and does not discriminate in favor of in-state transmission line owners over out-of-state owners.[18]

In affirming the district court, the Eighth Circuit sidestepped applying *Tracy* and focused instead on performing its own dormant Commerce Clause analysis. *First*, like the district court, the appellate court held that the Minnesota law is not facially discriminatory because it draws a neutral distinction between existing electric transmission owners and all other entities, regardless of whether they are in-state or out-of-state. In this regard, the court found particularly persuasive the fact that many incumbent transmission line owners are headquartered outside Minnesota.[19] *Second*, the court held that the law did not have a discriminatory purpose on the record before it. The court found Minnesota's right of first refusal law is consistent with the state's policing power to regulate utilities, which inherently involves siting, permitting, and constructing transmission lines. Moreover, it noted that FERC left such control to

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[16] Brief for the United States Government as Amicus Curie in Support of Neither Party, *NextEra Energy Capital Holdings, Inc. v, Walker*, No. 20-50160 (5th Cir. Apr. 1, 2020) (citing *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051, 2011 WL 2956837 (July 21, 2011) ("Order 1000")).

[17] *LSP Transmission*, 954 F.3d at 1025.

[18] *Id.*

[19] *Id.* at 1027-29.

the states and did not foreclose state right of first refusal laws.[20] *Third*, the court held that the law did not have a discriminatory effect. Again, the court pointed to the neutral treatment of in-state and out-of-state interests in reaching its decision.[21] *Finally*, the court held that Minnesota's right of first refusal law did not impose an undue burden relative to its putative local benefit. The court balanced Minnesota's legitimate interest of regulating intrastate transmission of electrical energy with appellants' alleged inability to compete. Ultimately, the court determined, from an aggregate standpoint, the Minnesota law did not eliminate competition because incumbents were not obligated to exercise their right of first refusal.[22]

Appellants are currently petitioning for rehearing at the Eighth Circuit.

Looking Ahead

Despite the potential impact on competition, *LSP Transmission* and *NextEra* reveal a strong deference to states' policing power to regulate public utilities. Perhaps these cases also reveal a weakness in dormant Commerce Clause challenges as an effective means of enforcing competition policy. In addition, "the issues raised in *LSP Transmission* and *NextEra* are fascinating from an AG power perspective since it implicates at least three of their powers/roles: competition regulator under their states' and federal antitrust laws; defender of legal challenges to states laws; and advocates at FERC, regional power markets and state PUCs on energy policy matters" said Perry Zinn Rowthorn, Connecticut's former Deputy Attorney General and Partner with Shipman & Goodwin LLP's State Attorneys General practice. "These kinds of cases will be interesting to watch because of that multi-role tension dynamic." Those interested should continue to monitor these cases for these reasons and given the potential for a circuit split and petition for certiorari to the Supreme Court.

LSP Transmission and NextEra reveal a strong deference to states' policing power to regulate public utilities...

[20] *Id*. at 1029-30.
[21] *Id*. at 1030.
[22] *Id*. at 1030-31.

State Action Immunity in the Wake of *Diverse Power v. City of LaGrange*

By Chris Wilson, Gibson Dunn

The U.S. Court of Appeals for the Eleventh Circuit's recent decision in *Diverse Power v. City of LaGrange* provides needed gloss on the scope of state immunity for antitrust violations set out in the Supreme Court's *Parker* decision[1] and its later opinions in *Town of Hallie v. City of Eau Claire*[2] *and FTC v. Phoebe Putney*.[3]

State Action Doctrine

State action immunity arises from the Supreme Court case of *Parker v. Brown*, which articulated a distinction between state actors and private actors for purposes of federal antitrust law.[4] In simple terms, while states have sovereign immunity from antitrust liability for laws that harm competition, local governments must act pursuant to authority given to them at the state level to avail themselves of this same immunity. Taken together, *Parker* and subsequent cases on this topic, most notably *Town of Hallie* and *Phoebe Putney*, hold that state action immunity applies when "displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."[5]

The Dispute Between Diverse Power and LaGrange

Diverse Power concerns LaGrange Ordinance 4-29, enacted in 2004, and which provided that:

> For all new construction outside of the corporate limits of the city . . . water service as set forth in this chapter shall be available only to those customers who install at least one (1) natural gas furnace, one (1) natural gas water heater, and at least one (1) additional natural gas outlet sufficient for potential future use for a clothes dryer, range, grill, pool heater or outdoor lighting fixture.[6]

This ordinance took on antitrust significance due to the way in which electricity, water, and gas are delivered to customers within the city of LaGrange and the surrounding unincorporated area of Troup County, within which LaGrange sits.

