

**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 ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association (“EPSA”)¹ respectfully submits these comments on the notice of inquiry issued by the Federal Energy Regulatory Commission (the “Commission”) in the above-captioned proceeding on March 17, 2011.² EPSA appreciates the Commission’s examination of its policies and regulations applicable to transactions under Section 203 of the Federal Power Act (“FPA”), as well as market-based rates pursuant to FPA Section 205, and offers the following comments for the Commission’s consideration.

Specifically, EPSA supports the Commission’s proposal to revise its approach for examining horizontal market power in transactions subject to Section 203 of the Federal Power Act (“FPA”)³ to use the higher Herfindahl-Hirschman Index (“HHI”) thresholds adopted in the August 19, 2010 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission (together, the “Antitrust

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² *Analysis of Horizontal Market Power under the Federal Power Act*, FERC Stats. & Regs. ¶ 35,571 (2011) (the “NOI”).

³ 16 U.S.C. § 824b (2006).

Agencies”).⁴ The Commission should not, however, adopt other aspects of the 2010 DOJ/FTC Guidelines. In particular, the Commission should refrain from adopting the more open-ended approach to analyzing horizontal market power issues or the approach to non-controlling ownership interests described in the 2010 DOJ/FTC Guidelines. These approaches are ill-suited to the Commission’s statutory duties and the process by which it performs those duties, would result in an unnecessary and unwarranted administrative burden on both the Commission and applicants, and creates considerable uncertainty that would chill needed investment in electric infrastructure. Finally, in the market-based rate setting, the Antitrust Agencies’ increased threshold for a highly concentrated market would justify a corresponding increase, from 20 percent to 30 percent, in the threshold used to determine whether a seller may have market power in the Wholesale Market Share screen.

I. COMMENTS

EPSA requests that all pleadings, correspondence and communications concerning these comments be directed to the following:

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⁴ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (issued Aug, 19, 2010) (the “2010 DOJ/FTC Guidelines”), *available at*: <http://ftc.gov/os/2010/08/100819hmg.pdf>.

II. BACKGROUND

The current horizontal market power analysis utilized by the Commission in evaluating merger applications and proposed transactions filed pursuant to FPA Section 203 was established in the Commission's 1996 Merger Policy Statement⁵ and codified in Part 33 Merger Regulations.⁶ The current framework adopted by the Commission was based on the Antitrust Agencies' 1992 Horizontal Merger Guidelines.⁷ The Antitrust Agencies issued a new set of guidelines in August 2010, which replace the 1992 DOJ/FTC Guidelines. Importantly, the 2010 DOJ/FTC Guidelines place less emphasis on market definition and the use of a prescribed formula for considering the effects of a merger. Instead, the Antitrust Agencies will engage in a fact-specific inquiry using a variety of analytical tools, including direct evidence of competition between the parties. Further, the 2010 DOJ/FTC Guidelines raise the HHI thresholds used to analyze the concentration of a market and assess the significance of a post-merger change in HHI. The NOI asks whether the Commission should revise its approach for examining horizontal market power concerns, including adoption of the Antitrust Agencies' more open-ended process, and/or the increased HHI thresholds as reflected in the 2010 DOJ/FTC Guidelines.

The Commission also seeks comments on whether there are any other aspects of the 2010 DOJ/FTC Guidelines that it should adopt for the purposes of its horizontal

⁵ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act*; Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31, 044 at 30, 111 (1996), *recons. denied*, Order No. 592-A, 79 FERC ¶ 61, 321 (1997) (codified at 18 C.F.R. pt. 2). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31, 111 at 31, 872 (2000) (collectively, the Commission's "Merger Policy").

⁶ See 18 C.F.R. Pt. 33 (2010).

