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Title: Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement

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Abstract:

This working paper examines collusive agreements in the U.S. energy industry, with a focus on Section 1 energy cases brought by the U.S. government since the early 1990s. It observes that public Section 1 enforcement in various segments of the domestic energy sector appears not to follow the pattern of enforcement against anticompetitive agreements more generally. Anomalies are apparent in terms of the relative number of cases won, a prepondence of civil (versus criminal) enforcement actions, and liberal use of injunctions. The paper proceeds to examine possible explanations for these observations, including the roles of regulation and judicially-created antitrust immunities in restraining a more vigorous approach to public enforcement. It concludes with observations and policy recommendations.

Keywords: antitrust, competition, collusion, regulation, immunities

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Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement

Diana L. Moss and Sandeep Vaheesan[1]

I. Introduction

Energy is one of the most important sectors in the U.S. economy, reflected in part by the enormous impact prices can have on disposable income levels and economic growth rates. Prices, however, are only one indicator of the state of competition in energy markets. Choices available to consumers, the pace of technological innovation, and the development of transparent market institutions are equally important in assessing competitive vigor and the degree to which consumers are reaping the benefits of rivalry. Questions surrounding these dynamics are arising with increasing frequency in U.S. energy markets, as competitive issues grow more complex and antitrust enforcement, along with sector regulation, play complementary roles in a competition enforcement regime.

For example, over the last two decades, regulated utility systems have been replaced in many regions of the country with semi-regulated centralized markets. These markets, which have often been fraught with competitive concerns, reveal the nexus between antitrust and regulation. In other areas, the foreign manufacture of some solar and other renewable technologies is raising contentious issues involving international trade and competition. The burgeoning development of new oil and gas resources in the U.S. also highlights the importance of a transparent and competitive process behind lease auctions and rights to develop resources on private and public

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land. Finally, periodic gasoline price spikes in parts of the U.S. invariably raise questions about coordinated conduct in concentrated regional refining markets.

These developments underscore the critical role of competition policy in the energy sector. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have pursued vigorous merger enforcement under Section 7 of the Clayton Act, blocking anticompetitive deals or seeking remedies in a number of cases.[2] As is the case in other industries, enforcement of Section 2 of the Sherman Act to address monopolization in energy markets is difficult and the cases are scarce. Civil and criminal public antitrust enforcement actions against conspiracies to restrain trade (i.e., collusive agreements to fix prices, set quotas, or divide up markets) under Section 1 of the Sherman Act have fared somewhat better.[3]

A review of Section 1 energy cases over the last two decades raises important questions about the scope of enforcement across industries, the type of enforcement, and the sanctions obtained. Namely, the pattern of Section 1 enforcement in energy does not appear to reflect the characteristics of Section 1 enforcement more generally. Most Section 1 cases are criminal, whereas the preponderance of Section 1 energy cases are civil. A sample of civil Section 1 energy cases reveals that one half involve the use of injunctions and the remainder involve civil fines and disgorgement. Moreover, DOJ's use of disgorgement in two cases has proved controversial since the amount disgorged was only a fraction of the violators' ill-gotten gains and ultimate harm to consumers.

[2] *See, e.g.*, United States v. Exelon Corp., No. 1:11-cv-02276 (D.D.C. May 23, 2012); Decision and Order, In the Matter of Kinder Morgan, Inc., F.T.C. Docket No. C-4355 (June 24, 2012).

[3] The U.S. government is the only party that can enforce the antitrust laws criminally.

Collectively, these questions prompt us to look deeper into Section 1 energy enforcement by the U.S. antitrust agencies, with a focus on the effects of sector regulation and judicially-created immunities on the intensity and scope of enforcement and the choice of sanctions. Data limitations prevent us from analyzing domestic private Section 1 enforcement. However, our observations on public enforcement do present opportunities to comment on the importance of complementarity in public and private enforcement. The paper proceeds in several sections. Section II provides a brief overview of the importance of energy in the U.S. economy. Section III analyzes Section 1 energy enforcement from 1993 to the present. Section IV discusses the current approach to Section 1 remedies and factors potentially affecting enforcement, including dual regulatory-antitrust enforcement regimes and antitrust immunities. Section V examines those factors with respect to eight Section 1 energy cases and Section VI concludes with observations and recommendations.

II. Importance of the Energy Sector in the Domestic Economy

The importance of the energy sector in the U.S. economy needs little explanation. According to the Energy Information Administration (EIA), Americans spent over $1 trillion, or roughly eight percent of U.S. gross domestic product, on energy in 2009.[4] Energy expenditures comprise a major fraction of household budgets in the U.S. EIA estimates show that U.S. households spent an average of $2,024 on energy for heating in 2009[5] and $2,832 on gasoline in 2011.[6]

[4] *Total Energy,* U.S. ENERGY INFO. ADMIN., http://www.eia.gov/totalenergy/data/annual/showtext.cfm?t=ptb0105 (last updated Oct. 19, 2011). In previous years when energy prices have been higher in real terms, energy expenditures have amounted to as much as thirteen percent of GDP.

[5] *Id.*

[6] Mark Cooper, *Gasoline Prices and Expenditures in 2011*, CONSUMER FED'N OF AM. (Mar. 2011), *available at* http://www.consumerfed.org/pdfs/Gasoline-Prices-and-Expenditures-Report-3-16-11.pdf.