For water-utility service, the City is effectively the only provider, both within city limits and unincorporated Troup County.[7] The City also provides natural gas service, but mainly within city limits. Diverse Power, a private corporation, offers electricity throughout much of unincorporated Troup County. Many new residential structures face a threshold choice of whether to use natural gas or electric appliances, meaning that Diverse Power and the City were "in direct competition" for these retail energy customers.[8]

With this in the mind, the effect of ordinance came into focus. The City was the monopoly provider of water, which all structures need, and

[1] *Parker v. Brown*, 317 U.S. 341 (1943).
[2] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).
[3] *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013).
[4] 317 U.S. 341 (1943).
[5] *Phoebe Putney*, 568 U.S. at 229.
[6] LaGrange Code of Ordinances, § 20-15-6.
[7] *See Diverse Power, Inc. v. City of LaGrange, Georgia*, No. 3:17-CV-000003-TCB, at 2 (11th Cir. Aug. 20, 2019).
[8] *Id.*

could, as the City utility director described it, "use water as leverage to require gas" in new developments outside of city limits.[9] In practice, this meant that all new constructions were effectively compelled to install gas appliances to secure access to water service. This effectively boxed out Diverse Power, who was foreclosed from providing electricity to this market segment.

In March 2017, Diverse Power challenged the ordinance as an unlawful tying arrangement in violation of the Sherman and Clayton Acts, pointing out the disparity in gas prices in areas where the city was not allowed to deny water services as compared to areas where the city could deny access to water. The City moved to dismiss under Fed. R. Civ. P. 12(b)(6), asserting, among other things, state action immunity. In its motion, the City did not present a competitive or efficiency rationale for the ordinance, instead asserting that the Georgia state legislature gave local municipalities the ability to set up and operate water and sewage systems, clearly foreseeing that this grant of power, which would allow municipalities to decide whether and how to offer these services, could diminish competition in this area. In opposition, Diverse Power pointed out that the law cited by the City said nothing about the City's ability to deny or condition access to natural gas service. After the City's motion was denied,[10] the issue went up to the Eleventh Circuit.

Reviewing *Parker* and many of the cases discussed above, the panel reiterated the requirement that the state "clearly articulate[]" a policy in favor of displacing competition, noting that destruction of competition must be the "foreseeable result" of the cited legislation.[11] Even though the policies cited in these cases, including noteworthy decisions like *Omni*,[12] had no textual reference to competition, notwithstanding their arguably severe effect, a loss of competition was the foreseeable result.

Mindful of *Phoebe Putney*—which was examined at length in the opinion—the Eleventh Circuit held that the City's actions did not pass muster under state action immunity.[13] Even though the Georgia state legislature specifically empowered LaGrange to set up and operate water and sewage systems, displacement of competition in adjacent markets other than water and sewage was not the "inherent, logical, or ordinary result" of the state law in question.[14] Georgia's law allowed municipalities to offer water service and little else. In the Eleventh Circuit's view, the state legislature did not reasonably foresee or expect that municipalities would then use the law to compel customers to purchase other services to obtain access to water. Said differently, the power to set up a water system did not give LaGrange license to leverage the water system to tie other services. If LaGrange's interpretation was correct, the panel saw no "limiting principle" that would constrain the city from using its water service to harm competition in any number of ways.[15] The court pointed out that if the City's argument were credited, it "would [give LaGrange] immunity to take anticompetitive actions affecting *any* industry so long as the demand were made as a condition of refusing water service."[16] LaGrange would repeal the ordinance following the Eleventh Circuit's

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[9] *Id.* at 3.
[10] *See Diverse Power, Inc. v. City of LaGrange*, No. 3:17-CV-000003-TCB, slip op. at 25 (N.D. Ga. Feb. 21, 2018).
[11] *Id.* at 7, citing *Town of Hallie*, 471 U.S. at 42.
[12] *City of Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365 (1991) (holding that zoning regulation mandating specific sizes for billboards foreseeably reduced competition and thus were immune from antitrust challenge).
[13] *Diverse Power, Inc. v. City of LaGrange, Georgia*, Dkt. No. 3:17-CV-000003-TCB, at 17 (11th Cir. Aug. 20, 2019).
[14] *Id.*
[15] *Id.*
[16] *Id.*

decision,[17] effectively ending the case as moot as of the time of this writing.[18]

Key Takeaways

State action immunity continues to evolve as a doctrine more than 80 years after *Parker*. *Parker*'s otherwise broad holding has been whittled down and refined over the years such that the range of actions and laws that will create immunity has arguably become somewhat narrow. Some key principles emerge from *Parker* and its progeny on this issue.