⁷ U.S. Dept. of Justice & Federal Trade Commission, "Horizontal Merger Guidelines" (1992), as revised (1997) (the "1992 DOJ/FTC Guidelines").

market power analysis under FPA Section 203⁸ and whether the 2010 DOJ/FTC Guidelines should have any impact “on the Commission’s analysis of horizontal market power in its electric market-based rate program” under FPA Section 205.⁹ The NOI notes that the 2010 DOJ/FTC Guidelines “address the potential competitive effects arising from partial acquisitions and minority ownership,”¹⁰ even in cases where the acquisition does not convey control to the acquirer.¹¹ The NOI also notes that “[i]ssues relating to partial acquisitions are among the issues before the Commission in Docket No. RM09-16-000,”¹² a rulemaking proceeding instituted in response to an EPSA petition seeking additional guidance regarding the concepts of “control” and “affiliation” for purposes of the requirements of FPA Section 203 and the Commission’s market-based rate regime under FPA Section 205.¹³

8 NOI, FERC Stats. & Regs. ¶ 35,571 at P 19.

9 *Id.* at P 21.

10 *Id.* at P 14 (*citing* 2010 DOJ/FTC Guidelines, § 13).

11 The Commission describes the analysis of non-controlling investments contemplated by the 2010 DOJ/FTC Guidelines as focusing on three principal effects:

(1) whether the acquiring company will be able to influence the competitive conduct of the target firm; (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 by the firms.

Id. (internal citations omitted).

12 See *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,650 (2010) (the “Control & Affiliation NOPR”). EPSA filed comments and reply comments generally supporting the Commission’s proposals in the Control & Affiliation NOPR, and seeking certain modifications and clarifications. See Comments of the Electric Power Supply Association, Docket No. RM09-16-000 (filed Mar. 29, 2010); Reply Comments of the Electric Power Supply Association, Docket No. RM09-16-000 (filed Apr. 13, 2010).

13 See Petition of the Electric Power Supply Association for Guidance Regarding “Control” and “Affiliation,” Docket No. EL08-87-000 (filed Sept. 2, 2008) (the “Guidance Petition”). Following the submission of comments on the Guidance Petition, the Commission determined that the Guidance

III. COMMENTS

A. The Commission Should Not Follow The Antitrust Agencies' More Open-Ended Approach To Horizontal Market Power Analysis.

As the overarching focus of the NOI, the Commission asks for comment on the question of whether it should update its horizontal market power guidelines used in FPA Section 203 applications to reflect the 2010 DOJ/FTC Guidelines. Specifically, the Commission seeks comment on the following:

[T]he 2010 Guidelines place less emphasis on market definition and the use of a prescribed formula for considering the effects of a merger than the 1992 [DOJ/FTC] Guidelines. Should the Commission adopt this approach?¹⁴

EPSA strongly urges the Commission not to adopt the less prescriptive, more open-ended approach for analyzing the potential competitive effects of utility merger transactions and transfers of control of generation capacity under FPA Section 203. As noted, these approaches are poorly suited to the Commission's statutory deadlines and review processes required by law, and should not be incorporated at this time. The Commission should continue its specific and focused analytical approach, using methodologies and data specified in the Commission's merger regulations. Further, the Commission should continue to require merger applications submitted for review under FPA section 203 to include a complete and comprehensive analysis in the initial filing as specified in the Commission's merger regulations. The Commission's current approach has been effective, efficient and transparent with respect to reviewing these transactions.

Petition "raises issues of generic implication to the electric utility industry," and re-docketed the proceeding with the more general PL docket prefix. See Notice of Redocketing Proceeding, Docket Nos. EL08-87-000 and PL09-3-000 (Nov. 5, 2008).

¹⁴ NOI at P 15.

As acknowledged in the NOI, the Commission’s merger review process is public, in contrast with the Antitrust Agencies’ non-public process, and this significant procedural difference alone would make the open-ended, flexible approach reflected in the 2010 DOJ/FTC Guidelines difficult for adoption by the Commission. The Antitrust Agencies’ non-public, off-the-record review is not subject to any of the formal requirements that underpin the Commission’s merger review pursuant to the Administrative Procedure Act (“APA”) for on-the-record decisions, including any *ex parte* concerns with respect to communications with applicants or third parties in contested proceedings. To wit, the 2010 DOJ/FTC Guidelines state that “[t]hese Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology.”¹⁵ EPSA cautions, however, that non-uniform application of multiple methodologies would be difficult – not necessarily impossible but difficult – to do in a way that conforms with the requirements of reasoned decision making, because it is well established that the Commission cannot have “one rule for Monday, and another for Tuesday.”¹⁶ The Antitrust Agencies’ informal, off-the-record process combined with less defined review requirements simply cannot be reconciled with the Commission’s APA requirements to issue a final public decision, based on a reasoned evaluation of a public record, which is subject to judicial review.

