



Energy Update

www.BlankRome.com

April 2011

FERC Issues Notice of Inquiry Regarding Horizontal Market Power Analysis

On March 17, 2011, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued a Notice of Inquiry (the “Notice”) regarding its analysis of horizontal market power under section 203 of the Federal Power Act (“FPA”). Specifically, the Commission is soliciting comments on if, and if so, how, the Commission should modify its existing approach for analyzing horizontal market power concerns under section 203 of the FPA in light of the issuance of the Horizontal Merger Guidelines by the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) on August 19, 2010 (the “2010 Guidelines”). The Commission also seeks comment on what impact the 2010 Guidelines should have, if any, on its horizontal market power analysis performed for market-based rate authority applications pursuant to section 205 of the FPA.

Section 203(a)(4) of the FPA requires the Commission to approve a proposed disposition, consolidation, acquisition or change in control of a public utility if it finds that the proposed transaction will be consistent with the public interest. Three factors are considered when the Commission analyzes whether a proposed transaction is consistent with the public interest: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. With respect to the effect on competition factor, FERC employs the framework found in the 1992 Horizontal Merger Guidelines (the “1992 Guidelines”) issued by DOJ and FTC

which contains four components: (1) the identification of the relevant products; (2) the identification of customers who may be affected by the merger; (3) the identification of potential suppliers to each identified customer; and (4) the analysis of market concentration using the Herfindahl-Hirschman Index (“HHI”) thresholds.

On August 19, 2010, DOJ and FTC issued the 2010 Guidelines which supersede the 1992 Guidelines and differ in several important ways. Generally, the 2010 Guidelines place less emphasis on market definition and the use of a prescribed formula for considering the effects of a merger. For example, with respect to the competition and analysis screens, the 2010 Guidelines raise the HHI thresholds for determining the level of existing market concentration and, for “concentrated” markets, increase the amount of post-merger changes in market concentration levels that are necessary to trigger significant concerns over competition and the ability to exercise market power. The 2010 Guidelines state that the administering agencies (i.e., FTC and DOJ) will engage in a fact-specific approach tailored to each transaction. The 2010 Guidelines also address the potential competitive effects arising from partial acquisitions and minority ownership.

In the Notice, the Commission seeks comment on whether, and if so, how, the Commission should revise its approach for examining horizontal market power concerns

in transactions governed by section 203 of the FPA by incorporating the 2010 Guidelines. FERC also seeks comments on what effects, if any, the 2010 Guidelines should have on FERC's analysis of horizontal market power issues when FERC considers granting authority to make wholesale sales of electricity at market-based rates pursuant to section 205 of the FPA. The Commission acknowledges that there are "fundamental" differences between its analyses and those performed by the FTC and DOJ. As an example, the FERC notes that its review process is made public, with parties free to intervene and comment, and its merger decisions are based on a factual record shaped not only by the applicant, but by intervenors and subject to analysis by Commission staff. In contrast, the review process

performed by DOJ and FTC is nonpublic and closed, and based on information submitted by the applicant and non-public information gathered by the DOJ and FTC staff, as well as the economic analysis performed by staff. Thus, the Commission requests comments addressing whether such differences should affect the extent to which the 2010 Guidelines are adopted.

Potentially affected stakeholders include those who are contemplating merger and/or acquisition transactions involving public utilities, and those entities seeking to become authorized to engage in wholesale sales of power at market-based rates. Comments in response to the Notice are due by May 23, 2011.

**If you have questions concerning the material contained in this alert,
please contact any of the following members of Blank Rome's Energy Industry Group:**

Nicholas A. Giannasca
212.885.5018
Giannasca@BlankRome.com

Carlos E. Gutierrez
212.885.5095
CGutierrez@BlankRome.com

James M. Burlew
215.569.5587
Burlew@BlankRome.com