

# ClientAlert

## Energy, Infrastructure, Project and Asset Finance

March 2011

### FERC Seeks Comments on Whether to Revise Its Analysis of Horizontal Market Power Under §§ 203 and 205 of the FPA in Light of the DOJ/FTC 2010 Horizontal Merger Guidelines

On March 17, 2011, the Federal Energy Regulatory Commission (Commission) issued its Notice of Inquiry (NOI) requesting comments on whether to revise the current method of analyzing horizontal market power. The NOI put the power industry on notice that there may be fundamental changes in the way the Commission will analyze horizontal mergers in the future. These changes may make it easier to win Commission approval for many types of merger transactions. However, depending on the type and breadth of changes the Commission adopts, they may add some uncertainty to the approval process.

Specifically, the Commission sought comments on whether it should amend its method of analyzing horizontal market concerns in transactions under § 203 of the Federal Power Act (FPA) in light of the 2010 Horizontal Merger Guidelines issued by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on August 19, 2010 (2010 Guidelines). The Commission also is requesting comments on whether any adjustments should be made to its analysis of horizontal market power in considering market-based rate authorizations under § 205 of the FPA.

In determining whether a proposed transaction is consistent with the public interest as required under § 203 of the FPA, the Commission considers three factors in its analysis: 1) effect on competition; 2) effect on rates; and 3) effect on regulation. With respect to the first factor, the Commission previously adopted the Horizontal Merger Guidelines issued by the DOJ and the FTC in 1992 (1992 Guidelines) to analyze whether a proposed transaction will have an adverse effect on competition. Specifically, the Commission adopted the Herfindahl Hirschman Index (HHI) thresholds set forth in the 1992 Guidelines to categorize a market as unconcentrated, moderately concentrated or highly concentrated as well as to assess the competitive significance of the change in HHI that would result from a proposed transaction.

Under the 2010 Guidelines, the DOJ and FTC will conduct fact-specific inquiries utilizing a variety of analytical tools and will rely less on market definition and the use of a prescribed formula in analyzing the effects of a merger on competition. The 2010 Guidelines also significantly loosen the thresholds for classifying market concentration and assessing the significance of post-merger changes in HHI, as summarized in the following:



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HHI (Market Concentration) Thresholds			HHI Changes Potentially Raising Significant Competitive Concerns		HHI Changes Presumed to Enhance Market Power	
Market	1992 Guidelines	2010 Guidelines	1992 Guidelines	2010 Guidelines	1992 Guidelines	2010 Guidelines
Unconcentrated	<1000	<1500				
Moderately Concentrated	1000-1800	1500-2500	>100	>100	>100	>200
Highly Concentrated <sup>1</sup>	>1800	>2500	>50	>100, <200	>100	>200

The Commission now seeks comments regarding whether and how it should revise its own approach for examining horizontal market power concerns under § 203 of the FPA to be consistent with the 2010 Guidelines. If the Commission were to adopt the revised HHI levels in the 2010 Guidelines in its analysis of whether a proposed transaction will adversely affect competition under § 203 of the FPA, it is likely that more transactions would be eligible for approval than under the Commission's current standards of review. Adoption of the revised HHI levels could also result in an increase in the number of § 203 transactions approved without conditions.

The Commission is also seeking comment on whether it should adopt any other characteristics of the 2010 Guidelines. If the Commission follows the DOJ and FTC's lead by relying less on market definition and focusing more heavily on fact-specific inquiries that could lead to greater uncertainty and more time consuming reviews of merger applications.

In addition, the 2010 Guidelines adjust the DOJ and FTC's analysis with respect to other issues, such as the timeliness of the entry of new competitors, the nature and relevance of "maverick" firms (i.e., firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals) and the focus on mergers of competing buyers. While the Commission historically has not imported as much of the analysis of these issues from the DOJ and FTC guidelines, the Commission certainly could do so to the extent that such issues impact how transactions involving energy firms are evaluated.

Furthermore, the Commission is seeking comments on whether the 2010 Guidelines should have any effect on its analysis of horizontal market power in granting market-based rate authority under § 205 of the FPA, particularly with respect to the wholesale market share indicative screen. The Commission currently uses the wholesale market share indicative screen and the pivotal supplier indicative screen to analyze horizontal market power in its market-based program. Sellers that fail either screen may rebut a presumption of market power by, among other things, submitting a delivered price test (DPT). In the NOI, the Commission notes that it previously adopted a 20 percent threshold to pass the wholesale market share indicative screen, despite the 1992 Guideline's statement that a market share of 35 percent or more is an indication of market power. Similarly, the NOI notes that the Commission currently uses an HHI threshold of 2,500 when analyzing market concentration in the context of a DPT analysis, rather than a lower threshold of 1,800. The Commission generally seeks comment on whether the 2010 Guidelines should have any impact on these analyses.

Comments will be due 60 days after the NOI is published in the *Federal Register*. Please contact Earle H. O'Donnell, Donna M. Attanasio or Daniel A. Hagan for more information regarding this proceeding.

This article reflects contributions from White & Case's Energy and Antitrust practice groups.

<sup>1</sup> In the NOI, at times the Commission used the term "concentrated" in depicting the differences between the 1992 and 2010 Guidelines. From the context it appears that "concentrated" was intended to have the same meaning as "highly concentrated" but parties can seek confirmation in comments.

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