15 2010 DOJ/FTC Guidelines, § 1.

16 *Shell Oil Co. v. FERC*, 664 F. 2d 79, 83 (5th Cir. 1981).

Additionally, the Commission operates under a 180-day statutory deadline for issuance of a final order on proposed merger transactions.¹⁷ From a purely practical standpoint, it would be administratively infeasible for the Commission to implement an undefined review process given the timeframes that Congress has previously established to ensure completion of Section 203 transactions occurs in an efficient manner.

Further, the Antitrust Agencies are evaluating mergers across a range of industries and will not have continued regulatory oversight over the entities involved in these transactions, so a more flexible and open-ended approach may be better suited to these circumstances. In contrast, the Commission's focus is more narrowly centered on the electric industry, an area in which the agency has considerable knowledge and expertise, and where it retains extensive ongoing regulatory authority, including the power to issue supplemental orders under Section 202(b) of the FPA, to ensure that markets remain competitive over time. Under this scenario, the Commission has the ability to assess how market power in the electric industry should be evaluated and the specific factors necessary to conduct an appropriate competitive analysis of proposed mergers, and should continue to do so under its current approach.

Given the extensive commitment of time, resources and expense to companies who are pursuing a merger, the applicants require predictability on whether a transaction is likely to be authorized, and therefore, the DOJ/FTC open-ended approach is ill-advised. By knowing what is required, entities are able to evaluate whether a

¹⁷ FPA Section 203(a)(5). In 2005, Congress amended FPA Section to impose the 180-day deadline. Congress also allowed for an additional 180-day extension of time, if necessary, although the Commission has only extended its review twice since imposition of the deadlines.

merger or acquisition will likely meet the current rigorous and well-defined review under FPA Section 203.

EPSA submits the current process provides regulatory certainty to Section 203 applicants and allows the Commission to meet its statutory deadlines, and has resulted in numerous beneficial transactions since implementation of the Commission's Merger Policy, which ultimately serves the public interest. Moreover, while EPSA does not support adoption of the less formulaic approach under the 2010 DOJ/FTC Guidelines, EPSA does encourage the Commission to continue to carefully evaluate the issues and concerns that may be raised by intervenors in FPA Section 203 proceedings, along with well-supported analysis, to allow the Commission to consider alternative or additional issues or analysis in rendering its merger decisions.

B. The Commission Should Adopt The 2010 DOJ/FTC Guidelines' Higher HHI Thresholds For Examining Horizontal Market Power Under FPA Section 203.

The Commission also asks:

"The 2010 [DOJ/FTC] Guidelines reduced emphasis on market definition and formulas aside, should the Commission adopt the revised HHI levels in the 2010 [DOJ/FTC] Guidelines in its analysis of whether a proposed transaction will adversely affect competition under Section 203 of the FPA?"

EPSA supports the Commission's adoption of the revised HHI levels to conform with the levels adopted by the Antitrust Agencies in the 2010 DOJ/FTC Guidelines. Specifically, EPSA notes that the new increased market concentration HHI levels reflect the Antitrust Agencies' experience since adoption of the 1992 DOJ/FTC Guidelines with assessing the potential impact from a proposed merger to competition of market concentration levels across a range of industries. The Antitrust Agencies' further

indicate that actual experience with respect to these increased HHI levels has not identified adverse competitive effects, even when applying more flexible approaches for evaluating potential market power issues associated with those mergers.