Because energy is the lifeblood of the modern economy, energy prices play a critical role in economic growth. Although the U.S. economy is not as energy intensive as it was several decades ago,[7] rising energy prices can still slow economic growth. As an important input for industry and transportation, higher energy prices increase costs and lower profits. Moreover, consumers' ability to modify their energy use and transportation arrangements in the short run is limited[8] and only mildly responsive to short run changes in prices.[9] Higher energy prices can take a particularly large toll on low-income households that spend a larger fraction of their budgets on energy than middle- and upper-income households.[10]

Because of the important macroeconomic and microeconomic role of energy prices, anticompetitive conduct in energy markets can be particularly harmful. Petroleum markets are vulnerable to collusive agreements, and the incidence of anticompetitive behavior at multiple levels in the supply chain compounds the adverse effects on consumers. Cartelization of the global crude oil market by the Organization of Petroleum Exporting Countries (OPEC) is one of the most well known examples. OPEC's decision to restrict crude oil production in the early 1970s plunged much of the world economy into recession.[11] Anticompetitive agreements also extend to price fixing at the retail level for products such as diesel and gasoline. Agreements to fix and raise prices between local competing retailers of refined petroleum products directly harm consumers by extracting supracompetitive prices on an essential commodity for which

[7] *Id.*

[8] *Assumptions to the Annual Energy Outlook 2012*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/forecasts/aeo/assumptions/pdf/0554(2012).pdf.

[9] *See, e.g.*, Peter C. Reiss & Matthew W. White, *Household Electricity Demand, Revisited*, 72 REV. ECON. STUD. 853, 869 (2005) ("We estimate the mean annual electricity price elasticity for California households to be -0.39.").

[10] Cooper, *supra* note 6.

[11] James D. Hamilton, *What Is an Oil Shock?* 113 J. ECONOMETRICS 363 (2003).

consumers cannot easily adjust consumption in the short run. More recently, collusion has surfaced in auctions for oil and gas exploration leases on federal and private land. Agreements between bidders not to compete against each other depress prices and reduce an important revenue stream for the government.[12]

The pernicious effects of collusive schemes in energy are not limited to petroleum markets. On a more local level, anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct. In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers.[13]

Collectively, these examples illustrate the serious harm to consumers and to the economy that flow from collusive agreements, making the case for rigorous Section 1 enforcement. A key component of Section 1 enforcement, however, is the choice of enforcement approach (e.g., criminal vs. civil) and remedy, the effectiveness of which is gauged by how well it deters future collusive behavior.

III. Section 1 Enforcement in Energy from the 1990s to the Present

Since the early 1990s, the DOJ and FTC have brought a total of eight Section 1 enforcement actions in the energy industry, two of which involved parties to the same agreement. The cases are described in Table 1. It is helpful to briefly summarize these cases, by major energy sector.

[12] The U.S. Bureau of Land Management earned $256 million in 2011 from leasing of federal land for oil and gas development. *See Onshore Oil, Gas Lease Revenue Up, Yet Below 2009*, ASSOC. PRESS, Jan. 13, 2012.

[13] The California electricity crisis in 2000 and 2001, mostly arising from unilateral rather than joint exercises of market power, illustrates the dangers of market power in electricity. During this period, a staggering $20 billion is estimated to have been transferred from consumers to suppliers. *See* Frank A. Wolak, *Managing Unilateral Market Power in Electricity* 7 (World Bank Policy Research, Working Paper 3691, 2005).

Table 1:
Section 1 Energy Enforcement Actions Brought by the DOJ and FTC

Case No.	Year/ Agency	Case/Description of Violation	Type of Agreement/ Enforcement	Remedy	Entities harmed	Regulatory Schemes and Immunities
1	1993/ DOJ	*U.S. v. Hayter Oil* – personnel from Hayter Oil and rival stations in Greeneville, TN agree to fix prices on gasoline.	Explicit Criminal	Jail time	Retail purchasers of gasoline	n/a
2	1997/ DOJ	*U.S. v. AIG, BP, Cargill* - AIG, BP, and Cargill exchange brokerage commission information via phone calls and meetings with the aim to lower commissions paid on purchase and sale of Brent spread contracts and contracts for differences.	Explicit Civil	Injunction	Brokers on Brent contracts	Securities and Exchange Commission (SEC) and state departments of insurance.[14]
3	1998/ DOJ	*U.S. v. Rochester Gas & Electric* - Rochester Gas & Electric strike a MOU under which Univ. of Rochester is offered discounted rates on electricity in exchange for not constructing a cogeneration facility that would sell surplus power to 3rd parties.	Explicit Civil	Injunction	Wholesale purchasers of electricity	State Action Doctrine
4	2007/ FTC	*In the Matter of American Petroleum Co*. - U.S. petroleum rivals agree to not import lubricants to Puerto Rico to pressure Puerto Rican legislature into repealing a law on safe disposal of lubricants, which included a deposit on each quart of oil purchased. Section 5 of the FTC Act.	Explicit Civil	Injunction	Retail purchasers of lubricants	Noerr-Pennington Doctrine/First Amendment

[14] DOJ structured the settlement as an order, rather than a final judgment to avoid triggering investigation of AIG by the SEC and state regulators. The DOJ claimed that regulatory penalties, on top of injunction, would be disproportionate to the underlying offense.

Table 1 (cont.):
Section 1 Energy Enforcement Actions Brought by the DOJ and FTC

Case No.	Year/ Agency	Case/Description of Violation	Type of Agreement/ Enforcement	Remedy	Entities harmed	Regulatory Schemes and Immunities
5	2008/ DOJ	*U.S. vs. Kwik-Chek and Jarrod Thomas* - Competing gasoline stations in Antlers, OK agree to raise prices on gasoline and diesel.	Explicit Criminal	Jail Time, Fines	Retail purchaser of gasoline	n/a
6(a)	2010/ DOJ	*U.S. vs. KeySpan* - KeySpan, using Morgan Stanley as an intermediary, enters into a financial swap (from 2006-09) with a rival generator that amounts to a virtual merger.	Explicit Civil	Disgorgement of $12 million	Wholesale and retail purchasers of electricity	Federal Energy Regulatory Commission (FERC)
6(b)	2011/ DOJ	*U.S. v. Morgan Stanley* - KeySpan, using Morgan Stanley as an intermediary, enters into a financial swap (from 2006-09) with a rival generator that amounts to a virtual merger.	Explicit Civil	Disgorgement of $4.8 million	Wholesale and retail purchasers of electricity	FERC
7	2012/ DOJ	*U.S. v. SG Interests, Gunnison Energy* - SG Interests and Gunnison Energy enter into a MOU and agree not to compete for natural gas leases on federal land in Colorado. DOJ action followed a qui tan action.	Explicit Civil	Fines of $275,000 per party to the agreement	Federal government and taxpayers	n/a

