On May 13, 2016, The Williams Companies, Inc. (Williams), a premier provider of large-scale infrastructure, announced that it had filed suit in the Delaware Chancery Court to prevent Energy Transfer Equity, L.P. (Energy Transfer) from canceling their impending merger over tax opinion issues. Matterhorn's M&A database provides deep analysis of the merger's terms as well as detailed comparisons versus other transactions to provide insights into the parties' motivations.

In September 2015, the two companies entered in a merger agreement, which is anticipated to close by June 28, 2016. At that time, the merger was valued at approximately $37.7 billion and would create the third largest energy franchise in North America.

Williams' lawsuit intends to prevent Energy Transfer from terminating the merger agreement on the basis of failure to close by the current "Outside Date" of June 28, 2016 or failure to obtain a legal opinion from its tax counsel under Section 721(a) of the Internal Revenue Code. Of the 189 public merger transactions filed in 2015 with a transaction value of $200 million or more, all of those transactions have a right to terminate for failure to close by an outside date. Of those transactions, approximately 50% have a reverse termination fee, averaging 4.07% of enterprise or transaction value.

Energy Transfer's reverse termination fee is significantly lower, however, at 1.09%. This is even low compared to the energy and power and utilities sectors, where reverse termination fees average at 2.92% of enterprise or transaction value.

Williams has indicated that its board of directors is unanimously committed to enforcing Williams' rights under the merger agreement and submitting the merger transaction to its stockholders for a vote. As a result, it is unlikely that the termination fee provisions of the merger agreement will be invoked. The merger agreement provides that Williams must pay a termination fee of $1.48 billion upon certain termination events, which is 3.93% of enterprise or transaction value, which is higher than the average termination fee in 2015 of 3.07%. This higher percentage value translates into a much higher in dollar amount; however, this is unlikely to be invoked as Williams is not terminating the merger agreement for a superior proposal, and Energy Transfer is not claiming that Williams is in breach of the merger agreement.

The merger agreement requires the parties to use their reasonable best efforts to take all actions necessary to consummate the merger, including satisfying all closing conditions. One of the closing conditions in this transaction is the receipt by Energy Transfer of a legal opinion from its tax counsel under Section 721(a) of the Internal Revenue Code. The reasonable best efforts standard was the predominant standard, used in 83%, of the transactions. However, just 31.2%, require a tax opinion to be issued as a closing condition.

The Energy Transfer reverse termination fee is lower than average for both the energy and power and utilities sectors and public merger transactions as a whole. The fact that Williams has filed a lawsuit to prevent the termination of the merger agreement is indicative of the fact that Williams is not interested in receiving a reverse termination fee and does not believe that such a fee will nearly compensate the company for lost value if the merger is not consummated.

Williams has indicated that it is prepared to move forward with mailing its proxy statement, holding its shareholder vote, and closing the transaction to provide the best value possible to its shareholders. It will likely use the fact that Energy Transfer must use its reasonable best efforts to do everything possible to close the transaction as well as the caveat to the closing condition that prevents a party from terminating the agreement upon its own failure to satisfy conditions to require Energy Transfer to consummate the merger prior to June 28, 2016.

Matterhorn’s M&A database demonstrates the peculiarities of this merger while assisting attorneys to learn from both its strengths and pitfalls as they structure future deals.