CITE AS
37 *Energy & Min. L. Inst.* 7 (2017)

Chapter 7

Dual Natural Gas Markets: The Antitrust Paradox of Deregulating a Market Tied to a Natural Monopoly

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Synopsis

§ 7.01. Introduction.

As a supplement to market oversight exercised by the Federal Energy Regulatory Commission, antitrust law referees competition in the natural gas industry. Federal and state antitrust laws are directed at conduct and agreements that unfairly destroy competition. In the natural gas industry, antitrust concerns may be associated with offers to supply gas, gas prices, and restrictions on market structure for production, processing and transportation. While coordination between natural gas companies can generate legitimate procompetitive efficiencies, such as reduced operating costs, the same agreements may raise red flags under antitrust law. Conduct that does not pass antitrust muster creates substantial liability for the parties involved.

Antitrust law can be used as a means for challenging efforts of traditional suppliers to retain or expand market share, as well as for contesting new arrangements to market energy and energy services. Unconventional shale production has brought about a renaissance in the natural gas industry, including substantial shifts in supply and demand dynamics. Particularly due to deregulation, antitrust enforcement is critical for preserving competition in increasingly complex natural gas markets. Thus far, however, antitrust courts have often misapplied antitrust principles to conduct engaged in by pipelines by failing to account for the inextricable link between the market for natural gas and the market for natural gas transportation. Pipelines can create bottlenecks for non-competitors by refusing access to their facilities. Although the market for natural gas is characterized by low barriers to entry, the market for natural gas transportation is a natural monopoly. Therefore, natural gas markets are adversely affected by the same issues that an antitrust court would address in a natural monopoly.

This chapter serves to outline how regulations impact antitrust exposure, address how antitrust law has been applied to address competitive effects of natural gas industry deregulation, and analyze market problems stemming from an antitrust court's failure to account for the inextricable link between the market for natural gas and the market for transportation.

§ 7.02. The Sherman Act.

Federal antitrust policy began with the preeminent Sherman Act. The Sherman Act, adopted in 1890, gave American courts the opportunity to develop common law analysis for condemning restraints on trade. Thus, the process of antitrust lawmaking has largely been confined to courts. The Sherman Act affords relief to competitors, purchasers, sellers and consumers for harm suffered as a result of unlawful conduct,[1] so long as the plaintiff's antitrust injury is "inextricably intertwined" with the antitrust

1 The Sherman Act allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring suit. 15 U.S.C § 15(a).