TEAMING UP WITHOUT TRIPPING UP: ANTITRUST GUARDRAILS FOR ENERGY INFRASTRUCTURE COLLABORATIONS

BY BENJAMIN HUFFMAN, ANN O'BRIEN & JOSH STURTEVANT[1]

1 Benjamin Huffman, partner and co-leader of Sheppard's Energy, Infrastructure and Project Finance industry team; Ann O'Brien, partner and co-leader of Sheppard's Antitrust and Competition practice group; and Josh Sturtevant, special counsel and a member of Sheppard's Real Estate practice group. https://www.sheppard.com/.

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In recent years, the combination of increased demand for energy resources together with supply-side shocks from a volatile federal energy and trade policy landscape has resulted in critical equipment price and availability uncertainty, adding value to proprietary supplier relationships and procurement pipelines. In addition, the market has witnessed marked diversification in the type, location and volume of electricity market generation resources, combined with barriers to needed upgrades to energy infrastructure. Against that backdrop of changes and challenges, the market is witnessing a variety of energy-sector participants working together to bring their respective resources and strengths together to try to meet demand. The article examines how those participants can collaborate on large infrastructure projects without running afoul of U.S. antitrust laws. The article also discusses practical safeguards to help energy-sector companies capture the efficiencies of collaboration while minimizing exposure to costly investigations, civil damages, and criminal liability under antitrust laws.

The energy sector in the United States is fundamentally intertwined with the country's economic wellbeing and national security. It is also a complex, interdependent and capital-intensive industry with a competitive landscape that is simultaneously both global and hyper-local. Ownership and operation of transmission and distribution infrastructure presents a natural monopoly and is regulated accordingly. Electricity generation and ancillary service markets are geographically defined and susceptible to concentration risk.

In recent years, the combination of increased demand for energy resources together with supply-side shocks from a volatile federal energy and trade policy landscape has resulted in critical equipment price and availability uncertainty, adding value to proprietary supplier relationships and procurement pipelines. The last 20 years has seen marked diversification in the type, location and volume of electricity market generation resources, combined with stubborn barriers to badly-needed upgrades to the transmission and distribution infrastructure carrying energy from producers to consumers.

Against that backdrop of changes and challenges, market participants are bringing different resources and strengths together to accomplish outcomes for end users that otherwise would be prohibitively expensive or technically unfeasible. Examples include the partnering of oil extraction companies and renewables developers in U.S. offshore wind, joint efforts between utilities and power plant developers to construct transmission lines to transport electricity generated by new plants, and development of data centers near natural gas reserves with co-located gas-fired generation.

Cooperation by market participants is crucial to the success of these projects, but involves coordinating efforts and sharing competitively sensitive information. Parties considering entering into teaming arrangements with other market participants to develop energy infrastructure need to evaluate antitrust compliance risk early in the process and establish and document clear protocols for discussion and information sharing to avoid appearance of anti-competitive behavior.

We have helped our clients establish, follow, and document compliance with protocols that are designed to limit behavior that could be considered anti-competitive, while still collaborating to create value for end users that otherwise would be unavailable. The following is a hypothetical fact pattern that we use to discuss risk mitigation options for antitrust issues that can arise when energy industry participants enter into teaming arrangements.

I. SCENARIO

Consider a scenario reflective of the current administration's stated goals to make the U.S. a data center leader under both current and anticipated generation and transmission constraints. Suppose an additional gigawatt of datacenter load is anticipated to come online in a rural area of an upper midwestern state in the next five years. In this area of the state, there are limited generation resources scheduled to come online prior to the datacenter load being added to resource requirements. While there are a few projects in development ranging in size from 200 to 500 MW, there is currently no single project that will meet the anticipated requirements. Additionally, there is currently no effective way to interconnect and transmit the electricity generated from these potential projects to the anticipated data centers on transmission lines of an efficient voltage. Finally, given the rural location, there are limited engineering, procurement and construction resources available locally.

The state's public utilities commission, working under a legislative mandate, announces a major procurement. The solicitation is for one-and-a half gigawatts of generation, reflecting the current anticipated data center load and a new mining operation coming online in five- to- ten years. The solicitation also requires that bidders include interconnection solutions and transmission solutions. Preference points will be given for bids that address community benefits, bids that include co-located storage solutions and joint bids that would increase efficiency for ratepayers and certainty of timing.

Four power plant developers, who compete locally and nationally, have projects that together meet the 1.5 GW generation goal in the geographic area of need. Each has well-developed community benefit strategies. They all have complementary supply strategies that would allow them to maximize tax credits and minimize foreign ownership and tariff concerns. Two of them are national leaders in co-locating energy generation and storage. Their projects could be sequenced in construction with the main local construction firm, avoiding the long snow/mud season and bat and bird concerns that exist at two of the potential project sites.

The developers know that they could team up and provide a proposal to the state that would provide a more complete and efficient outcome for the state and its citizens than could be achieved through separate bids. However, they have concerns. Interconnection locations and upgrade costs, relationships with transmission owners (many of whom are also competitive in other facets of the developers' businesses), supplier and construction company relationships and community benefit strategies are all key information for bid preparation that would not customarily be shared between competitors.

The developers decide to explore a joint bid submission. What structures for information sharing should they implement? How can they provide a responsive bid while protecting key corporate information and relationships? How can they ensure that their activities do not run afoul of antitrust concerns?