A. Summary of the Cases

1. Petroleum

Five of the eight Section 1 violations summarized in Table 1 involve multiple segments in the petroleum supply chain. Two violations involving price fixing in gasoline and diesel were prosecuted by the DOJ as criminal offenses, which typically involve prison sentences and fines. In 1993, the DOJ brought criminal charges against two gasoline stations in Greeneville, Tennessee for fixing the price of gasoline.[15] Again in 2008, the DOJ filed a criminal complaint for price fixing involving a gasoline station in Antlers, Oklahoma.[16]

At the opposite end of the petroleum supply chain, the DOJ brought a civil enforcement action in 2012 against SG Interests and Gunnison Energy for colluding in Bureau of Land Management (BLM) auctions for natural gas exploration and production leases in Colorado.[17] The two parties, which had previously competed for leases in the Ragged Mountain Range in Western Colorado, entered into a Memorandum of Understanding (MOU) under which they agreed that SG Interests would be the sole bidder for the leases, would not bid in excess of a mutually agreed-on cap and, if its bid was successful, would assign a 50 percent interest in the lease to Gunnison Energy at cost. The MOU between SG Interests and Gunnison Energy thus depressed Ragged Mountain lease prices, reducing lease revenue to the federal government. The DOJ reached a settlement with the two companies under which they each agreed to pay $275,000 in civil fines.[18]

In 1997, the DOJ filed a civil complaint against AIG Trading Corp., British Petroleum, and Cargill for colluding to lower brokerage commissions on financial derivatives for North Sea

[15] Press Release, U.S. Dept. of Justice, Tennessee Oil Company and Its President Charged With Gasoline Price Fixing (Jul. 21, 1993), *available at* http://www.justice.gov/atr/public/press_releases/1993/211645.pdf.

[16] Press Release, U.S. Dept. of Justice, Convenience Store Company and Individual Charged with Retail Gasoline Price Fixing in Oklahoma (Sep. 19, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/237430.pdf.

[17] The Bureau of Land Management leases tracts of federal land to companies to explore for and produce oil and gas for a fixed number of years. These leases are generally awarded to oil and gas companies through auctions. Competitive Impact Statement, United States v. SG Interests, Ltd., Civ. Action No. 12-cv-00395-RPM-MEH (D. Colo. Feb. 15, 2012), *available at* http://www.justice.gov/atr/cases/f280200/280290.pdf.

[18] Another potential Section 1 cases has emerged recently. Encana and Chesapeake allegedly agreed via email exchange not to compete for natural gas exploration and production leases on private land in Michigan. *See* Brian Grow & Scott Haggett, *Encana Clears Itself of Collusion in Michigan*, REUTERS, Sep. 5, 2012, http://www.reuters.com/article/2012/09/05/us-encana-chesapeake-idUSBRE8841JE20120905.

Brent crude oil contracts.[19] The DOJ reached a settlement with the defendants that enjoined the exchange of information on brokerage commissions and agreeing to fix commissions in the future. Finally, in 2007, the FTC brought an enforcement action against American Petroleum Co. for agreeing with other petroleum lubricant suppliers not to import product into Puerto Rico.[20] The companies restricted imports for the purpose of pressuring (successfully) the Puerto Rican government into repealing legislation that established a safe disposal program for lubricants. In the settlement, the FTC – acting under Section 5 of the Federal Trade Commission Act, as opposed to Section 1 of the Sherman Act – enjoined American Petroleum Co. from agreeing with any other supplier of lubricants to limit the sale of lubricants or refusing to sell to any actual or potential buyer.

2. Electricity

The remaining three Section 1 cases summarized in Table 1 involve electricity. In 1997, the DOJ brought a civil enforcement action against Rochester Gas & Electric (RG&E) in which it alleged that RG&E entered into an anticompetitive agreement with the University of Rochester.[21] Under the agreement, the university would receive lower electricity rates in exchange for agreeing not to build a cogeneration plant.[22] The surplus power would have been sold to retail customers, in competition with RG&E. By offering discounted electricity rates to the university RG&E, in effect, paid a potential competitor not to compete against it in the retail

[19] Competitive Impact Statement, United States v. AIG Trading Corp., Civ. Action No. 97 CIV 5260 (S.D.N.Y. Jul. 18, 1997), *available at* http://www.justice.gov/atr/cases/f1300/1341.pdf.

[20] Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of American Petroleum Co., File No. 061 0229 (F.T.C. Jun. 14, 2007), *available at* http://www.ftc.gov/os/caselist/0610229/0610229analysis.pdf.

[21] Competitive Impact Statement, United States v. Rochester Gas & Electric Corp., Civ. Action No. 97-CV-6294T (W.D.N.Y. Mar. 30, 1998), *available at* http://www.justice.gov/atr/cases/f1600/1614.pdf.

[22] Before reaching this agreement with RG&E, the University had intended to build a cogeneration plant to meet its own electricity needs.

electricity business. The DOJ enjoined the conduct and RG&E agreed not to enter into similar future agreements with the university or other potential rivals.

Finally, the DOJ filed civil complaints against KeySpan and Morgan Stanley in 2010 and 2011 for creating a financial arrangement that allowed KeySpan to raise electricity prices in New York City.[23] In 2006, KeySpan entered into a financial swap with Morgan Stanley. The investment bank then entered into an offsetting swap with the Astoria Generation Company, a KeySpan rival. Under this arrangement, Morgan Stanley would pay KeySpan the difference between the market price and a predetermined price times a fixed amount of power if the market price exceeded the predetermined price. In the event the predetermined price exceeded the market price, KeySpan would pay Morgan Stanley the difference between the market price and the predetermined price times a fixed amount of power.

