

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Analysis of Horizontal Market Power
under the Federal Power Act

Docket No. RM11-14-000

COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL
(ELCON) AND THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES (NASUCA)

The Electricity Consumers Resource Council (ELCON) and the National Association of State Utility Consumer Advocates (NASUCA) appreciate the opportunity to comment on the March 17, 2011 Notice of Inquiry (NOI), which seeks comment on whether the Commission, in light of the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission on August 19, 2010 (2010 Guidelines), should revise its approach to horizontal market power concerns raised by proposed transactions, and what impact the 2010 Guidelines should have, if any, on the Commission's analysis of horizontal market power in its electric market-based rate program. ELCON and NASUCA urge FERC not to take any action that would dilute its current market power analysis. Such action would be inconsistent with FERC's Federal Power Act obligations, would be contrary to the purpose and intent of the 2010 Guideline revisions, and would increase the risk of market concentrations harmful to consumers.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate

hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States.

NASUCA is a voluntary association comprised of offices from 40 states and the District of Columbia, charged by their respective state laws to represent consumers before federal and state utility commissions, before other federal and state agencies, and before federal and state courts. Many NASUCA members have extensive experience with regulatory policies governing the electric utility industry. NASUCA members' primary interest is the protection of residential and other small consumers.

Comments

FERC's approach to assessing horizontal market power currently follows much of the 1992 merger guidelines, including their use of the Herfindahl-Hirschman Index (HHI), to assess post-merger market concentration. The NOI focuses on increases in the HHI thresholds adopted by the 2010 Guidelines to identify moderately concentrated and highly concentrated markets. The NOI also notes that the 2010 Guidelines place less emphasis on market definition and use of a prescribed formula for assessing the effects of the merger. ELCON and NASUCA are concerned that FERC has both over-emphasized and also taken out of context, the antitrust agencies' increases to the HHI thresholds -- which viewed in isolation would weaken the standards for assessing market power -- while failing to appreciate other significant changes in the 2010 Guidelines. Indeed, the 2010 Guidelines are viewed by the antitrust bar as giving the agencies greater scope to challenge horizontal mergers.¹

When viewed as a whole, the 2010 Guidelines establish a flexible, totality of evidence analysis to form a judgment about the competitive effects of the transaction,

¹ See e.g., Herbert J. Hovenkamp, *Harm to Competition Under the 2010 Horizontal Merger Guidelines*, April 2011, available at <http://ssrn.com/abstract=1702843> (Stating that the 2010 Guidelines are notable for "an expanded set of theories of harm that justify preventing mergers or reversing mergers that have already occurred"); Gopal Das Varma, *Will Use of the Upward Pricing Pressure Test Lead to an Increase in the Level of Merger Enforcement?*, 24 *Antitrust* 27 2009-2010 (Predicting that "If the UPP test were to replace the structural presumption in the agencies' merger reviews, more mergers would likely be subject to additional scrutiny")

with less emphasis on a rigid, formulaic process looking to market definition, market shares and concentration.² The 2010 Guidelines specifically establish a foundation for greater enforcement by supporting narrowly defined markets, looking to potential harm to localized competition, and they place new emphasis on the importance of analyzing profit margins. Further, the increased HHI thresholds to identify concentrated markets are accompanied by clarification by the antitrust agencies that they do not create safe harbors and more generally that the agencies will look to a broad range of factors, of which HHI is only one.

The 2010 Guidelines cover a broad range of industries with widely varying market structures. Many of the changes to the 2010 Guidelines are an attempt to build in greater flexibility, and to create an expanded set of analytic tools, to allow the agencies to tailor their review to the unique characteristics of each market. For example, the adoption of an Upward Pricing Pressure (“UPP”) test and an increase focus on diversion ratios are a response to the difficulties of analyzing unilateral effects in differentiated product markets. FERC does not face the same issues as the agencies insofar as it is tasked with reviewing mergers in a small set of clearly defined industries producing homogenous products. Moreover, these are heavily regulated industries, with high fixed costs and high barriers to entry. While most utilities (including unregulated generation companies and affiliated generation companies) are relatively small in terms of market capitalization, any exercise of generation market power can severely impact the wholesale markets. The NOI raises the concern that FERC might improperly relax its standards for assessment of market power issues under the Federal Power Act, when in fact the 2010 Guidelines have, if anything, the opposite effect in the general antitrust context.

