

CONTENTS

FOREWORD	ix
PREFACE.....	xi

CHAPTER 1

Introduction to the Energy Industry

A. The Electric Power Industry	1
1. Unique Features of Electricity	1
2. Traditional Industry Structure.....	2
3. Traditional Regulatory Structure	3
4. Electricity Generation	3
5. Transmission and Distribution	7
6. Traditional Electricity Products	10
7. ISOs, RTOs, and Organized Electricity Markets.....	12
8. Reliability	15
B. The Natural Gas Industry	15
1. Current Framework of Competition.....	16
2. Liquid Natural Gas and Geographic Expansion of Natural Gas Markets	18
C. The Petroleum Industry	19
1. Upstream Activities—Exploration and Production	20
2. Downstream Activities—Refining and Marketing	22
D. Energy Trading.....	24

CHAPTER 2

Restructuring and Regulation of Electric and Gas Industries

A. Federal Statutory Scheme for Electric Utility Regulation.....	27
B. Electric Utility Regulatory Principles, Definitions, and Applications.....	30
1. The Basis for Regulation	31
2. Rate Regulation and the Evolution of Ratemaking.....	35
3. Rate Regulation for Wholesale Electricity	37
4. Performance-Based Ratemaking.....	37
5. Electricity Transmission Access	38
C. Natural Gas Regulation	42

CHAPTER 3**Concerted Actions**

A. Agreements among Competitors Affecting Price.....	51
1. Illegality Assessed under the Per Se Rule.....	52
a. Bid Rigging	53
b. Market Allocation	54
c. Agreements on Credit or Other Terms of Sale.....	57
d. Agreements on Inputs.....	57
e. Agreements under Up-To Rates	58
f. Output Restrictions.....	59
g. Exchange of Information.....	60
2. Illegality Assessed under the Rule of Reason.....	61
a. Legitimate Agreements with Ancillary Price Effects.....	61
b. Exchange of Information.....	61
B. Joint Conduct to Exclude Competition.....	63
1. Refusals to Deal.....	63
2. Industry Associations, Reliability Organizations, and Standards Development	66

CHAPTER 4**Single Firm Conduct**

A. Monopolization	71
1. Possession of Monopoly Power in the Relevant Market	72
2. Conduct to Maintain or Extend Monopoly Power	79
a. Tying	80
b. Exclusive Dealing Agreements	83
c. Predatory Pricing.....	88
(1) Pricing Below Cost.....	90
(2) Price Squeeze.....	91
(3) Demanding Predatory Prices	94
d. Refusals to Deal and the Essential Facility Doctrine	96
e. Monopoly Leveraging.....	105
f. Cross-Subsidization.....	109
3. Antitrust Injury	110
4. Attempted Monopolization.....	112
a. Conduct and Intent	113
b. Dangerous Probability.....	114
5. Conspiracy to Monopolize.....	118
6. Shared Monopoly.....	119

B. Single Firm Pricing Conduct 121
 1. Robinson-Patman 121

CHAPTER 5

Joint Ventures Between and Among Competitors

A. General Principles 125
 B. Joint Ventures in the Energy Industry 127
 C. Joint Ventures and Their Parents as Separate Economic
 Actors Pursuing Separate Economic Interests 131
 D. Analytic Framework of Competitor Collaborations 140
 1. Collaborations Between Competitors 148
 2. Joint Buying and Selling 151
 3. Collateral Restraints 154
 4. Interlocking Directorates 155

CHAPTER 6

Mergers, Acquisitions, Divestitures, and Related Issues

A. Review under Section 7 of the Clayton Act 159
 1. FTC Review of Oil and Gas Industry Transactions 160
 a. FTC Merger Review Practice by Petroleum Industry
 Sector 161
 (1) Crude Oil Exploration and Production 161
 (2) Bulk Transportation and Storage of Crude Oil 162
 (3) Refining 164
 (4) Bulk Transportation of Refined Products 166
 (5) Terminaling 168
 (6) Retail and Wholesale Marketing 171
 b. FTC Merger Review Practice by Natural Gas
 Industry Sector 175
 (1) Natural Gas Production 175
 (2) Natural Gas Gathering Services 176
 (3) Natural Gas Transportation 177
 (4) Fractionation 179
 (5) Natural Gas Distribution 179
 2. DOJ Review of Electricity Industry Transactions 181
 B. Review under the Federal Power Act 187
 1. FERC Jurisdiction over Electricity Mergers 188
 2. Standards of FERC Review 189

CHAPTER 7**Antitrust Immunities and Defenses**

A. State Action Immunity	193
1. Clearly Articulated Policy	194
2. Active Supervision.....	198
B. <i>Noerr-Pennington</i> Immunity for Petitioning the Government	200
1. <i>Noerr-Pennington</i> Immunity, Generally	200
C. Filed-Rate Doctrine	204
D. Implied Repeal of Antitrust Laws	208

CHAPTER 8**Market Manipulation Statutes and Rules**

A. FERC Rules.....	211
1. Background.....	211
a. FERC Jurisdiction	212
(1) Natural Gas	212
(2) Electric Power.....	213
b. Western Energy Crisis of 2000-2001 and Adoption of the Market Behavior Rules	214
2. EPCRA 2005 and Order No. 670	216
a. Elements of a Manipulation Violation	218
(1) Manipulative Conduct.....	219
(2) Scienier	224
(3) In Connection with Jurisdictional Transactions.....	226
(4) Safe Harbors and Affirmative Defenses	226
b. Application: <i>Amaranth</i>	227
c. Application: Multiple-Affiliate Bidding	230
3. FERC's Show Cause Procedures	232
4. Recent FERC Enforcement.....	232
5. FERC Remedies.....	234
B. CFTC Rules.....	234
1. Background.....	234
2. CFTC Historical Authority over Manipulative Conduct	238
a. Elements of Market Manipulation Claim—CEA § 9(a)(2).....	238
(1) Manipulative Conduct.....	239
(2) Ability to Influence Prices	242
(3) Specific Intent to Manipulate Prices.....	243
(4) Artificial Price	244

- (5) Attempted Manipulation 245
- 1. CFTC Authority over Manipulative Conduct Expanded
by Dodd-Frank 246
 - a. Deceptive or Manipulative Devices or Contrivances 247
 - b. False Reporting 248
 - c. Price Manipulation 250
- 2. CFTC Remedies 250
- B. FTC Rules 251**
 - 1. Elements 251
 - 2. False Reporting 253
 - 3. FTC Remedies 254
 - 4. FTC Enforcement 256
- C. Jurisdictional Overlap and Boundaries 256**
- D. Conclusion 258**
- GLOSSARY OF ENERGY INDUSTRY TERMS 259**
- TABLE OF CASES 279**