The swap arrangements, with Morgan Stanley at the center, amounted to a virtual merger between KeySpan and Astoria. It gave KeySpan the incentive to increase its bids and raise market prices because KeySpan would earn higher margins on its capacity sales and also make money from its swap with Morgan Stanley. The DOJ settled with the two parties and sought disgorgement for the first time in a Section 1 energy case. KeySpan and Morgan Stanley disgorged $12 million and $4.8 million, respectively.

B. Empirical Analysis of Section 1 Energy Enforcement

Despite the limited number of Section 1 energy cases brought by the DOJ and FTC over the last two decades, it is still possible to analyze the data from a number of useful perspectives.

[23] Competitive Impact Statement, United States v. KeySpan Corp., Civ. Action No. 10-cv-1415 (S.D.N.Y. Feb. 23, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255578.pdf.

Data on all Section 1 cases won by the DOJ in U.S. district court in years in which Section 1 energy cases were *also* brought are shown in Table 2.[24] In 1993, a total of 71 Section 1 cases were won by the DOJ, followed by 48 in 1997, 66 in 1998, 20 in 2007, 27 in 2008, 29 in 2010, and 38 in 2011.

Table 2:
Section 1 Cases Won by the DOJ and FTC
in Years in Which the Government Brought Section 1 Energy Cases [25]

Year	**1993**	**1997**	**1998**	**2007**	**2008**	**2010**	**2011**	**Percent of Total**
	All Section 1 Cases Won							
Civil	3	13	7	1	2	1	1	9
Criminal	68	35	59	19	25	28	37	91
Total	71	48	66	20	27	29	38	100
	Energy Section 1 Cases Won							
Civil	0	1	1	1	0	1	1	71
Criminal	1	0	0	0	1	0	0	29
Total	1	1	1	1	1	1	1	100
Percent of all Section 1 Cases	1.4	2.1	1.5	5.0	3.7	3.4	2.6	2.3

One observation that emerges from the statistics in Table 2 is that the eight domestic Section 1 energy cases spanning the two decades from the early 1990s represent a very small proportion of total Section 1 enforcement. In the years in which the government brought Section 1 energy enforcement actions, it brought a total of 271 Section 1 cases. Energy cases account for just over two percent of that total. A look at DOJ Section 1 enforcement in the international arena reveals a similar pattern. International hard-core price fixing agreements have been the

[24] Section 1 cases constitute about two-thirds of all antitrust enforcement actions won by the DOJ in district court. Over the entire sample (1990-2011), Section 1 cases won by the government in district court are about 65 percent of all public antitrust enforcement actions. Because the DOJ accounts for the bulk of energy Section 1 enforcement actions, cases won by the FTC are not included in the statistics.

[25] *See Antitrust Division Workload Statistics (1990-1999)*, U.S. DEP’T OF JUSTICE, *available at* http://www.justice.gov/atr/public/246419.pdf; *Antitrust Division Workload Statistics (2000-2009)*, U.S. DEP’T OF JUSTICE, *available at* http://www.justice.gov/atr/public/281484.pdf; *Antitrust Division Workload Statistics (2002-2011)*, U.S. DEP’T OF JUSTICE, *available at* http://www.justice.gov/atr/public/workload-statistics.html.

subject of extensive analysis, particularly in assessing the effectiveness of fines in deterring future agreements.[26]

Between 1998 and 2011, 57 price fixing investigations or private actions were launched internationally into conduct potentially affecting the prices of gasoline, other refined petroleum products, electricity, and coal. Of the 57 cases, the DOJ was the lead agency in three (five percent) of cases. Both domestic and international Section 1 energy enforcement statistics reveal that the percentage of energy cases is relatively small. The size of the domestic energy sector relative to the U.S. economy suggests that a far higher percentage of total Section 1 cases should be related to energy. Moreover, the relative size of the U.S. economy in the global economy suggests that a far higher percentage of the energy sector price fixing is within the jurisdiction of the DOJ and the U.S. court system.

Table 2 also reveals that the ratio of criminal to civil Section 1 energy cases is nearly the inverse of that for all Section 1 cases. Over the time period assessed, only about nine percent of Section 1 cases won by the DOJ are civil and the remaining 91 percent are criminal. In contrast, 70 percent of Section 1 energy cases are civil and about 30 percent are criminal. The DOJ sought criminal penalties only in two instances, in matters involving the fixing of gasoline and diesel prices.[27] The DOJ's Section 1 energy enforcement actions thus do not reflect the balance in all Section 1 enforcement where criminal cases are the norm.

Finally, the six civil Section 1 energy cases in our dataset from 1993-2011 reveal a mix of remedies. The agencies imposed injunctions in half the cases (*AIG*, *RG&E*, and *American*

[26] *See, e.g.*, Robert H. Lande & John M. Connor, *Cartels As Rational Business Strategy: Crime Pays* 3 (July 30, 2012), *available at* http://ssrn.com/abstract=1917657.

[27] State attorneys general have also brought civil and criminal actions against gasoline retailers that engaged in price fixing.

Petroleum Co.). Financial sanctions were sought in the remaining half of the cases. Civil penalties were applied in *SG Interests*, and the defendants in *KeySpan* and *Morgan Stanley* were required to disgorge a portion of the profits from their anticompetitive conduct. While we do not have data on the types of remedies employed in all Section 1 cases, the liberal use of injunctions – as opposed to more stringent monetary penalties – warrants further analysis.