EPSA believes a further safeguard for the Commission in adopting the increased HHI levels relates to its ongoing regulatory oversight of the electric industry. As opposed to the Antitrust Agencies, the Commission has continued regulatory oversight over the involved entities' wholesale market activities following the Section 203 merger review. Additionally, in organized wholesale electric markets, the merged entities' market activities are subject to oversight by market monitors, and in the bilateral markets, market participants remain subject to other Commission requirements, including demonstrating that they lack market power in order to obtain authority to sell power at market-based rates. The Antitrust Agencies are adopting these increased thresholds without the ongoing protections and oversight the Commission has over the electric industry. Accordingly, EPSA supports the Commission's adoption of the increased HHI levels, which are more reflective of the current threat of competition raised by changes in market concentration resulting from a proposed merger based on the Antitrust Agencies' actual experience and consistent with the Commission's current approach to merger reviews.

C. The Commission Should Continue To Focus On Control For Purposes Of Both Its FPA Section 203 And Market-Based Rate Analysis.

While the Commission should adopt the higher HHI thresholds set forth in the 2010 DOJ/FTC Guidelines for purposes of its horizontal market power analysis of applications filed under Section 203 of the FPA, consistent with the rationale for adopting the HHI thresholds that the Commission currently employs, the Commission

should refrain from adopting other aspects of the 2010 DOJ/FTC Guidelines. As the Commission recognized in the NOI, “there are fundamental differences between the Commission’s process and that of the Antitrust Agencies.”¹⁸ There are likewise fundamental differences between the roles contemplated for the Commission, on the one hand, and the Antitrust Agencies, on the other hand, under their respective organic statutes. The fundamental and important differences render the other aspects of the 2010 DOJ/FTC Guidelines ill-suited to the Commission’s purposes.

In the 2010 DOJ/FTC Guidelines, the Antitrust Agencies emphasize that the relevant provisions of the federal antitrust statutes they are charged with enforcing apply not only to transactions pursuant to which two competitors come under common ownership and control but also to “one firm’s partial acquisition of a competitors” and to the “minority positions” that may result.¹⁹ The same cannot be said of Sections 203 and 205 of the FPA in the sense that the Commission has consistently focused on control in the performance of its duties under these provisions.

In the FPA Section 203 setting, for instance, the Commission has made clear that “transactions that do not transfer control of a public utility do not fall within the ‘or otherwise dispose’ language of Section 203(a)(1)(A) and thus do not require approval under Section 203(a)(1)(A) (assuming there is no sale or lease of the facilities).”²⁰ The Commission has likewise held that “the requirement to obtain the Commission’s approval under the ‘merge or consolidate’ clause [in FPA Section 203(a)(1)(B)] depends

¹⁸ NOI, FERC Stats. & Regs. ¶ 35,571 at P 20.

¹⁹ 2010 DOJ/FTC Guidelines, § 13.

²⁰ See *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 45 (2007) (“*Supplemental Policy Statement*”), on clarification & reconsideration, 122 FERC ¶ 61,157 (2008).

on whether the public utility's facilities are subject to the jurisdiction of the Commission and whether the transaction directly or indirectly would result in a change of 'control' of the facilities."²¹ The Commission's regulations also provide blanket authorizations for acquisitions of securities pursuant to Section 203(a)(2) of the FPA that are presumed to be non-controlling, including a blanket authorization for the acquisition of an unlimited number of shares of "[a]ny non-voting security (that does convey sufficient veto rights over management actions so as to convey control) in a transmitting utility, an electric utility company, or a holding company" without any limitation on the aggregate interest that will result.²²

Control has likewise long been central to the Commission's analysis under Section 205 of the FPA. For example, whether the Commission has FPA Section 205 jurisdiction over an agreement is primarily a function of whether the agreement conveys control over Commission-jurisdictional facilities to the acquirer.²³ In addition, control has always been central to the Commission's competitive analysis in applications for market-based rate authorization under Section 205 of the FPA, with the Commission requiring that an applicant include not only generation it owns, but also any generation it or its affiliates control in the relevant market.²⁴

²¹ *Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 45 (citing *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270 at P 13 (2003)).

²² 18 C.F.R. § 33.1(c)(2)(ii) (2011). *See also* 18 C.F.R. § 33.1(c)(2)(i) (2011) (blanket FPA Section 203(a)(2) authorization for a holding company's acquisition of less than 10 percent of the outstanding voting securities of a transmitting utility, electric company or holding company).