II. ANALYSIS OF ANTITRUST ISSUES AND RISK MITIGATION PROTOCOLS

Four horizontal competitors in electricity generation contemplating a joint bid implicates Section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade. Arrangements among horizontal competitors receive heightened scrutiny, and certain conduct — including price fixing, bid rigging and market allocation — is treated as *per se* unlawful, meaning simply agreeing is illegal without the need to show actual harm or effects. However, competitor collaborations that generate procompetitive efficiencies are evaluated under the rule of reason. The solicitation's preference points for joint bids is a good indicator and supports, but does not on its own establish, procompetitive justification.

A. Key Antitrust Risks

Exchanging competitively sensitive information — interconnection costs, supplier relationships and terms, community benefit strategies and tax credit optimization approaches shared during bid preparation are appropriate as part of the collaboration, but the antitrust risk is that the information shared within the collaboration could be used to facilitate tacit coordination in other procurements or markets. A joint bid necessarily involves agreement on pricing, terms, and project sequencing among competitors, so the information shared is inherently competitively sensitive and raises the potential antitrust risk.

- Vertical information-sharing risk — transmission developers and owners who are also competitive with the generators in other business lines may gain access to competitively sensitive generation-side information, potentially facilitating exclusionary conduct.
- Market allocation — if the four generators collectively represent all available generation capacity in the relevant geographic market, a joint bid could be said to eliminate competitive bidding for the solicitation.
- Group Boycott — if the four generators condition their participation in the solicitation on bidding jointly, or if the joint bid arrangement has the effect of excluding other market participants from the procurement (e.g., by tying up the sole local construction firm or critical interconnection capacity), the arrangement could be characterized as a concerted refusal to deal. Group boycotts among horizontal competitors can be subject to *per se* condemnation where they are designed to disadvantage competitors or coerce conduct. Even where analyzed under the rule of reason, exclusionary effects on non-participating generators or transmission developers would weigh against the collaboration.

Note that the procompetitive justifications are strengthened if neither the individual firms, nor others, can independently satisfy the 1.5 GW requirement; it weakens if any subset could independently bid or other entrants could feasibly compete.

B. Practical Antitrust Risk Mitigation Steps

Document the procompetitive justifications — memorialize in writing that no single party can independently satisfy the solicitation's requirements and that the collaboration produces efficiencies unavailable absent the joint effort. Contemporaneous documentation is critical to a rule of reason defense.

- Execute a teaming agreement with antitrust guardrails — define the collaboration's scope, limit information sharing to what is reasonably necessary for bid preparation, prohibit discussion of competitively sensitive topics outside the joint bid's scope, preserve each party's independent decision-making authority and address treatment of shared information upon termination.
- Establish clean team structures — restrict competitively sensitive information (cost data, supplier pricing, construction methodologies) to minimum number of designated individuals.. Maintain exchange logs or records and, where feasible, aggregate or anonymize data through an independent third party before broader dissemination.

- Preserve independent pricing — each generator should develop pricing independently, without disclosure of individual cost structures except where specifically needed to support the join bid. Where a consolidated bid price is required, risk can be mitigated by engaging an independent third party to aggregate individually submitted pricing so no party has visibility into a competitor's margins.
- Manage information flows with transmission developers — if the generation developers also partner with a developer of interconnection and transmission infrastructure (which is likely to be needed in this scenario), they should subject the transmission developer to the same clean team and use-restriction protocols, and execute separate nondisclosure agreements with robust restrictions prohibiting use of generation-side information in any competitive activity outside the joint bid.
- Involve antitrust counsel — including antitrust counsel in substantive meetings among competitors' participants where sensitive information is discussed can mitigate risk. It is helpful to prepare agendas identifying permissible and impermissible topics, intervene when discussions stray and review meeting minutes to create a contemporaneous compliance record.
- Limit duration and scope — it is helpful from an antitrust risk mitigation perspective to narrowly tailor the agreement as much as possible, including restricting the arrangement to the specific solicitation, avoiding broader discussions about market conditions or competitive strategy. Following abandonment or submission of the bid, formally dissolving the clean team, documenting the return or destruction of shared information, and documenting wind-down compliance further mitigate risk.
- Consider transparency and proactive regulatory engagement — disclosing the teaming arrangement in the bid submission shows the joint submission members true procompetitive intent and arrangement terms and can be helpful to establishing credibility and transparency. Proactive engagement with the offeror to seek any needed clarification regarding a joint bid prior to submission may also be helpful. Where market shares are high or the arrangement is particularly complicated, seeking a DOJ business review letter or engaging the state attorney general's office for informal guidance prior to the joint submission may also be options.

Rapid, technological change and shifting demand patterns have been increasing pressure on the American power generation and delivery system for decades. Both physical assets and the traditional procurement and planning processes have been unable to effectively keep pace. That pressure appears to be getting more, not less, intense with the near- and medium-term data center build-out that's widely expected to occur. The scale, profile and location of data centers as heavy electricity users will be difficult for the current infrastructure and processes to absorb.

Strong demand facing stubborn constraints is a recipe for innovation and collaboration. Market participants will need to collaborate to achieve what is not possible for them to do individually in non-traditional ways to meet the demand. In doing so, they should institute prudent and practical measures to protect themselves from running afoul of antitrust rules while still achieving society-benefiting outcomes. Antitrust risks, including the potential for costly government investigations, treble damage lawsuits, reputational harm, and, in worst case scenarios, criminal prosecution and jail time far exceed the upfront investment required to implement these protocols. These measures must be tailored to the specific facts, market dynamics and risk tolerance of the parties involved, and early engagement of experienced antitrust counsel is the single most important step market participants can take.

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