IV. Guidance on Section 1 Remedies and Factors Affecting Section 1 Energy Enforcement

The analysis in the previous section indicates that Section 1 energy enforcement by the U.S. government differs in multiple ways from broader Section 1 enforcement. We are particularly struck with the results that (1) most enforcement is civil as opposed to criminal, and (2) injunctions – which are known to have little or no deterrent value – have been used in one half of civil cases. Answers to these questions require a more in-depth analysis of factors in energy markets that potentially complicate antitrust enforcement. A brief look at current guidance on Section 1 remedies is helpful for framing this discussion, before considering the factors that potentially affect the scope and type of enforcement and the sanctions employed.

A. Current Guidance on Section 1 Remedies

The theory of optimal deterrence in sanctioning cartels is well established. An antitrust remedy that optimally deters future anticompetitive conduct will weigh the present value of the gains from the conduct against the present value of the expected monetary fines (adjusted for the risk of detection).[28] Kaplow notes that injunctions do not deter violations, and that injunctions do not seem to be widely used in collusion cases.[29] He highlights the centrality of fines and damages in private and public Section 1 enforcement, noting that monetary penalties can be calibrated to

[28] Lande & Connor, *supra* note 26*,* at 3.

[29] *Id.*, at 429, 447.

"the extent of harm caused and the likelihood of detection."[30] In a leading empirical approach to evaluating the effectiveness of Section 1 remedies, however, Lande and Connor evaluate rates of recidivism for a large sample of international hard-core price fixing cases. They conclude, among other things, that cartel sanctions should be increased on the order of five-times their current rates to more effectively deter collusion.[31]

Public antitrust enforcement is, of course, limited by constraints on the government's ability to pursue damages, as opposed to civil fines. Elhauge notes, though, even in light of this constraint, "…pursuing disgorgement claims can at least reduce some of the shortfall in deterrence, as well as achieve the goal of depriving the antitrust wrongdoer of its illicit loot."[32] Given the virtues of disgorgement, he concludes that its disfavored status as an antitrust remedy is puzzling.[33]

Formal guidance on remedies from the antitrust agencies themselves is scarce. The DOJ has stated publicly that criminal penalties are the appropriate remedy for hard-core collusion. In fact, the agency increased levels of penalties (including monetary fines and prison terms) in the mid-1990s.[34] But there is no current set of general guidelines or statements on Section 1

[30] Louis Kaplow, *Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 417 (2011).

[31] Lande & Connor, *supra* note 26, at 50

[32] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 501, 517 (2009).

[33] *See id.* at 516 ("In short, the disfavored status of disgorgement as an antitrust remedy is somewhat puzzling. Like all remedies, it raises problems. But the alternative government remedies often are ineffective or raise even worse problems. Their regulatory nature often makes them inefficient or over burdensome, and narrowing their use to avoid these problems often makes them ineffectual or illusory. Disgorgement neatly avoid these problems by monetizing the obligation in a way that eliminates any need for government and judicial entanglement in ongoing business operations.").

[34] Gary R. Spratling, *The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game, Presentation at the 11th Annual National Institute on White Collar Crime* (Mar. 7, 1997), *available at* http://www.justice.gov/atr/public/speeches/4011.pdf.

remedies.[35] In 2003, the FTC issued a Policy Statement on Monetary Equitable Remedies in Competition ("Policy Statement").[36] The Policy Statement indicated that the agency would seek disgorgement and restitution only sparingly, based on a number of guidelines.[37] The antitrust community reacted critically to the Policy Statement, questioning why the FTC would impose limits on its remedial powers in light of the greater procedural challenges facing private plaintiffs and the broad support for the antitrust agencies in seeking monetary remedies.[38] In 2012, the FTC withdrew the Policy Statement, recognizing that it restricted the agency's ability to seek monetary remedies in competition matters, to the detriment of consumers.[39] The agency mentioned that with the greater procedural burdens facing private antitrust plaintiffs today that it should be free to seek monetary remedies more frequently in competition cases.

Given the importance of deterrence in fashioning Section 1 remedies, clear support for

[35] *See* Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions, Presentation at the 26th Annual National Institute on White Collar Crime* (Mar. 1, 2012), *available at* http://www.justice.gov/atr/public/speeches/283738.pdf ("Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition. Cartels, therefore, are not properly redressed with just a liability rule designed to compensate victims. Rather, participation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly. Like other serious crimes, cartels are never socially desirable, and therefore U.S. law properly seeks to deter them completely rather than merely tax them.").

[36] FED. TRADE COMM'N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (2003), *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.shtm.

[37] Disgorgement was considered appropriate only when the violation was "clear," based on an objectiveness test. Per se violations such as price fixing and market division and some non-per se violations qualified as "clear" violations. An example of the latter is Mylan Pharmaceuticals' use of exclusive dealing to monopolize the market for two anti-depressant drugs. In addition, the FTC would seek monetary remedies only if it had a reasonable basis for computing the defendant's gain or consumers' harm from the violation. It emphasized, however, that this reasonable basis does not require "undue precision." Finally, the Policy Statement explained that the FTC would more likely seek disgorgement when other remedies, such as private damages, are unavailable or inadequate.
See id. ("[T]he Commission believes that the value of deterrence is reduced when the violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy of having to pay back all the potential gains.").

[38] Elhauge, *supra* note 32, at 504.

[39] FED. TRADE COMM'N, WITHDRAWAL OF THE COMMISSION'S POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (2012), *available at*
http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf.

financial sanctions among antitrust experts, and the agencies' retraction of guidelines that disfavored monetary penalties, a fair question is why the antitrust agencies do not seek such remedies more in Section 1 energy cases. To answer this question, it is necessary to examine other factors.

