

## Energy Regulatory Alert

### FERC Reaffirms Current Horizontal Market Power Guidelines

February 23, 2012

On February 16, 2012, the Federal Energy Regulatory Commission (FERC, or “Commission”) issued an order reaffirming its existing policies regarding the analysis of horizontal market power concerns when reviewing transactions under section 203 of the Federal Power Act (FPA) and market-based rate filings under FPA section 205.<sup>1</sup> The decision comes months after the Commission issued a Notice of Inquiry<sup>2</sup> seeking comments as to whether it should revise its current horizontal market power guidelines under FPA sections 203 and 205 to reflect the revised Horizontal Merger Guidelines issued by the Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, the “Antitrust Agencies”) on August 19, 2010 (“DOJ/FTC Guidelines”). The Commission previously had adopted the five-step framework set out in the Antitrust Agencies’ 1992 Horizontal Merger Guidelines, which was superseded by the 2010 Guidelines.<sup>3</sup> Having chosen not to adopt the DOJ/FTC Guidelines, the Commission terminated its proceeding in Docket No. RM11-14.

In its Notice of Inquiry, the Commission noted the features of the 2010 DOJ/FTC Guidelines that differed from the Commission’s horizontal market power analysis and asked whether it should adopt these changes. First, the DOJ/FTC Guidelines deemphasized market definition as a starting point for analysis and departed from the sequential five-step framework for analyzing horizontal market power. Second, the DOJ/FTC Guidelines relaxed the thresholds of the Herfindahl-Hirschman Index (HHI) used to classify the relative concentration of a market and assess the competitive significance of a post-merger change. Finally, the DOJ/FTC Guidelines addressed the potential competitive effects arising from partial acquisitions and minority ownership.

#### FPA Section 203 Analysis Affirmed

In the February 16 Order, the Commission retained its existing approach for analyzing horizontal market power under FPA section 203. Specifically, the Commission reaffirmed the five-step framework for assessing the competitive effects of a proposed transaction, with the first step consisting of the Competitive Analysis Screen, because the Commission found that “the approach remains useful in determining whether a merger will have an adverse impact on competition.”<sup>4</sup> The Commission further noted that the Competitive Analysis Screen provides “analytic and procedural certainty to industry at a relatively low cost.”<sup>5</sup> In addition, the Commission rejected comments that its approach was overly rigid, noting that its policy statements make clear that it can look beyond the HHI screens, that it has done so and that it will continue to consider arguments and information beyond the screen results.<sup>6</sup>

<sup>1</sup> “Analysis of Horizontal Mkt. Power under the Fed. Power Act,” 138 FERC ¶ 61,109 (2012) (“February 16 Order”).

<sup>2</sup> “Analysis of Horizontal Mkt. Power under the Fed. Power Act,” 134 FERC ¶ 61,191 (2011) (“Notice of Inquiry”).

<sup>3</sup> Merger Policy Statement, FERC Stats & Regs. ¶ 31, 044 at 30,118; 30,130 (1996).

<sup>4</sup> February 16 Order at P 34.

<sup>5</sup> *Id.* at P 35.

<sup>6</sup> *Id.* at PP 36-38.



Second, the Commission did not adopt the DOJ/FTC Guidelines' modified HHI thresholds for use in its analysis of FPA section 203 applications because the purpose of the Competitive Analysis Screen is to be "conservative enough so that parties and the Commission can be confident that an application that clears the screen would have no adverse effect on competition."<sup>7</sup> Given this purpose, the Commission reasoned that the current, more stringent thresholds are appropriate, when compared to the relaxed thresholds of the DOJ/FTC Guidelines. The Commission also found that it would be inappropriate to adopt the 2010 Guidelines' HHI thresholds without adopting other aspects of the Guidelines.<sup>8</sup>

With respect to partial acquisitions and minority ownership, the Commission stated that its "existing approach to control is not contrary to the approach set out in the [DOJ/FTC] Guidelines."<sup>9</sup> The Commission stated, for example, that, in certain instances, it has found that a minority interest can confer control over the acquired company, but that the Commission has conditioned its approval of such transactions on restrictions limiting the ability to exercise control.<sup>10</sup> The Commission also rejected the suggestion that the Commission should incorporate the portion of the 2010 Guidelines dealing with buyer (monopsony) market power and, instead, stated that buyer market power will continue to be considered on a case-by-case basis.<sup>11</sup>

## Electric Market-Based Rate Analysis Affirmed

The Commission also chose not to modify the current market power analysis used for electric market-based rate applications to reflect the DOJ/FTC Guidelines, noting that its "market-based rate analysis is not explicitly tied to the Antitrust Agencies' merger guidelines and commenters fail to identify any feature within those guidelines that warrant [sic] a change to the program."<sup>12</sup> Moreover, the Commission observed that the HHI threshold used in its analysis of market-based rate applications (2,500) is already consistent with the HHI threshold in the DOJ/FTC guidelines (2,500). Finally, regarding the use of indicative screens, the Commission confirmed that it will maintain a 20 percent threshold because "the 20 percent threshold strikes the appropriate balance between having a conservative but realistic screen and imposing undue regulatory burdens."<sup>13</sup>

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<sup>7</sup> *Id.* at P.39 (quoting Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at P 41.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at P 42.

<sup>12</sup> *Id.* at P 55.

<sup>13</sup> *Id.* at P 56.