1. ***Carefully review any statutory grants of authority that may create anticompetitive effects in a given market***. Private actors should take a close look at any laws or ordinances conferring broad power to local governments in the provision of a product or service. The *Diverse Power* decision makes clear that courts will closely scrutinize the government's basis for diminishing competition.

2. ***Even a state law directly addressing the market or conduct in question may not create state action immunity***. *Midcal*, *Phoebe Putney*, and *Diverse Power* make clear that even directly relevant state law cannot be used to justify anticompetitive activity if the activity was not the inherent, logical, and ordinary result of the law at issue.

3. ***Federal antitrust law will continue to be the yardstick for conduct with competitive dimensions***. Private parties should assume that federal antitrust law could apply to their conduct and structure their operations accordingly—even when state legislation would appear to displace antitrust liability.

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[17] *Ga. City Says It Stopped Bundling Utilities, Wants Out Of Suit*, Nadia Dreid, Law360, Nov. 8, 2019, available at: https://www.law360.com/articles/1217983/ga-city-says-it-stopped-bundling-utilities-wants-out-of-suit.

[18] *Ga. City Gets Antitrust Suit Over Bundled Utilities Cut Off*, Nadia Dreid, Law360, Apr. 14, 2020, available at: https://www.law360.com/competition/articles/1263230/ga-city-gets-antitrust-suit-over-bundled-utilities-cut-off?nl_pk=66192e41-ece7-4b6c-9293-df26d67b7e89&utm_source=newsletter&utm_medium=email&utm_campaign=competition.

First Circuit Affirms Dismissal of Price-Fixing Case, Finding Filed-Rate Doctrine Applies

By Lisa P. Rumin and Matt Evola, McDermott Will & Emery LLP

Last September, the U.S. Court of Appeals for the First Circuit affirmed the dismissal of a $3.6 billion price-fixing suit against two large providers of natural gas in New England, Eversource Energy and Avangrid, Inc.[120] The First Circuit held that the filed-rate doctrine precluded the action because the challenged electricity rates were filed with the U.S. Federal Regulatory Commission ("FERC").

The Plaintiffs, a putative class of retail electricity purchasers in New England, alleged that Eversource Energy and Avangrid, Inc. reserved excess capacity of natural gas along a pipeline without using or reselling it. This conduct allegedly constrained the volume of natural gas available in New England, thereby resulting in higher prices for retail electricity consumers. The Plaintiffs brought claims under Section 2 of the Sherman Act and various state antitrust and consumer-protection laws.[121]

The U.S. District Court for the District of Massachusetts dismissed the claims as barred by the filed-rate doctrine and, alternatively, for lack of antitrust standing and the failure to plausibly allege a monopolization claim. The filed-rate doctrine generally prohibits civil antitrust challenges to agency-approved rates, tariffs, or conditions that have been filed with and approved by a federal regulatory agency. The district court held that the rates at issue were filed with FERC[122] and Plaintiffs had not established an applicable exception to the filed-rate doctrine.[123] Thus, the court could not alter the terms of tariffs approved by FERC. The court noted, in the

[120] *Breiding v. Eversource Energy*, 939 F.3d 47 (1st Cir. 2019). A similar complaint was filed on behalf of a putative class of wholesale electricity purchasers. *See PNE Energy Supply LLC v. Eversource Energy*, 396 F. Supp. 3d 200 (D. Mass. 2019). The wholesalers unsuccessfully attempted to distinguish their claims through their status as purchasers in the wholesale electricity market and by claiming that a portion of their claims involved the natural gas market, which was not subject to FERC regulation.

[121] Plaintiffs alleged unjust enrichment under Massachusetts law (and alternatively under the laws of Connecticut, Maine, New Hampshire, and Vermont) as well as consumer protection and antitrust violations of Connecticut, Maine, New Hampshire and Vermont laws. Plaintiffs specifically alleged violation of Connecticut's Unfair Trade Practices Act (CONN. GEN. STAT. § 42-110a *et seq*.); violation of Maine's antitrust law (ME. STAT. TIT. 10, § 1101 *et seq*.); violation of New Hampshire's Consumer Protection Act (N.H. REV. STAT. ANN. § 358-A:1 *et seq*.); violation of the Vermont Consumer Fraud Act (VT. STAT. ANN. tit. 9, § 2451 *et seq*.); and violation of the Massachusetts Consumer Protection Act (MASS. GEN. LAWS ch. 93A, § 1 *et seq*.).