B. Factors Affecting Section 1 Energy Enforcement

Public antitrust enforcement involving Section 1 energy cases is likely to be shaped by a number of key factors. One is political visibility, driven by the importance of energy commodities in the economy, their prominence in consumer budgets, and the damaging effects of anticompetitive price increases. We need not look far to find examples of the economic pain and political backlash arising from high prices for energy commodities. These range from the OPEC oil embargo in the early 1970s, to electricity price spikes associated with the California restructuring crisis in the early 2000s, to the most recent round of high gasoline prices in California due to refinery shutdowns in the Fall of 2012.[40] The substantial consumer harm from price fixing in transportation fuels likely explains why the DOJ brought criminal actions in two price fixing cases involving gasoline and diesel fuels. But it is also important to note that refined petroleum markets are relatively unfettered by the economic regulation or the antitrust immunities that are present in other energy industries.

This brings us to the second factor that affects public enforcement of Section 1 energy cases – the presence of a dual competition (regulation and antitrust) regime, for example, in electricity, pipelines, and energy derivatives. In these industries, sector regulation and the

[40] The gasoline price spikes generated Congressional demands for an investigation, at least one major report, and calls for a criminal investigation by public interest groups. *See, e.g.,* Michael Winter, *Western Refineries Made Gas During Price Spikes*, USA TODAY, Nov. 14, 2012, http://www.usatoday.com/story/news/nation/2012/11/14/gasoline-price-spikes-west-coast-refineries-not-shut/1705523/.

antitrust laws are complementary parts of a competition policy framework. Antitrust enforcement therefore addresses whether regulatory rules and oversight are adequate to address competition infractions. The interaction of regulation and antitrust is likely a key driver of the scope of antitrust enforcement and sanctions employed in energy.

A third and related factor that affects Section 1 energy enforcement is the presence of judicially-created antitrust immunities. Explicit or implied immunities that limit or prohibit the application of the antitrust laws apply to many of the industries involved in the Section 1 energy cases evaluated here.[41] In its comprehensive review of the U.S. antitrust laws, the Antitrust Modernization Commission (AMC) looked askance at immunities (and exemptions), noted their dubious value, and recommended that they generally be disfavored.[42] Judicial immunities implicated in the AMC's review include the State Action Doctrine, Noerr-Pennington Doctrine, and Filed Rate Doctrine that act to immunize private parties fully or partially from liability under the antitrust laws.

The State Action Doctrine, for example, immunizes violations undertaken pursuant to a clearly articulated and actively supervised state policy intended to displace competition.[43] The Noerr-Pennington doctrine immunizes attempts to influence the passage or enforcement of laws, even if the laws advocated would have anticompetitive effects.[44] The Filed Rate Doctrine bars private treble damages actions by plaintiffs if a regulatory authority approved the rate at issue.

[41] Immunities do not include a broad complement of statutory exemptions (e.g., railroads and intra-state natural gas) in some industries.

[42] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (April 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Immunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. (at viii.)

[43] *Id.* at ix.

[44] *Id. at* 362.

Because it does not bar the government from bringing an antitrust action, or apply to attempts to obtain injunctive relief, the Filed Rate Doctrine is not a full immunity.

Of equal concern is the emergence of implied immunities in key Supreme Court decisions, including *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko* and *Credit Suisse Securities v. Billing*.[45] In *Trinko*, the alleged antitrust violation involved an incumbent telecommunications provider's refusal to provide access to its network by a competitive local exchange carrier for the purpose of providing retail services. *Credit Suisse* centered on an alleged collusive agreement involving the underwriting of initial public offerings of securities. In both cases, the Court deferred to regulatory rules to adjudicate market conduct.

The *Trinko* and *Credit Suisse* decisions mark a distinctive shift in how the judiciary views antitrust enforcement in regulated industries. Shelanski notes that prior to these cases, "…the Court did not view it as surprising or troublesome for antitrust agencies or private parties to challenge conduct as anticompetitive even if that conduct was already subject to agency rules."[46] While the implications of *Trinko* and *Credit Suisse* for private antitrust action is clear,[47] a major concern, of course, is the potential spillover effect on public antitrust enforcement. The FTC has called publicly for limiting the application of *Trinko* and *Credit Suisse* to private antitrust claims, citing the tangible benefits of public versus private enforcement.

[45] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Credit Suisse Sec. v. Billing, 551 U.S. 264 (2007).

[46] FED. TRADE COMM'N, "IS THERE LIFE AFTER *TRINKO* AND *CREDIT SUISSE*? THE ROLE OF ANTITRUST IN REGULATED INDUSTRIES," PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS AND COMPETITION POLICY 2 (June 15, 2010).

[47] *Trinko* arguably made it more difficult for private plaintiffs to pursue antitrust claims if the conduct in question "exceeded the clear boundaries of antitrust precedent." *Id.* at 11. After *Credit Suisse*, the Court extended the plain repugnancy precedent to bar antitrust claims involving conduct the regulatory agency had no purview over or could regulate in a way that created inconsistencies with antitrust law. *Id.* at 5.

V. Explaining Section 1 Energy Enforcement

Assuming that the presence of sector regulation and antitrust immunities affect antitrust enforcement, it is important to consider their potential impact in energy. Table 3 lists the six civil Section 1 energy cases brought by the government between 1993 and the present, noting the remedy obtained and the presence of any regulatory authority and immunities. Ideally, we would like to explain how the remedies in six civil cases are influenced by these factors. While the limited number of Section 1 energy cases in our sample precludes an empirical analysis of the choice of remedy, a qualitative analysis nonetheless highlights some major observations.