²³ *See, e.g., Bechtel Power Corp.*, 60 FERC ¶ 61,156 at 61,572-73 (1992).

²⁴ *See, e.g., Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 157 ("Order No. 697") (explaining that "[i]f a seller has control over certain capacity such that the seller can affect the ability of the capacity to reach the relevant market, then that capacity should be attributed to the seller when performing the generation market power screens"), *clarified*, 121 FERC ¶ 61,260 (2007), *on reh'g*, Order

Following the approach to non-controlling investments contemplated by the 2010 DOJ/FTC Guidelines would thus depart from literally decades of precedent under Sections 203 and 205 of the FPA. The Commission should reject this approach. There is no justification for sweeping aside this established precedent in favor of the case-by-case consideration of virtually every single direct or indirect acquisition of interests in a public utility, which is the scenario that would logically follow from the adoption of the Antitrust Agencies' approach in 2010 DOJ/FTC Guidelines. As the Commission has previously recognized, not requiring case-by-case approval under Section 203 of the FPA for transactions that do not convey control "is consistent with the intent of Congress that [the Energy Policy Act of 2005] increase outside investment in the utility sector while protecting customers."²⁵

It is neither necessary nor appropriate for the Commission to follow the Antitrust Agencies' approach in this regard. To be sure, the Commission can, should, and does take antitrust policies into account in proceedings under the FPA. But the courts have emphasized that Congress did not intend that "the Commission serve as an enforcer of antitrust policy in conjunction with" the Antitrust Agencies.²⁶ The Commission and the

No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008), *on partial reh'g & clarification*, 124 FERC ¶ 61,055, *on reh'g & clarification*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010). *See also, e.g., Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 53.

²⁵ *Transactions Subject to Federal Power Act Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 144 (2005), *on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

²⁶ *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) ("NUSCO"). *See also, e.g., Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (explaining that the Commission "is not bound to use antitrust principles when they may be inconsistent with the Commission's regulatory goals" and observing that "indiscriminate incorporation of antitrust policy into utility regulation 'could undercut the very objectives the antitrust laws are designed to serve.'"); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960 (D.C. Cir. 1968) ("This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust laws.").

antitrust authorities may, however, focus on different aspects of the same conduct, as one would fully expect given they have different statutory objectives. But, as the Court of Appeals for the First Circuit noted specifically with reference to Section 203 of the FPA, commenters “may rest assured that were FERC to approve a merger of utilities which ran afoul of Sherman Act or other antitrust policies, the utilities would be subject to either prosecution by government official responsible for policing the antitrust laws. . . .”²⁷

Consistent with the Commission’s longstanding focus on control in both the FPA Section 203 and 205 settings, EPSA urges the Commission not only to refrain from adopting the Antitrust Agencies’ approach to non-controlling investments but also to move forward with a final rule in Docket No. RM09-16-000. The Control & Affiliation NOPR was issued in that docket more than 15 months ago, and the Commission enjoys the benefit of a full and complete record on which to proceed in that matter. The Commission can and should adopt the proposed rule set forth in the Control & Affiliation NOPR, with the clarifications and modifications proposed by EPSA.

D. The 2010 DOJ/FTC Guidelines Would Justify Increasing The Thresholds Employed In The Commission’s Wholesale Market Share Screens.

With respect to the Commission’s inquiry as to what, if any, impact the 2010 DOJ/FTC Guidelines should have on the Commission’s electric market-based rate program,²⁸ EPSA respectfully submits that the Antitrust Agencies’ adoption of higher HHI thresholds would support a corresponding increase in the threshold for the Commission’s Wholesale Market Share Screen from 20 percent to 30 percent, or, at the

²⁷ *NUSCO*, 993 F.2d at 948.

