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Client Alert

Global Transactions Practice Group

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FERC Reaffirms its Policies on Analyzing Horizontal Market Power

In an order issued on February 16, 2012 (February 16 Order), the Federal Energy Regulatory Commission (FERC) **reaffirmed** its policies regarding horizontal market power analyses under Sections 203 and 205 of the Federal Power Act (FPA), and terminated a rulemaking that contemplated the potential adoption of revised guidelines issued by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in 2010 (2010 Guidelines).

Under Section 203 of the FPA, FERC is charged with approving only those mergers and acquisitions of jurisdictional facilities that are consistent with the public interest. As part of its evaluation, FERC examines whether a merger would significantly increase market concentration in relevant markets. In recent years, FERC has relied heavily on a competitive analysis screen based on DOJ and FTC's 1992 horizontal merger guidelines (1992 Guidelines). This screen analyzes market concentration using the Herfindahl-Hirschman Index (HHI), and uses concentration thresholds taken from the 1992 Guidelines to assess whether a proposed transaction may have anti-competitive effects.

The 2010 Guidelines increase the HHI thresholds relative to those set forth in the 1992 Guidelines. At the same time, however, the 2010 Guidelines embody a more flexible approach to merger analysis, including fact-specific inquiries using a variety of analytical tools.

In a Notice of Inquiry issued in March 2011, FERC sought comment on whether, and if so, how, it should revise its approach to examining horizontal market power under Section 203 of the FPA in light of DOJ's and FTC's adoption of the 2010 Guidelines. FERC also sought comment on what, if any, impact the 2010 Guidelines should have on its analysis of horizontal market power for purposes of its market-based rate program under Section 205 of the FPA.

In the February 16 Order, FERC declines to adopt the 2010 Guideline's higher HHI thresholds, explaining that "the Competitive Analysis Screen is intended 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.'" FERC stated that the screen "remains an important tool for evaluating mergers on the basis of their effect on market structure and performance while also providing analytic and procedural certainty to

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industry at a relatively low cost." In response to commenters who criticized its approach as being overly rigid, FERC stated that its approach is "flexible enough to incorporate the theories set forth in the 2010 Guidelines, while still retaining the certainty that the current approach provides."

FERC also declined to modify the horizontal power analyses used under FERC's market-based rate regime to reflect the 2010 Guidelines. FERC determined that the analyses are not "explicitly tied" to DOJ and FTC guidelines, and "strike[] the appropriate balance between having a conservative but realistic screen and imposing undue regulatory burdens." It also noted that in cases where an entity submits an HHI analysis, the 2,500 HHI threshold used by the Commission for the market-based rate program is already consistent with the HHI threshold adopted in the 2010 Guidelines.