Table 3:
Civil Section 1 Energy Cases – Immunities and Regulatory Regime

Case	Remedy	Regulatory Authority	Explicit Immunity	Implied Immunity Potentially Relevant?
U.S. v. AIG/BP/Cargill (1997)	Injunction	SEC	n/a	No (pre-Trinko)
U.S. v. Rochester Gas & Electric (1998)	Injunction	FERC	State Action Doctrine	No (pre-Trinko)
In the Matter of American Petroleum Co. (2007)	Injunction	n/a	Noerr-Pennington	No (not regulated)
U.S. v. KeySpan (2010)	Disgorgement	FERC	Filed Rate Doctrine	Yes
U.S. v. Morgan Stanley (2011)	Disgorgement	FERC	Filed Rate Doctrine	Yes
U.S. v. SG Interests, Gunnison Energy (2012)	Civil penalty	n/a	n/a	No (not regulated)

A. Role of Sector Regulation

Sector regulation appears to play a significant role in the DOJ's approach in four of the six civil cases. In *AIG*, for example, the DOJ structured the settlement as an order, rather than a final judgment, to avoid triggering regulatory proceedings and sanctions by multiple authorities, including the Securities and Exchange Commission, state departments of insurance, and foreign entities. The DOJ's Competitive Impact Statement (CIS) notes that such an outcome would be "burdensome" to the defendants, given the limited scope of the violation.[48] Thus, while the presence of sector regulation does not explain the choice of injunction over stiffer financial sanctions in this case, it does appear to signal the DOJ's sense of comity in taking a balancing approach in prosecuting Section 1 violations when there are multiple enforcement authorities.

In *RG&E*, the government's consent decree both enjoined RG&E from enforcing the agreement with the University of Rochester and entering into other agreements, and required RG&E to make affirmative commitments to establish an internal antitrust compliance program. The CIS notes the regulated nature of the retail electricity market in New York and conditions the term of the injunction on a demonstration of entry in the retail electricity market in the event of industry restructuring. This reference to the regulated retail electricity market and tying of the term of the injunction to the development of competition supports the notion that sector regulation influenced the government's approach to sanctions.

The presence of sector regulation appears to play a lesser role in the government's approach in *KeySpan* and *Morgan Stanley*, the first time the DOJ sought disgorgement (albeit of a portion of anticompetitive profits) as a remedy for a Sherman Act violation. Whether the DOJ's choice of enforcement approach and remedy were influenced by the presence of FERC regulation governing wholesale electricity markets is not clear. The CIS makes no mention of the fact that the New York Independent System Operator (NYISO) capacity market operates subject to a FERC-approved tariff. And the DOJ complaint and judgment appeared two years after a non-public FERC staff investigation into whether the swap agreement violated tariff rules found

[48] *See AIG*, *supra* note 19, at 5.

no evidence that the parties to the swap agreement violated the NYISO capacity tariff, or Commission regulations.[49]

B. Role of Antitrust Immunities

The influence of antitrust immunities on the enforcement approach in Section 1 energy cases appears to be weaker than that of sector regulation. Indeed, explicit antitrust immunity defenses have been either expressly rejected by the antitrust agencies or used to justify a more stringent remedy as necessary to protect the public interest and deter future anticompetitive conduct. On the latter score, for example, the CIS in *KeySpan* justifies disgorgement as a remedy because the Filed Rate Doctrine would impose significant obstacles on private parties in obtaining damages.[50] To wit, the Second Circuit recently affirmed a district court dismissal of a private antitrust suit against KeySpan and Morgan Stanley on the basis of the Filed Rate Doctrine.[51]

Nonetheless, the disgorgement amount has been criticized as sub-optimal from a deterrence perspective, creating a scenario under which market participants are likely to find it profitable to collude again and to view the penalty as just another "cost of doing business." The sum of $16 million was estimated to be only about 30 percent of the profits the two companies earned from the anticompetitive swap agreement and about 10 percent of the increment in total

[49] The report found no evidence that KeySpan, Astoria, or Morgan Stanley violated the NYISO's Service Tariff or Part 1c of the Commission's regulations. *See* FED. ENERGY REGULATORY COMM'N, OFFICE OF ENFORCEMENT, DOCKET NOS. IN08-2-000 & EL07-39-000, FINDINGS OF A NON-PUBLIC INVESTIGATION OF POTENTIAL MARKET MANIPULATION BY SUPPLIERS IN THE NEW YORK CITY CAPACITY MARKET 3, (February 28, 2008), *available at* http://www.ferc.gov/enforcement/market-manipulation/nyiso-icap.pdf.

[50] *See* KeySpan, *supra* note 22, at 8–9.

[51] Simon v. KeySpan Corp., 694 F.3d 196 (2d Cir. 2012). The court held that the plaintiff lacked standing as an indirect purchaser and that the Filed Rate Doctrine prohibits private antitrust enforcement against anticompetitive behavior that FERC enacted rules to prevent and also investigated. The application of the filed rate doctrine to wholesale power markets has arguably created a form of "radical deregulation" in which neither FERC nor "private attorneys general" adequately police anticompetitive behavior. *See* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1596 (2003).

purchased power costs resulting from the agreement and borne by ratepayers.[52] The relatively small disgorgement requirement in *KeySpan* and *Morgan Stanley* does highlight the possibility that the threat of implied immunities (e.g., in *Trinko* and *Credit Suisse*) and the FERC's failure to find a violation of its governing statute created subtle pressures for the DOJ to take more measured approach to fashioning a remedy.

In other cases, the courts rejected attempts by defendants to invoke immunities as justifications for collusive agreements. In *RG&E*, for example, the State Action immunity was deemed inapplicable in part because the DOJ's challenge was to the agreement, not the discounted rates charged to obtain the University of Rochester's agreement not to compete. State policy therefore did not displace competition with regulation and the effect of the agreement to prevent competitors from entering the market was not a foreseeable consequence of New York state permitting the discounting of rates to certain customers.[53] In *American Petroleum Co.*, the FTC ruled that the Noerr-Pennington Doctrine was not a defense to liability, noting that the alleged restraint of trade (i.e., a constriction in the supply of petroleum lubricants) was the *means* by which the conspirators sought to obtain favorable legislation, as opposed to the consequence of governmental action.[54]

C. Other Considerations

The remaining civil Section 1 energy case in Table 3 is *SG Interests*, the first instance in which the U.S. government challenged a joint bidding arrangement for BLM mineral rights

[52] KeySpan's profits from the scheme were estimated at $49 million. Morgan Stanley's estimate net revenues from the transaction were $21.6 million. The American Association of Retired persons estimates that New York City ratepayers may have paid $159 million more for power in 2006 alone. Comments of AARP, United States v. KeySpan, S.D.N.Y. Civil Action No. 10-cv-1415, 75 Fed. Reg. 9,946 (March 4, 2010).