²⁸ NOI, FERC Stats. & Regs. ¶ 35,571 at P 21.

very least, to 25 percent. An increase in the market share thresholds is not only consistent with sound economic principles and the latest economic thinking, as codified in the 2010 DOJ/FTC Guidelines, but it may also reduce the number of “false positive” failures of the Wholesale Market Share Screen that have been observed when sellers pass the Pivotal Supplier Screen, but fail the Wholesale Market Share Screen.²⁹ Reducing the number of such false positives would both enhance administrative efficiency and permit regulated sellers to avoid the regulatory uncertainty and other costs resulting from the institution of an FPA Section 206 investigation.

In any case, the Antitrust Agencies’ decision to increase the HHI threshold from 1,800 to 2,500 has eliminated the basis for the Commission’s objections to the use of a market share threshold higher than 20 percent. In Order No. 697, the Commission rejected requests to increase the market share threshold from 20 percent to 35 percent based on the thresholds adopted by the Antitrust Agencies in the 1992 version of the Horizontal Merger Guidelines.³⁰ There, the Commission stressed that it would retain the 20 percent threshold because, “in a market comprised of five equal firms with 20 percent market shares, the HHI is 2,000,” which is 200 points (or just over 11 percent) above the 1992 DOJ/FTC Guidelines’ threshold of 1,800 for a highly concentrated market.³¹ Using the revised guidelines, however, that same market, or a market with

²⁹ See, e.g., *BE Louisiana, LLC*, 132 FERC ¶ 61,118 (2010) at PP 9-10, 14 (order instituting an investigation under FPA Section 206, 16 U.S.C. § 824e (2006), of market-based rate sellers in the Cleco Corporation, Inc. balancing authority because their market share was 21.3 percent in spring and 28.9 percent in summer).

³⁰ See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (issued 1992, rev. Apr. 8, 1997) (“1992 DOJ/FTC Guidelines”), available at: <http://www.ftc.gov/bc/docs/horizmer.shtm>.

³¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 89. See also *AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018, *on reh’g*, 108 FERC ¶ 61,026 at P 96 (2004) (the “July 2004 Order”).

four equal firms with 25 percent market share (and an HHI of 2,500), would be deemed to be only moderately concentrated. Indeed, by the same logic, the threshold should be 30 percent – or, at a minimum, 25 percent. The HHI for a market with three firms that each have a 30 percent market share and one with a 10 percent share would be 2,800, which, in percentage terms, exceeds the 2,500 HHI threshold by the same amount that 2,000 exceeded 1,800. At the very least, it would justify increasing the threshold to 25 percent, because in a market comprised of four equal firms with 25 percent market shares, the HHI would be equal to 2,500. EPSA respectfully submits that the Commission should consider updating its horizontal market power test for market-based rate sellers to ensure that it remains consistent with the Antitrust Agencies' revised thresholds.³²

While the above recommendation is an appropriate parallel change that should be incorporated to ensure consistency, EPSA cautions that the NOI primarily appears to relate to possible changes to the Commission's Merger Policy applicable to merger and other asset transfer applications filed under FPA Section 203. There is only brief reference of how the horizontal market power screen changes might affect market-based rate authorizations under FPA Section 205,³³ and this brief mention raises concerns that there may be assumed or resultant impacts to the market-based rate program that are more far reaching pursuant to parties' comments that may be filed in this proceeding. If and to the extent that the Commission is going to consider broader

³² Although the Commission should not adopt the DOJ/FTC open-ended approach for merger reviews as discussed herein, it should not preclude the Commission from continuing to exercise flexibility and balance different factors in reviewing the Delivered Price Test results in the context of the FPA Section 205 market power analysis for market-based rate authority.

³³ NOI at P 21.

changes to its market-based rate regime in response to the 2010 DOJ/FTC Guidelines, these changes should be explored in depth, and therefore, may require a separate proceeding or supplemental NOI. EPSA is not suggesting that such a step is necessary at this juncture, only that it would be appropriate if the Commission had broader changes to the market-based rate regime in mind than the relatively straightforward, conforming change suggested above.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully asks that the Commission consider these comments in determining how to proceed in this matter.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

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On behalf of the
Electric Power Supply Association

Dated: May 23, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon
Each person designated on the official service list compiled by the Secretary in this
proceeding.

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



Nancy Bagot, VP of Regulatory Affairs