[122] The court noted that "[a]lthough the parties disagree as to whether FERC regulates sales of natural gas on the spot market, there is no dispute that (pursuant to the ISO-NE Tariff) FERC exclusively regulates the region's wholesale electricity market, including ISO-NE's wholesale electricity auctions and the resulting prices." *Breiding*, 344 F. Supp. 3d at 446.

[123] The court explored *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), *Brown v. Ticor Title Ins. Co*., 982 F.2d 386 (9th Cir. 1992) and *Composite Co., Inc. v. Am. Int'l Grp., Inc*., 988 F.Supp.2d 61 (D. Mass. 2013) but found all three distinguishable from the present case. *Id*. at 449.

alternative, that Plaintiffs could not demonstrate a direct connection between their alleged injury and the Defendants' alleged conduct[124] and thus Plaintiffs lacked antitrust injury and, in turn, standing.[125] Finally, the court held that Plaintiffs had not sufficiently alleged monopoly power and thus had not stated a cognizable antitrust claim.[126]

In February 2019, the Plaintiffs appealed the district court's decision to the First Circuit. The Plaintiffs argued that FERC had abdicated its regulatory oversight of the spot market for natural gas and that the filed-rate doctrine should not apply to the power providers' alleged conduct. Citing *Town of Norwood*[127] and other prior cases in the energy industry, Plaintiffs suggested that the filed-rate doctrine is inapplicable to challenges to upstream, non-jurisdictional activity that indirectly affects downstream FERC-approved tariffs.

The First Circuit affirmed the dismissal of the price-fixing claims. The court declined to rule on the precise reach of the filed-rate doctrine as it pertains to upstream conduct in a spot market, instead focusing on the FERC tariff for sales and purchases of natural gas capacity. The court noted that FERC has exclusive authority to regulate the transmission of natural gas and can mandate that companies file documents showing all rates and charges for sales of natural gas transmission capacity. Any challenge to practices over which FERC has jurisdiction and actually regulates are barred under the filed-rate doctrine.

The First Circuit explained that the FERC-approved tariff for the transportation or sale of natural gas includes the pipeline's statement of rates and rate schedule for transportation services along the pipeline. FERC's regulatory aims also seek to maintain the efficient use of limited transmission capacity. Thus, all of the alleged conduct occurred in the natural gas transmission market and "was done in open and plain view of [the pipeline], the defendants' competitors, and FERC."

The First Circuit also noted that FERC has powers to police anticompetitive conduct in the market for transmission capacity and is authorized to investigate and initiate enforcement actions against those who violate applicable regulations. In the instant case, FERC actually investigated the power providers' alleged manipulation of the natural gas market through their no-notice contracts, but found no evidence of anticompetitive conduct.[128]

FERC has powers to police anticompetitive conduct in the market for transmission capacity…

In November 2019, the First Circuit denied the Plaintiffs' request that the appellate court rehear the circuit's earlier decision.

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[124] The court further stated that "the nature of any damages is attenuated and the risk of duplicative recovery is real." *Id*. at 455.

[125] *Id*. at 456 ("[T]he Court concludes that Plaintiffs' allegations are insufficient as a matter of law. The remaining factors for antitrust standing—including the nature of Plaintiffs' injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and Plaintiffs' injury and the potential for duplicative recovery or complex apportionment of damages—weigh heavily against judicial enforcement of Plaintiffs' antitrust claims.").

[126] *Id*. at 456 ("[T]he Plaintiffs have not met their burden under the elements of either monopolization or attempted monopolization. Accordingly, the Plaintiffs have not stated cognizable antitrust claims.").

[127] *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000).

[128] *News Release: FERC Staff Inquiry Finds No Withholding of Pipeline Capacity in New England Markets*, Fed. Energy Regulatory Comm'n (Feb. 27, 2018), https://www.ferc.gov/media/news-releases/2018/2018-1/02-27-18.pdf ("A Federal Energy Regulatory Commission (FERC) staff inquiry has revealed no evidence of anticompetitive withholding of natural gas pipeline capacity on Algonquin Gas Transmission by New England shippers. The Commission will take no further action on the matter.").