[53] United States v. Rochester Gas & Elec. Corp., 4 F. Supp. 2d 172, 175–76 (W.D.N.Y. 1998).

[54] *Id.* at 3.

leases.[55] This case involves neither sector regulation nor antitrust immunities, factors that might have shaped the government's approach to a remedy. In this case, the DOJ obtained a settlement that included civil damages that "…reflect[ed] additional auction revenues that the BLM likely would have received had SG Interests and GEC acted as independent competitors," thus forcing the companies to pay seven times more for the gas leases than they had under the anticompetitive bidding arrangement.[56]

It is important to note that because the government chose not to litigate the *SG Interests* matter, there was no finding of liability and the damages obtained were not a precise estimate of the monetary harm suffered as a result of the joint bidding agreement. This strategy appeared motived by the risks of going to trial.[57] In an interesting turn of events, the DOJ's final judgment failed to withstand review under the Antitrust Procedures and Penalties Act (also known as the "Tunney Act"). A district court opinion recently rejected the judgment as inadequate to deter future bid rigging behavior, which is typically punished with criminal fines and prison terms.[58] At the time of this writing, the case has not yet been resolved.

VI. Conclusions and Recommendations

The small sample of public Section 1 energy cases over the last two decades limits hard conclusions about antitrust enforcement involving collusive agreements, but it does allow for a

[55] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. SG Interests, Ltd., Civ. Action No. 12-cv-00395-RPM-MEH (D. Colo. Feb. 15, 2012), *available at* http://www.justice.gov/atr/cases/f285700/285754.pdf, at 18.

[56] *Id.*

[57] The government noted in its response to public comments submitted under the Antitrust Procedures and Penalties Act that, "Calculation of damages in this case would require a determination of the price the United States would have received for the leases had Defendants bid against each other at auction – a multi-variable exercise. Were this case to proceed to trial, both the amount of damages and the calculation methodology would be heavily disputed by the parties." *Supra* note 57, at 19.

[58] United States v. SG Interests I, Ltd., 2012 U.S. Dist. LEXIS 176310 (D. Colo. 2012).

number of key observations. First, we see relatively few Section 1 energy cases, despite the importance of energy in the domestic economy. While the antitrust agencies pursue an aggressive enforcement program against anticompetitive energy mergers in the U.S., merger enforcement alone is not sufficient to preserve competition. Vigorous enforcement against collusive and exclusionary conduct and mergers is necessary to promote competition in energy markets. Notwithstanding this general observation, there may be valid reasons, as discussed below, for why Section 1 energy enforcement may be perceived as relatively light.

Second, it is clear that explicit cases of price fixing in gasoline and diesel retailing, if uncovered, will invite criminal prosecution. Less explicit forms of collusion, including agreements to restrain output and other methods to extract supracompetitive price increases and profits, appear to be subject to civil enforcement, including fines and disgorgement. A recent rejection of DOJ's proposed final judgment in *SG Interests* involving bid rigging for federal natural gas leases, however, bolsters the notion that agreements that directly affect prices should be pursued as a criminal violation.[59]

Third, the antitrust agencies' predominantly civil enforcement approach and liberal use of injunctions in Section 1 energy cases likely signals the influence of complicating factors. In two cases, *AIG* and *RG&E*, the presence of sector regulation may have influenced the DOJ's choice of remedy (e.g., injunctions over harsher monetary sanctions) and term of the judgment. Antitrust immunities – which were invoked but rejected in two cases (*RG&E* and *American Petroleum Co.*) – do not appear to play a strong role in enforcement approach. We emphasize again, however, that the limited number of cases in our sample makes it difficult to draw any firm conclusions, particularly about the impact of judicially-created immunities in this area of antitrust law.

[59] Grow & Haggett, *supra* note 18.

In *KeySpan* and *Morgan Stanley* – cases that involve both regulated entities and touch on antitrust immunity – the DOJ appeared careful to distance its action from FERC and employed disgorgement as a remedy. DOJ's approach to sanctioning a collusive agreement in these complex cases is likely to be an important part of competition policy moving forward, highlighting the notion that competition policymakers would benefit from additional guidance. Guidance includes a high level of transparency in DOJ settlements and the development of judicial precedent on the intersection between the antitrust laws and relevant regulatory schemes.[60] The latter, of course, can be established by litigating cases. The process of clarifying the law and establishing judicial precedent through litigation would make it easier to obtain favorable settlements and aid private plaintiffs in the future.

Fourth, antitrust enforcement should abandon injunctions as a standalone remedy, but at the same time recognize that while financial sanctions are likely to be a more effective deterrent, their use raises important policy issues. It is clear that injunctions fail to send a clear signal to market participants that collusive agreements will not be tolerated and violate the principle of choosing remedies that optimally deter future collusive conduct. However, it is also clear that the presence of sector regulation and judicially-created antitrust immunities do have some bearing on the scope of Section 1 enforcement in energy and the choice of remedies. As Section 1 energy cases accumulate, more definitive conclusions can be drawn in this regard.

This complexity arguably supports the notion that government sanctions should be viewed as part of a complementary balancing approach that recognizes the value of both public and private enforcement. While we do not analyze private enforcement in the energy sector in this paper, we note that the DOJ has articulated cogent reasons (e.g., in *KeySpan*) for why public Section 1 enforcement involving energy remains essential due to limitations on private action. At

[60] Other guidance can include DOJ business review letters, official agency speeches, etc.

the same time, while it can compensate for limits on private enforcement, public enforcement should not attempt to displace the private bar for purposes of compensatory damages and deterrence.