² See Hovenkamp at 1 (“The 2010 Guidelines are more flexible than previous Guidelines and also more catholic about the types of harms that mergers might cause and the techniques that can be used to assess them.”)

Issues for Comment

“The Commission seeks comment on whether, and if so, how, the Commission should revise its approach for examining horizontal market power concerns in transactions under § 203 of the FPA to reflect the 2010 Guidelines.”

The Commission has, in writing as well as in practice, adopted an approach that reflects the changes most relevant to electricity markets that are included in the 2010 guidelines. For example, in the 2007 Section 203 Supplemental Policy Statement (at ¶ 65), FERC stated:

In fact, as noted above, the Commission does look beyond the change in HHI in its analysis of the effect on competition in both horizontal and vertical mergers. The change in HHI serves as a screen to identify those transactions that could potentially harm competition. If the screen is failed, then, as discussed in paragraph 59 above, the Commission examines the factors that could affect competition in the relevant market. Specifically, in these circumstances the Commission typically considers a case-specific theory of competitive harm, which includes, but is not limited to, an analysis of the merged firm’s ability and incentive to withhold output in order to drive up prices.

Many of the most significant changes to the 2010 Guidelines have little or no applicability to electricity markets. In light of FERC’s current practice, revisions are unnecessary.

“Should the Commission adopt the 2010 Guidelines’ classification? Or should the Commission continue to classify a market as unconcentrated if the post-merger HHI in the market is below 1,000 points?”

ELCON and NASUCA do not see a need to change the HHI thresholds used by FERC. Electricity markets have a number of characteristics that create a heightened risk of market power abuse, including high barriers to entry, transmission constraints that create local sub-markets, and the fact that during periods of peak demand even small generators may exercise significant market power. Moreover, revisions to the HHI

thresholds must be considered in the context of all the other related changes to the 2010 Guidelines. The revisions to the HHI thresholds in the 2010 Guidelines are closely tied to a focus on narrower markets and a use of alternative new tests for anti-competitive harm such as UPP, that collectively grant the agencies greater latitude to challenge transactions.

“Should the Commission adopt any of the other aspects of the 2010 Guidelines? If so, which ones, and how would the Commission incorporate these aspects into its market power analysis?”

The changes to the HHI thresholds are only one small element of a broader overhaul to the 2010 Guidelines. The revisions to the HHI thresholds only make sense when viewed as part of an attempt by the agencies to apply a more nuanced case-by-case approach to merger review. The 2010 Guidelines, for example, make clear that the agencies will define markets more narrowly than in the past, which is likely to result in more merger challenges than under the lower thresholds. Thus it would be logically incoherent to adopt one part of the 2010 Guidelines, but to ignore the other closely related revisions.

“The Commission seeks comment on whether the differences between the Commission’s process for considering applications under §§ 203 and 205 of the FPA and the process used by the Antitrust Agencies for considering mergers affect the extent to which the Commission should adopt the 2010 Guidelines.”

The public nature of the Commission’s process for review of merger applications should have no effect on the legal guidelines the Commission adopts. The goal of the both the 1992 and 2010 Guidelines is to strike an effective balance between prevention of anti-competitive conduct, and avoiding unnecessary regulatory burden. The public or non-public nature of the proceedings is irrelevant to the content of the guidelines.

“[T]he Commission also seeks comment on what impact the 2010 Guidelines should have, if any, on the Commission’s analysis of horizontal market power in its electric market-based rate program.”

The 2010 Guidelines should have no effect on the Commission’s analysis of horizontal market power. As discussed above, electricity markets have a number of characteristics that create a heightened risk market power abuse. ELCON and NASUCA urge FERC to take a conservative approach to market power issues and not dilute its current standards for analysis of horizontal market power.

Notices and Communications

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: May 23, 2011

/s/ W. RICHARD BIDSTRUP
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