



Incorporation of DOJ/FTC 2010 Merger Guidelines Into Horizontal Market Power Analyses

Federal Energy Regulatory Commission Seeking Comments

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The Federal Energy Regulatory Commission (FERC) is considering whether to incorporate into its traditional horizontal market power analysis certain facets of the 2010 Horizontal Merger Guidelines (2010 Guidelines) adopted by its sister agencies, the Department of Justice and the Federal Trade Commission (Antitrust Agencies).¹ Any change would impact the FERC's consideration of: (1) disposition, acquisition or merger transactions; and (2) the agency's electric market-based rate program. Comments must be submitted to the FERC by **May 23, 2011**.

FPA Section 203

Today, the FERC assesses the effect on competition of a proposed disposition, acquisition or merger by applying the Herfindahl-Hirschman Index (HHI) thresholds reflected in the Antitrust Agencies' 1992 Guidelines.² Through the NOI, the FERC seeks comment on:

- Whether it should adopt the 2010 Guidelines' approach of placing less emphasis on "use of a prescribed formula" and apply a more "fact-specific inquiry;"
- Whether it should adopt the increased HHI thresholds reflected in the 2010 Guidelines;³
- Whether it should adopt other facets of the 2010 Guidelines such as provisions addressing the potential competitive effects of partial acquisition and minority ownership arrangements;⁴
- If so, what elements it should adopt and how should they be incorporated into its analysis;
- Whether the differences between the FERC and Antitrust Agencies review processes should affect whether to adopt any portion of the 2010 Guidelines.⁵

FPA Section 205

Today, the FERC will grant authority to sell electric power at market-based rates if the seller, among other things, has less than a 20 percent wholesale market share in the relevant market. Otherwise the FERC will assess horizontal market power consistent with prior DOJ standards. Through the NOI, the FERC asks what impact, if any, the 2010 Guidelines should have on its horizontal market power analysis for electric market-based rates.



If the outcome of the NOI leads to FERC issuance of proposed rules, it could have significant impacts on the electric power industry.

Endnotes

- 1 *Analysis of Horizontal Market Power Under the Federal Power Act, Notice of Inquiry*, 134 FERC ¶ 61,191 (2011) (NOI).
- 2 The HHI Index is calculated by summing the squares of the individual market shares of the firms in the relevant market. It results in a single number somewhere between a number approaching zero (a market composed of thousands of small competitors) and 10,000 (a market composed of a single monopoly).
- 3 The 2010 Guidelines raise the market concentration threshold to 1500 for Unconcentrated Markets (from 1000), 1500-2500 for Moderately Concentrated Markets (from 1000-1800) and >2500 for Highly Concentrated Markets (from >1800). In Concentrated Markets, a HHI change of >200 is "presumed likely to enhance market power" (from >100), with a change of >100 "potentially raising significant competitive concerns" (from >50). See *id.* at P 12.
- 4 Under the 2010 Guidelines, a partial acquisition analysis focuses on: "(1) whether the acquiring company will be able to influence the competitive conduct of the target firm [such as through a voting interest, governance rights and right to appoint board members]; (2) whether the partial acquisition will reduce the financial incentive to compete because losses from one owned firm are offset by gains at the other; and (3) whether the partial acquisition enables companies to access non-public competitive information that can lead to coordinated activity [i.e., collusion] by the firms." See *id.* at P 14.
- 5 The FERC's review process is public, open to intervention and comments and is based on a factual record shaped by the applicant and intervenors. The Antitrust Agencies' review process is non-public and is "based on information submitted by the applicant, non-public information gathered by the agency staff [and] economic analysis performed by agency staff." See *id.* at P 20.

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